SC CV 95 017

CV 03226

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CREDITEL OF CANADA LIMITED as assignees of SWISS INSTRUMENTS LIMITED

Plaintiff
(Defendant by Counterclaim)

- and -

NORTHERN METALIC SALES (N.W.T.) LTD.

Defendant
(Plaintiff by Counterclaim)

- and -

SWISS INSTRUMENTS LIMITED

Defendant by Counterclaim

Action on unpaid invoice for goods supplied; counterclaim for excessive freight charges.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on April 10 & 11, 1995

Reasons filed: April 26, 1995

Counsel for Plaintiff &
Defendants by Counterclaim: James D. Brydon

Counsel for Defendant &
Plaintiff by Counterclaim: Steven L. Cooper

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REASONS FOR JUDGMENT

INTRODUCTION

1 This action started out as a simple debt collection. The plaintiff, Creditel of Canada Limited, took over collection of an unpaid invoice for goods delivered by Swiss Instruments Limited ("Swiss") to Northern Metalic Sales (N.W.T.) Ltd. ("Northern"). After being served with the statement of claim in this action, Northern responded by saying that Swiss was bound by a contract to a lower price for the goods in question as well as by launching a counterclaim for excessive freight charges.

2 The evidence presented at the trial consisted of testimony from witnesses for both Swiss and Northern, a set of admissions sought by the plaintiff through a Notice to Admit, read-ins from discovery transcripts, and various documents. In the end, however, the case turns on a question of fact.

EVIDENCE

3 The process of fact finding starts with the undisputed facts that both sides accept. Then one adds to these such other facts as seem likely to be true or indisputable. Only then does one have reference points so as to test the validity of evidence that is in dispute.

4 In June of 1990 the Government of the Northwest Territories issued a tender call for the supply of four specialty precision wall storage units. The tender specified the type of wall units, a product known as "Lista walls", as well as the unit and quantity specifications. Northern, a supplier of different types of industrial products, was asked to bid. Northern's staff had no familiarity with "Lista walls" so they contacted Swiss, an importing company based in Mississauga, Ontario, who were the Canadian distributors for this product. Northern was represented in its dealings with Swiss, and at trial, by its president, Mr. Blake Hill.

On June 13, 1990, Hill sent a fax to Swiss requesting a cost, net of tax, on the units required by the government. Attached to this note were two pages from the government tender outlining the specifications of the items sought. There was a diagram attached to the original tender documents but it was not sent to Swiss nor was it introduced at trial. The tender excerpt included the delivery date (August 24, 1990) but not the closing date for the bids. Hill testified that the closing date was June 20, 1990, but no documentary evidence was provided to confirm this fact.

6 In Swiss's office, Mr. James McLean received Northern's fax. He initially interpreted the tender as requesting three wall units, not four. This was due to the way the tender specifications were written on the two-page excerpt sent by Northern. On those pages there are three numbered items (1, 2 and 3) listing the specifications. Beside each numbered item there is another number but there is no indication what those numbers signify. Beside item number 1, there is another number 1; beside item number 2, however, there is another number 2; while beside item number 3 there is the number 1. In hindsight, it is clear that the second set of numbers refer to unit quantities. This would have been perfectly clear if the diagram attached to the tender had also been sent. This was not however clear initially to McLean who proceeded to prepare a quote for only three wall units.

7 The quote prepared by McLean was faxed to Northern on June 19, 1990. The quote was broken down into wall units numbered 1, 2 and 3, listed each of the specific components listed on the government tender, and then gave separate component unit prices and total prices for each whole wall unit. The total amount quoted was $22,298.40. The quote also specified: "F.O.B. point is Mississauga".

8 Hill testified that he was aware that the government wanted four wall units in total (specifically two of the wall unit number 2 on the tender). He said, however, that he was not aware that the quote was for only three units (and specifically only one of wall unit number 2). He said that he had no familiarity with the Lista wall product so he had no idea how many of each component went into any particular unit, although the government tender specified each wall unit by quantity and types of components. Hill testified that he was initially confused about the quote and, in telephone discussions with people at Swiss in the surrounding days, he emphasized that all he wanted was an assurance that the government requirements would be met and a final bottom-line price to do so. He said he was assured that the quote sent on June 19th met his requirements. According to Hill he incorporated the quote from Swiss ($22,298.40) together with a quote he received on anticipated freight charges ($1,500.00) and a 9% to 10% profit margin in Northern's bid ($26,250.00) on the tender. The bid document, however, was not entered into evidence.

McLean testified that after the quote was sent to Northern his supervisor discovered the discrepancy between the quote and the tender requirements, that is, the need for two of wall unit number 2. He said that he then spoke by telephone with Hill and told him about the discrepancy. McLean testified that he told Hill that the quantities listed on the quote for wall unit number 2 had to be doubled. He said nothing about price but assumed that Hill understood that the cost for that wall unit would also be doubled. McLean's testimony was that Hill, in response to this information, simply said "no problem" or words to that effect. He said Hill made no mention of whether the government tender had closed by then.

10 Hill categorically refuted McLean's evidence regarding this telephone conversation. He testified that no such conversation took place. Hill said that it was he who called McLean, after receiving the quote, because he was confused about the quotes. On this point certain contradictions were put to Hill during his cross-examination at trial.

11 At his examination for discovery, Hill testified that he was aware of the discrepancies in the quantities required for two of wall unit number 2 from those set out in the quote and therefore he called McLean about it. He said that during that conversation he made notations on the quote doubling the quantities under wall unit number 2. At his discovery Hill said he did not, however, realize that

prices would double because he had asked Swiss for a firm quote on exactly what the government requested.

12 At trial Hill testified that, when he received the quote, he assumed that it covered four units and the notations he made on his copy of the quote (which was entered as an exhibit) were not made until much later when he received Swiss's invoice.

13 What is not disputed is that on June 21st Hill called McLean and gave him a purchase order number. Hill said he then faxed a written purchase order to Swiss. Introduced as an exhibit was a copy of a written purchase order, dated June 21, 1990, from Northern to Swiss quoting the total figure of $22,298.40 from Swiss's quote of June 19th. Swiss's witnesses testified that they could find no record of having ever received the written purchase order.

14 On August 23, 1990, Swiss shipped the goods to the government on Northern's direction. Northern had designated Reimer Express as the trucking firm. The goods were loaded on to the truck by Swiss's personnel. Northern apparently received a bill from Reimer for shipping costs in excess of $9,000.00. This bill was eventually settled by Northern paying $7,884.00 to Reimer.

Hill's evidence was that Reimer quoted a price of $1,500.00 to ship an anticipated 4,000 pounds comprising the Swiss shipment. The shipment in August, as indicated on the bill of lading, was 3,500 pounds. There was a further shipment of a 100 pound package in October consisting of a few back-ordered items. In support of his evidence about the original quote, Hill produced a 1992 letter from Reimer saying in effect that this is what they would have quoted in 1990. Hill also testified that he was told by people at Reimer that the reason the freight costs were so high was that Swiss's personnel would not permit anything to be stacked on top of their shipment. This evidence is, of course, hearsay and no direct evidence on the calculation of freight costs was provided.

16 Swiss sent Northern two invoices, one after each shipment, the first for $28,222.20 and the other for $752.40, totalling $28,974.60. In February of 1991 Northern sent Swiss a cheque for $15,298.40. This was apparently calculated by taking the original quote of $22,298.40 and deducting $7,000.00 for excess freight costs. Nothing more has been paid.

DISCUSSION

17 Counsel, in their trial briefs, raised a number of issues: existence of a valid contract, unilateral or mutual mistake, variation of contractual terms, binding effect of a bid in the tendering process, and *quantum meruit*. To me, however, as I noted above, the case turns on a finding of fact to be determined on my

assessment of credibility. Did the telephone conversation as described by McLean take place? If it did, then I think the logical and inescapable conclusion is that the contract price for the goods delivered was the price quoted by Swiss as amended verbally in that conversation. If it did not, then Swiss is bound by its quote.

18 The *Sale of Goods Act*, R.S.N.W.T. 1988, c.S-2, provides that a contract may be made partly in writing and partly orally. It also provides that a contract, not under seal, is enforceable if there is acceptance of the goods and part payment. Here there was delivery and acceptance and a payment was made. The quote of June 19th is capable of constituting a contract upon acceptance. The verbal provision of a purchase order number constitutes acceptance. The only question, as I have already said, is whether, in between the provision of the quote and the provision of the purchase order number, there was a variation by means of the alleged McLean-Hill telephone conversation.

19 Counsel for Northern quite rightly points out that the burden of proof is on Swiss and that the burden is quite high having regard to the fact that Swiss is relying on parol evidence of the purported contractual variation. He submits that it would not be reasonable for Hill to say "no problem" to a doubling of the quantities on the quote since, according to Hill, at that time he had already submitted his bid to the government. Hill testified that the closing date for his bid was June 20th. His conversations with McLean therefore would have had to be

between receipt of the quote on June 19th and submission of his bid on June 20th. Hill also testified that on June 21st he was informed that he had been awarded the contract, he telephoned Swiss to give them the purchase order number, and then sent the purchase order to Swiss by fax. Yet there was no evidence supporting the actual transmission of the purchase order nor was there any documentary evidence, as one would expect there to be, supporting Hill's testimony about the bid on the tender.

20 The indisputable facts are that the government tender called for four units and Swiss's quote provided for only three units. This would have been obvious to anyone comparing the two documents. Hill said at his examination for discovery that this discrepancy was obvious to him. At trial, however, he said that this was not obvious and that he was confused by the quote. He could however offer no explanation for his confusion; he could not point to anything confusing; and I cannot accept that a businessman of his experience would be confused by the quantities listed in the quote when compared with the tender documents.

21 I find that I cannot accept Hill's evidence given at trial. The contradictions between his evidence on discovery and at trial are very serious and undermine his testimony.

22 I find that Hill was aware of the government's requirements and, as he stated at the discovery, aware of the discrepancies in the quote. I accept McLean's evidence as to his telephone conversation with Hill. It is supported by the notations on the quote document. I find that he did tell Hill that the quantities for wall unit number 2 were to be doubled. Is it significant that he did not explicitly tell Hill that the costs would be doubled? In the circumstances of this case that is not a significant omission. Hill, as an experienced businessman, would have to know that if the quantities are doubled then the costs are doubled. The quote contains separate unit prices for each component.

23 I also do not accept Hill's evidence that the written purchase order was sent to Swiss. Hill's evidence was that he faxed this document to Swiss on June 21st (Swiss's personnel had no record of it). The goods were not shipped until August 23rd. Surely if Swiss's personnel had seen the purchase order with the originally quoted price on it they would have immediately recognized a problem and not shipped the goods.

24 McLean's evidence was that his conversation with Hill regarding doubling of the components for wall unit number 2 occurred before Hill gave them the purchase order number. I accept this evidence.

I find that there was a contract for the supply of the four Lista wall units. This contract consisted of the original quote for three units as varied by the subsequent telephone conversation with respect to doubling of the components for one of the units and the consequent doubling of costs for that unit. The contract became complete upon the provision of a purchase order number. There was delivery and acceptance of the goods and partial payment. It may be that the defendant Northern made a mistake in its bid to the government. But the evidence on behalf of the defendant was not that McLean's telephone call came when it was too late to amend its bid. The defendant's evidence was that the call was not made at all. I find that position to be incredible and it goes against the documentary evidence. The creation of the written purchase order, whenever it was created, seems to be simply an attempt by Northern to confine Swiss to its original quote.

26 From a commercial perspective, a finding in favour of Swiss means simply that Northern will have to pay full value for the goods that were supplied. There is nothing unfair in that. Whatever may have been the dealings between Northern and the government, and whether Northern had or has further recourse against the government, is not in evidence before me. These are not issues that I have to address.

27 With respect to the counter-claim for excessive freight charges, there is no proper evidence before me. The hearsay evidence proffered by Northern fails to meet any test for admissibility. There was no explanation given as to why representatives of Reimer Express could not have been called to provide direct evidence.

28 The terms of the contract were that the goods were to be shipped "F.O.B. Mississauga" ("free on board" at Mississauga). An F.O.B. seller has the duty to put the goods on board the shipper but the shipper is designated, as it was in this case, by the buyer. An F.O.B. seller is also responsible for making sure that the goods are loaded and packed carefully so as to withstand the rigours of transport. But all costs of transport are the responsibility of the buyer.

29 In this case there was evidence that the Lista units, being precision made goods, had to be packed and shipped carefully. They are normally stacked on pallets and secured in the truck. Northern's position is that the high cost of freight was directly due to Swiss's requirement that the load not be "top-loaded" with other items so that the entire truck unit was used up. Northern's counsel argues that in such a situation there was a duty on Swiss to warn Northern of any special shipping requirements that would increase the cost. The evidence was that Hill neither inquired about nor did he specify any special shipping requirements.

Assuming for sake of argument that the freight costs were directly attributable to the manner in which Swiss loaded the goods, did they owe a duty to Northern as suggested by its counsel? In my opinion they did not. Hill admitted that he was unfamiliar with this product. Yet his company undertook a supplier role vis-à-vis the government. Hill would have been aware that if there were any defects in the product the government would have looked to Northern to remedy that defect. In my opinion if Northern was undertaking this obligation then it should have satisfied itself about the shipping arrangements — especially since it was responsible for the shipping costs.

31 Having said all that, however, the counterclaim can be simply disposed of due to a lack of proper evidence as to what were the reasonable anticipated freight costs and what were the causes for the actual freight costs.

CONCLUSIONS

32 The plaintiff will have judgment on its claim for the unpaid balance due in the sum of $13,676.20. Any dispute over interest was withdrawn at trial. It was conceded that the applicable interest rate was 24% per year (2% per month non-cumulative) on the outstanding amount starting 30 days after the invoice date. The plaintiff will therefore have judgment for interest calculated on the basis set out in paragraph 4 of the prayer for relief in the amended Statement of Claim.

Since the original sale was exempt of taxes there will be no additional allowance for goods and services tax.

33 The counterclaim is dismissed.

COSTS

34 Plaintiff's counsel submits that costs should follow the event but the applicable tariff should be doubled. I agree for a number of reasons.

35 First, as everyone involved with civil litigation in this jurisdiction realizes, the current tariff of costs is badly outdated and in need of revision.

36 Second, defendant's counsel failed to file his trial brief ahead of time as required by the Rules of Court. The trial brief was filed, and provided to opposing counsel, only at the opening of the trial. There have to be some consequences for such a failure to comply with the rules.

37 Finally, defendant's counsel failed to respond to a Notice to Admit served by plaintiff's counsel some five months before the trial. The Rules of Court provide that a failure to dispute facts set out in such a notice within a set time is deemed to be an admission of those facts. In this case the plaintiff could have relied on such a failure to respond but, out of an abundant sense of caution, called

evidence and had witnesses come from Ontario to testify as to the facts. Most of these facts were contained in the Notice to Admit. A Notice to Admit can be a powerful and convenient document enabling matters to be tried much more efficiently. To ignore such a document is to do so at one's peril. In this case I think the effort put in by plaintiff's counsel to try and simplify matters by serving a Notice to Admit is worthy of support by means of increased costs.

38 Therefore, the plaintiff and defendants by counterclaim will have their costs of this action, but one set of costs only, on the basis of double column 3 of the tariff of costs, no limiting rule to apply.

39 Finally, as requested by counsel, the exhibits (except for exhibits 11 and 12) will be returned to plaintiff's counsel upon expiry of the appeal period should no appeal be filed. Counsel should attend at the clerk's office to retrieve the exhibits at the appropriate time.

J. Z. Vertes
J.S.C.

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Defendants by Counterclaim: James D. Brydon

Counsel for Defendant &
Plaintiff by Counterclaim: Steven L. Cooper

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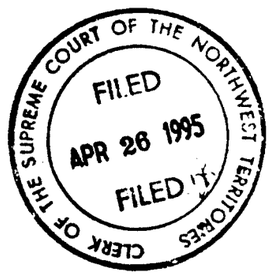

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes

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