CV 05073

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOHN MANTLA

Plaintiff

- and -

HAMLET OF RAE-EDZO

Defendant

Trial of Claim for Damages for Breach of Contract.

REASONS FOR JUDGMENT OF THE HONOURABLE MADAM JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories
on June 19 to 21, 1996

Reasons filed: July 19, 1996

Counsel for the Plaintiff: Hugh Latimer

Counsel for the Defendant: Karan Shaner

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REASONS FOR JUDGMENT

1 The Plaintiff in this case claims damages for breach of contract from the Defendant. The contract in question was for the pickup and disposal of human waste or nightsoil (honeybags) by the Plaintiff in Rae-Edzo, Northwest Territories.

2 The issue is whether the Defendant breached the contract, or rendered its performance by the Plaintiff impossible, by reason of the following:

(a) failing to make formal contract documents available;

(b) telling the Plaintiff to stop working on the contract; or

(c) failing to give the Plaintiff a reasonable time within which to obtain the equipment required under the contract.

Facts:

3 For the most part, the facts are not in dispute.

4 In early 1992, the Defendant invited tenders for the collection and removal of honeybags for a four year period. The Plaintiff, using the business name "John Mantla Contracting" submitted his tender by completing and delivering a pre-printed form. The relevant portions of that form read as follows:

> We, John Mantla Contracting...having examined the attached tender specifications and having been made familiar with the site location, hereby offer to enter into a Contract to perform the Work required for the stipulated price of: ...
>
> ...
>
> We hereby declare that;
> a) We agree to perform the work in compliance with the required conditions as stated in the tender specifications and to commence the contract 2 weeks after receiving notice of Contract Award:
>
> (emphasis added)

5 Included in the tender specifications was the following condition:

> Collection shall be made in a vehicle constructed for that purpose, that is, a leak proof unit with automative dump.

6 The Plaintiff's tender was dated March 2, 1992. By letter dated March 16, 1992, which he testified he received on March 18, the Plaintiff was advised by the Defendant that he was the successful tenderer. He was also told in the letter that, as stated in his tender, it was expected that he would commence work by April 1, 1992 and that contract documents would be available for signature the first week of April.

7 The Plaintiff did not have a vehicle which conformed to the tender specifications (a "specification vehicle"), nor did he have the funds to purchase such a vehicle. He testified that he made the following efforts in that regard:

(a) he inquired about obtaining a business loan from the Department of Economic Development and Tourism of the Government of the Northwest Territories, but did not pursue this when told there would be a six month wait;

(b) he met with someone at Canadian Imperial Bank of Commerce. She wanted to see a signed contract. The Plaintiff made a further appointment but did not keep it;

(c) he obtained a quote for purchase of a specification vehicle from Healy Ford in Edmonton and had discussions with them about renting a vehicle but was told they needed to see a written contract;

(d) he inquired about funding from the Metis Development Corporation but did not pursue same as he was told there was a six month wait;

(e) he made an appointment with the Bank of Montreal, but did not keep it;

(f) he had discussions about renting a specification vehicle from Anthony Lafferty. I will refer to these discussions in more detail later.

8 It was not clear on the evidence exactly when most of these inquiries or actions were made or taken.

9 The Plaintiff did lease a pickup truck from a Yellowknife dealer. He put a 45 gallon drum in the back of the truck and went to work collecting the honeybags, which he would put into the drum and haul to the disposal site.

10 The Plaintiff testified that he had no problems with spillage using this method, which was helped by the fact that as it was early April, the contents of the bags were frozen.

11 However, the Plaintiff also testified that he knew that the pickup truck outfitted with the drum was not a specification vehicle. He testified that he decided to start by using the pickup truck until he had some money in the bank and a signed contract.

12 On April 16, 1992, the Plaintiff was making his rounds with the pickup truck, when he was stopped by the Defendant Hamlet's foreman and given a letter. There was a dispute in the evidence as to whether the foreman was aware of the contents of the letter and told the Plaintiff what it was about. In my view, nothing turns on that. The Plaintiff testified that he read the letter, which was signed by the Senior Administrative Officer of the Defendant, and reads as follows:

> Re: Honey Bag Collection & Disposal
>
> Council at their regular meeting last night reviewed your contract and performance.

> In your tender you stated that you could start work with in two weeks of the tender being awarded. Four weeks have now elapsed and you still don't have the proper equipment.
>
> You are to stop picking up Honey Bags immediately as the equipment you are using does not meet the Health Standards and you are endangering your own health. Unless you can show proof that you have a suitable vehicle on order, or have made concrete arrangements for a proper vehicle. This tender will be cancelled immediately.

13 Upon receiving this letter, the Plaintiff stopped picking up the honeybags.

14 On April 21, 1992, the Hamlet Council met to discuss the contract. The Plaintiff attended the meeting. One of the Hamlet councillors, Leonard Camsell, urged that the Plaintiff be given a month or more to get a specification vehicle and that in the meantime he be permitted to use his pickup truck and drum.

15 I will refer to the April 21 meeting in further detail later. The Plaintiff left the meeting before a decision about his contract was made. The minutes of the meeting, which were entered as an exhibit, reflect that final discussion would be put over to May 6, 1992, and in the meantime the Plaintiff "has to make some deal, lease a vehicle already in the community or to purchase a new unit".

16 On April 22, 1992, the Plaintiff met John Smith on the road. Mr. Smith, who had had the honeybag contract from 1988 to 1992 and was an unsuccessful tenderer in the 1992 tender invitation, was picking up the honey bags. The Plaintiff and Mr. Smith agreed that the Plaintiff would perform the work for Mr. Smith. This would be for a period of six months so that the Plaintiff could make the lease payments on his pickup truck.

17 The Plaintiff then went to the Hamlet office. He told the Senior Administrative Officer, Mr. Konelsky, about his arrangements with Mr. Smith. Mr. Konelsky wrote up a letter from the Plaintiff to the Defendant Hamlet. The Plaintiff testified that Mr. Konelsky read the letter to him and that he understood it and signed it. Mr. Konelsky testified that he wrote what the Plaintiff asked him to write. I am satisfied that the letter reflects what the Plaintiff wanted to say. The letter reads as follows:

April 22, 1992

Senior Administrative Officer,
Hamlet of Rae-Edzo,
P.O. Box 68
Rae-Edzo, NT X0E 0Y0

Dear Sir;

Re: Honey Bag Collection and Disposal Contract

It appears that I submitted my tender prior to thinking out how I would perform this service if awarded the contract.

I have now exhausted all my possibilities of obtaining a proper vehicle to perform the contract awarded me. As a result I withdraw my bid on the understanding that the contract will be awarded to J.P. Services.

Since J.P. Services were councils second choice I have made arrangements to work for them for the next six months, giving me sufficient revenue to pay for the 3/4 ton truck I purchased.

While in the employment of J.P. Services I will carry out my work diligently and with upmost care as not to damage the vehicle or any property.

In closing I wish to thank council for the confidence they had in me by awarding the tender.

Yours truly,

John Mantla.

18 J. P. Services was Mr. Smith's business name.

19 The Plaintiff started working for Mr. Smith. Sometime in June of 1992, Mr. Smith told the Plaintiff that he did not want him to continue working for him so the Plaintiff stopped.

20 The Plaintiff acknowledges receiving from the Defendant just over $1,000.00 for the work he performed under his contract with the Defendant.

The Issues:

21 The Plaintiff alleges breach by the Defendant. The Defendant argues that the Plaintiff repudiated or abandoned the contract by his letter of April 22, 1992, and that the Defendant accepted this, resulting in the obligations of both parties being at an end. Alternatively, the Defendant says that if it did breach or repudiate the contract, such breach or repudiation was accepted by the Plaintiff.

22 Whether conduct amounts to a repudiation and whether such repudiation is acquiesced in by the innocent party so as to effect a rescission of an agreement by mutual consent are questions of fact: *Wellington Oil & Gas Co. v Alberta Pipe Line Co.*, [1936] 2 D.L.R. 335 (S.C.C.).

Failure to Make Formal Contract Documents Available:

23 The Plaintiff alleges, as one of the ways in which the Defendant breached the contract, its failure to make formal contract documents available to the Plaintiff for signing.

24 Mr. Konelsky testified that the practice was to prepare the formal documents once it was known that the successful tenderer had the proper equipment for the job. He said that the Plaintiff never spoke to him about the formal documents or about needing documents for financing purposes. Mr. Konelsky said he received no messages that the Plaintiff had been to the Hamlet Office asking about documents. The Plaintiff testified that he attended at the Hamlet Office three times and was told by secretarial staff that Mr. Konelsky was out of town or otherwise unavailable. He did not specifically refer to formal contract documents but just told the secretaries that there were to be papers for him to sign. He did not pursue it beyond that.

25 There is no evidence that the Defendant refused to provide the formal contract documents. The Plaintiff had represented in his tender that he would be ready to commence the work under the contract two weeks after notification of the award. When he did begin the work, at the beginning of April, he was in breach by not using a specification vehicle. Based on Mr. Konelsky's evidence, which I accept, it is unlikely that formal documents would have been signed because of the vehicle problem. In any event, on the evidence before me, it is clear that the Plaintiff simply missed Mr. Konelsky when he tried to see him, did not pursue the matter any further and did not make it known that the documents were required for financing purposes.

26 I find therefore that the Plaintiff's argument as to breach by reason of failure to make the documents available fails.

Telling the Plaintiff to Stop Work:

27 It is important to look at the entire course of conduct of the parties in dealing with this issue.

28 It is clear from the Tender Specifications that maintenance of certain health standards was an important part of the honeybag contract. In addition to the specification vehicle, there were, for example, terms requiring the contractor to maintain the vehicle hygienically by regular washing and disinfecting, to wear protective clothing and to make his vehicle and premises available for inspection by the Hamlet and Public Health Officer.

29 Leon Lafferty, the community works foreman for the Defendant for 23 years, testified as to why the particular vehicle described in the tender specifications is required. He said that it is to be a sealed or leak proof unit because the honeybags often break when they are thrown into it. The vehicle is to have an automative dump or hoist so that the person working does not have to touch the honeybags after loading them. The vehicle can be backed up to the edge of the pit where the honeybags are dumped and the hoist used to dump them in.

30 The evidence indicates that on April 15, 1992, the Hamlet council was advised by Mr. Konelsky that the Plaintiff was not using a proper vehicle for the honeybag contract. There was concern that Mr. Mantla was creating a health hazard to himself. Council asked Mr. Konelsky to contact the Plaintiff to have him stop work and provide proof that he had a properly equipped vehicle coming.

31 I have considered that there was no evidence before the court that in fact there was a health hazard to the Plaintiff, who testified that he did not experience any ill health at the relevant time. Counsel for the Plaintiff emphasized this point. But, as I have said, the tender specifications made it clear that health and safety concerns were important. Clearly the disposal of human waste involves health concerns. There was no evidence to suggest that the Council was motivated by anything other than those concerns.

32 On April 16, 1992, the Plaintiff received the letter telling him to stop work. The contents of the letter are quoted above.

33 Counsel for the Plaintiff relies on the incorrect punctuation, being the use of a period rather than a comma after the words "for a proper vehicle" in the second last sentence of the letter. He argues that the last sentence as it is, i.e. "This tender will be cancelled immediately", should be interpreted as indicating that the Defendant was, by means of that letter, terminating the contract.

34 I disagree. When the whole of the letter is read, it is clear that the Defendant was telling the Plaintiff two things: the first, that he was to stop picking up honeybags immediately due to health concerns arising from his use of a non-specification vehicle, and the second, that unless he could provide proof that he had a suitable vehicle coming, the contract would be cancelled immediately.

35 The contract was not terminated. The Plaintiff's work on the contract was put on hold pending receipt of information from him about the vehicle.

36 The Plaintiff testified that he thought the contract was at an end. He stopped working on the contract. It does not appear that he took any immediate steps to obtain a specification vehicle or to let the Defendant know where his efforts stood. He did, however, attend the Hamlet Council meeting on April 21, 1992. Both the Plaintiff and Councillor Camsell made a pitch for more time. The Plaintiff testified that he left the meeting before any decision was made because he observed Councillor John Smith shaking his head. Mr. Smith was an unsuccessful tenderer on the contract and is referred to in the facts above. He had withdrawn from the meeting but was still in the room.

37 I have described above how the result of the April 21 meeting was to defer a decision on the contract until May 6.

38 It does not appear from the evidence that the Plaintiff made any mention to Council of, or pursued any further, discussions that he had had with Anthony Lafferty between April 13 and 16. Both the Plaintiff and Mr. Lafferty testified that Mr. Lafferty was willing rent his specification vehicle to the Plaintiff. However, after receiving the April 16 letter from the Defendant, the Plaintiff told Mr. Lafferty that he had lost the contract and no longer needed the vehicle.

39 I have some difficulty understanding the Plaintiff's position in this regard. Clearly he had the option of renting Mr. Lafferty's vehicle, which would have allowed him to carry out the contract in accordance with the tender specifications. Although the Plaintiff testified that he thought the contract was at an end, the fact that he attended the April 21 meeting and tried to get more time casts some doubt on that assertion. The fact that

he did not pursue the rental option with Mr. Lafferty or even raise that as an option with the Hamlet Council leaves me unconvinced that the Plaintiff was serious about getting a proper vehicle.

40 I find the evidence of Mr. Marion, the Mayor, helpful on this issue. Mr. Marion testified that the Plaintiff pleaded with Council that he could perform the contract but that underlying the plea was the Plaintiff's proposal that he could do it with the vehicle he had already been using.

41 Then we have the arrangement made by the Plaintiff with Mr. Smith and the April 22 letter whereby the Plaintiff withdrew his bid. The first paragraph of the letter, wherein the Plaintiff indicates that he submitted his tender prior to thinking about how he would perform the contract, is echoed by the Plaintiff's evidence at trial. In cross-examination, the Plaintiff said that when he put in his tender, he knew that he was supposed to get a specification vehicle but "took a chance" to see if he could get the contract. He also said that he had someone else fill in the time after notification of award when he would commence the contract and that he did not really hear whether that individual said he was putting two weeks or two months. The time that was put in was two weeks as is evident from the pre-printed form referred to above.

42 In my view, the evidence indicates that the Plaintiff did take a chance. He took a chance that he might be able to get a specification vehicle or that the Defendant would not insist on him getting that vehicle. It appears that he did this at least in part based on the fact that Mr. Smith had not invariably used a specification vehicle when he had the

contract. The Plaintiff's evidence was, however, that he did not clear with the Defendant the use of a vehicle which did not conform to the tender specifications because he did not want to ask for favours. He also took a chance in that he, on his own evidence, paid little attention to what was being represented to the Defendant as to when he would be ready and equipped to start the contract.

43 In my view, the Plaintiff essentially "gave up" once he realized, as he must have at the April 21 meeting, that the Defendant would insist on a proper vehicle. He found his way out of what was an unsatisfactory situation by making arrangements to work for Mr. Smith and withdrawing his tender. Indeed, his April 22 letter states that he is withdrawing his tender on the understanding that the honeybag contract would be awarded to Mr. Smith's business.

44 By taking the step of withdrawing his bid, the Plaintiff repudiated the contract. He made it clear that he did not intend to be bound by it.

45 But counsel for the Plaintiff argues that the Defendant breached the contract by ordering the Plaintiff to stop work, thereby making it impossible for him to continue. He argues that with no money being paid him, the Plaintiff could do nothing about the vehicle problem.

46 The evidence is not, however, that the Plaintiff could do nothing. He simply did nothing. He did not pursue any of the options that he had earlier considered.

47 The Plaintiff was clearly in breach of the tender specifications and therefore of the contract because of his failure to use the required vehicle. In my view it was a breach for which the Defendant may well have been entitled to terminate the contract because it went to the root of the contract, which was for the hygienic disposal of the honeybags. I need not, however, decide that point in light of my decision that the Defendant did not in fact cancel or terminate the contract.

48 Counsel for the Plaintiff also argues that the Defendant acted outside of the terms of the contract in telling the Plaintiff to stop work. He refers to the penalty clause in the tender specifications. Although poorly worded, that clause appears to require 30 days' notice of cancellation as follows:

> Penalty
>
> Failure to comply with with the specifications listed and after three written of notice lack of compliance issued the contract maybe cancelled on thirty days notice. Notice to be made by the Registered Mail or Hand delivered and receipt acknowledged.

49 The Defendant did not, however, cancel the contract. At most, the Defendant issued a warning by means of its April 16 letter. It did not, therefore, act outside, or in contravention, of the contract.

50 I find, therefore, that the Defendant did not breach the contract by telling the Plaintiff to stop work.

Failing to Give the Plaintiff a Reasonable Time to Obtain a Specification Vehicle

51 The Plaintiff also alleges that the Defendant breached the contract by failing to give him a reasonable time within which to obtain a specification vehicle, notwithstanding that the Plaintiff indicated in his tender that he would be ready to work in compliance with the tender specifications within a certain time. The Plaintiff as I understand it asks me to read into the contract a term providing that the Plaintiff be permitted to use a non-specification vehicle for a reasonable time based on (i) custom and (ii) good faith dealings in government contracts.

52 The Plaintiff seeks to establish custom on the basis of evidence that John Smith, who had the honeybag contract from 1988 to 1992 and again after the Plaintiff ceased working on it, sometimes used a nonspecification vehicle. A number of witnesses, including Mr. Smith, testified about this. Their evidence as a whole established that Mr. Smith had a specification vehicle and that when it would break down or was otherwise unavailable he would use a substitute, nonspecification vehicle for up to a week at a time. The evidence of Leon Lafferty, the Hamlet foreman, was that Mr. Smith would let him know when this happened.

53 The only evidence which went beyond Mr. Smith's situation was the testimony of Anthony Lafferty, who said he thought people used to get 30 to 60 days' notice to get the right truck in place. He said that was how it was done when he got the dry garbage pickup contract. He also said that he was not sure about the notice.

54 Mr. Marion, the Mayor, denied that there was any practice of allowing persons to start the contract with a nonspecification vehicle. He agreed that such a vehicle might be used in an emergency during the course of the contract.

55 Counsel referred to *Socanav Inc. v Northwest Territories (Commissioner)*, [1993] N.W.T.R. 369 at p.379, where Vertes J. said the following about custom:

> I recognize that it is possible for trade custom or trade usage to form part of the terms of a contract, although not expressly incorporated in the written document: see *Hudson's Building and Engineering Contracts* (10th ed.), pp. 52-54. To be a valid trade usage, capable of forming a part of a contractual relationship, a usage must satisfy four conditions: notoriety, certainty, reasonableness, and legality.

56 The evidence in this case falls short on the conditions of notoriety and certainty. The only witness who testified to a general practice was Mr. Lafferty who was not sure. His evidence was contradicted by that of the Mayor. At most it could be said that it was known that Mr. Smith did, from time to time, use a substitute vehicle. That is a far cry from saying that there was a well-known practice of allowing the use of a substitute vehicle until a specification vehicle could be obtained. So the custom which the Plaintiff contends ought to be read into the contract as a term is neither notorious nor certain.

57 Indeed, the Plaintiff's own evidence does not support the argument that there was such a custom. In his evidence, the Plaintiff stated that he did not ask the Defendant to allow him to use a nonspecification vehicle because he did not want to ask for favours. That indicates to me that he knew that he would be asking for a consideration out of the ordinary and not understood as part of the contract.

58 I need not, therefore, go on to consider the conditions of reasonableness and legality.

59 I will note here that there was brief reference in argument as well to an alleged custom that the Defendant would give financial help to a contractor. Only one such instance was referred to in the evidence, that being a guarantee given by the Defendant of loan payments to be made by Mr. Smith in 1988. The evidence was that the guarantee was given without proper authority. Under the *Hamlets Act*, R.S.N.W.T. 1988, ch. H-1, s.168, it is illegal for a hamlet to guarantee a loan. Therefore, at least one condition for custom is not met. Nor was there any evidence that this was notorious or certain. And there was no evidence that the Plaintiff attempted to get financial help from the Defendant.

60 The second branch of the Plaintiff's argument that a reasonable time ought to have been allowed to the Plaintiff to obtain a specification vehicle is based on an alleged breach of the requirement of good faith on the part of the Defendant.

61 The doctrine of good faith has been acknowledged in the context of tenders and the treatment of bidders: *Martselos Services Ltd. v Arctic College*, [1994] N.W.T.R. 36 (C.A.). There is no evidence that there was any lack of good faith or fairness in the bidding process which led to the Plaintiff being awarded the contract in this case.

62 I accept that as a public body operating with public funds, the Defendant was required to conduct its operations in a manner worthy of the high trust placed in it by the public: *Martselos Services Ltd. v Arctic College* (1992), 5 B.L.R. (2d) 204 (N.W.T.S.C.) reversed on other grounds [1994] N.W.T.R. 36 (C.A.). This is essentially a duty of fairness. But the Defendant also had a duty to act in the public interest with respect to a contract involving public health. It was reasonable for the Defendant to be diligent in requiring its contractor to abide by the terms of the contract. I fail to see how the Defendant would be acting reasonably by allowing further time to the Plaintiff, who presented no plans as to how he would obtain the required equipment. I am unable therefore to find any lack of good faith or fairness on the part of the Defendant by reason of its not having extended more time than it did.

63 The Plaintiff also points to an alleged conflict of interest on the part of the Mayor, Mr. Marion, as a basis for saying there was a lack of good faith or fairness on the part of the Defendant.

64 The alleged conflict of interest arises out of business dealings between the Mayor and John Smith. As I understood the evidence, in 1988, Mr. Smith rented a truck from a company in which the Mayor had an interest. The truck was rented by Mr. Smith for approximately three months and was used by him for the honeybag contract work. The truck burned, leaving only the box, which Mr. Smith rented. Then, in 1989, Mr. Smith and the Mayor made a trade, the box for a deck, so that Mr. Smith ended up with the box.

65 In May of 1993, after the Plaintiff was no longer involved in the honeybag contract, the company in which the Mayor has an interest purchased Mr. Smith's truck. Mr. Smith was still using it at the time of trial, but paying no rent.

66 There was no evidence that any of these events occurring some years prior to and then one year after, the Plaintiff's contract, had any effect on the Defendant's dealings with the Plaintiff.

67 The tender specifications and the tender invitation itself made it clear that the successful tenderer was expected to be ready to perform the contract with the proper vehicle at the time set out in the tender. There was no requirement, implied by custom or good faith or otherwise, that he would be given any more time to obtain, or make arrangements to obtain, a vehicle. There was, therefore, no breach by the Defendant on this ground.

Conclusion:

68 I find that the Plaintiff has failed to show that the Defendant breached the contract. The action is therefore dismissed.

69 Costs normally follow the event. If counsel are unable to agree, they may make submissions as to costs within 30 days of the date of these reasons.

V.A. Schuler

J.S.C.

Dated at Yellowknife, Northwest Territories
this 19th day of July, 1996

Counsel for the Plaintiff: Hugh Latimer

Counsel for the Defendant: Karan Shaner

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