CASE SUMMARY

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HOW *NOT* TO INSTRUCT YOUR EXPERT WITNESS

Bruell Contracting Ltd. v. J. & P. Leveque Bros. Haulage Ltd.

The Ontario Ministry of Transportation ("MTO") decided to rehabilitate a stretch of Highway 575, a provincial secondary highway connecting the communities of Verner and Field, just north of Lake Nipissing. It awarded the contract for that work to J. & P. Leveque Bros. Haulage Limited ("Leveque") on June 19, 2007. Leveque and its sub-contractor Bruell Contracting Limited ("Bruell") constructed a so-called double lift surface treatment. As it turned out, they ended up doing so twice. It took a 17-day trial with 19 witnesses to determine whose fault that was.

Ten days after the completion of the initial double lift surface treatment placement, which had been done during the last week of September, the surface treatment began to exhibit visible signs of deterioration. A month later, the MTO issued a Work Directive requiring the surface treatment to be removed. Leveque removed the initial surface treatment by November, and once again placed another double lift surface treatment commencing the following June 23. This extra work of removing and replacing was performed under protest.

The Contract

One of the potential causes for the failure of the surface treatment was an incompatibility of the aggregate chosen by the general contractor and the binder chosen by the subcontractor. To determine who would be responsible for such incompatibility, the court had to determine what type of contract the parties entered into.

Leveque argued that its contract was a method specification contract and that it supplied material fit for the purpose of this contract because these requirements were prescribed by the specifications. Both the aggregate source selected by Leveque and the binder selected by Bruell were tested by the MTO and passed all the tests required by the contract. Leveque further submitted that the designer of the prescribed system, not the contractor, should be responsible for the design's performance. Finally, Leveque argued that according to its warranty, it was responsible for the proper performance of the work only to the extent that the design and specifications permitted such performance.

The MTO argued that the contract was not a pure method specification contract as submitted by Leveque, but rather a mixed specification contract incorporating many performance-based elements. The MTO submitted that Leveque could choose any aggregate source it wished in order to create a satisfactory product as per their contractual Warranty and that it failed to meet its contractual obligations when it did not take reasonable steps to ensure that the aggregate it selected and used was suitable for the project.

The Cause of the Failure

In the end, the court held that it did not really matter who was responsible for incompatibility, since incompatibility was not the sole, or even the primary, cause of the deterioration that occurred one month after the work had been initially done. When MTO elected to opt for surface treatment on Highway 575, it rejected a previously approved hot mix design, without additional review by an engineer and without input or modification from its own consultant.

Subsequent to the award to Leveque, the MTO demonstrated that Leveque had to solely manage the very tight schedule, even with obstacles created by the MTO, such as the delay of the pre-construction meeting. Even as it was obviously recognized that late season work was not optimal for placing surface treatment, the court held that the MTO showed a complete lack of cooperation and was "pompously oblivious or completely unconcerned".

The evidence was clear that, in the circumstances, the initial double surface treatment was quite well constructed by the contractors, and the main cause of the deterioration was the MTO's decision to allow highway loading of extremely heaving trucking too soon after construction, before the curing was finished. Significant rainfalls accelerated the deterioration. In the end, what caused the project to fail was what the court described as a "perfect storm" created from the design using excessive binder application rates for such heavy commercial traffic, coupled by the rainfall with the cool temperatures inhibiting curing.

The Experts

The parties called numerous experts on development of road and pavement rehabilitation, surface treatments, pavement and materials engineering, forensic evaluations of pavement structures, construction materials, quality assurance and quality control, and pavement condition evaluations in Ontario and across North America relative to all these subjects.

Despite eventually not being determinative of the case, one of the principal issues upon which expert evidence was received was whether the contract was (1) a method specification without any requirement of performance guarantees as was argued by Leveque, or (2) a mixed specification incorporating many performance-based elements as was submitted by the MTO.

In deciding the issue, the court was faced with dramatically clashing expert evidence. While the MTO's expert was admittedly extremely experienced and qualified, the court eventually attached almost no weight to any of the opinions proffered by him.

In determining whether an expert's evidence will be helpful, a court will, as a matter of common sense, look to the question of the expert's independence or objectivity, since a biased expert is unlikely to provide useful assistance. While courts have recognized and accepted that experts are called by one party in an adversarial proceeding and are generally paid by that party to prepare a report and to testify, courts insist that expert witnesses render opinions that are the product of their expertise and experience and, importantly, their independent analysis and assessment. In other words, courts rely on expert witnesses to approach their tasks with objectivity and integrity: *Carmen Alfano Family Trust v. Piersanti*. To the extent that

they do not, they are not properly qualified to give expert opinions: *Bank of Montreal v. Citak*.

Justice Nadeau summarized the law as follows:

> When courts have discussed the need for the independence of expert witnesses, they often have said that experts should not become advocates for the party or the positions of the party by whom they have been retained. It is not helpful to a court to have an expert simply parrot the position of the retaining client. Courts require more. The critical distinction is that the expert opinion should always be the result of the expert's independent analysis and conclusion. While the opinion may support the client's position, it should not be influenced as to form or content by the exigencies of the litigation or by pressure from the client. An expert's report or evidence should not be a platform from which to argue the client's case. As the trial judge in this case pointed out, "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the court".

In this case, the evidence showed that the opinion presented by the MTO's expert was actually an opinion prepared and developed by the MTO. Leveque was able to show that some conclusions in the expert's report had been taken verbatim from the instruction letter to the experts and that the MTO had requested certain deletions from the report. The MTO also instructed their experts not to contact certain other clients in the course of their investigation. During discoveries, correspondence came to light in which the MTO told the expert that "further information provided about weather ... will not change your opinion about the weather".

The MTO's expert opined that there was a standard industry practice at the time of the original work being done, which required contractors to conduct aggregate-binder compatibility testing. Such testing being industry standard, the argument went, the contractor had to conduct the testing, even though it was not specified in the contract. The evidence showed that the "industry standard" argument was actually an argument that originated inside the MTO and was based on a call to one other road contractor who told the MTO that it was their own standard to do so. Three other experts suggested that there was no such industry-wide standard.

Based on this evidence, the court came to the conclusion that the MTO's expert "was committed to advancing the theory of the case of his client, thereby assuming the role of an advocate" and preferred what it considered to be the "thoughtful, independent, fair, objective and non-partisan expert opinion evidence" presented by the other experts.

In the end, partially as a result of attaching no weight to the MTO's expert evidence, the court found that there was no liability upon Leveque and Bruell and that the MTO was solely responsible and liable for their breach of contract. The MTO was ordered to pay approximately $3 million to Leveque and Bruell in damages and interest.

Costs

In supplementary reasons released on November 22, 2013, the court dealt with costs of the proceedings. While the court had stayed just clear of awarding punitive damages against the MTO in its substantive reasons, it saw fit to impose costs sanctions on the MTO, based on the MTO's conduct throughout the trial. With respect to the evidence proffered by the MTO, the court found that the MTO had purposely failed to conduct an objective investigation of the causation issue before reacting as it did against the contractors. Instead, the MTO manufactured an "industry standard" defence, and Justice Nadeau found that he had an obligation to rebuke, rather than appear to condone, that defence.

The MTO was ordered to pay to Leveque its costs of the action as claimed on a full indemnity scale, fixed in the amount of $863,013.07. The MTO had to pay to Bruell its costs of the actions as claimed on a mixed partial and substantial indemnity scale, fixed in the amount of $435,983.70. Finally, the MTO had to pay to AECOM its costs of these actions on a partial indemnity scale, fixed in the amount of $370,638.16.

Ontario Superior Court of Justice
July 25, 2013
Nadeau J.

CITATIONS

Bank of Montreal v. Citak, [2001] O.J. No. 1096, [2001] O.T.C. 192 (Ont. Sup. Ct. (Comm. List)).

Bruell Contracting Ltd. v. J. & P. Leveque Bros. Haulage Ltd., [2013] O.J. No. 3538, 2013 ONSC 1985.

Carmen Alfano Family Trust v. Piersanti, [2012] O.J. No. 2042, 2012 ONCA 297.

J & P Leveque Bros. Haulage Ltd. v. Ontario, [2013] O.J. No. 5314, 2013 ONSC 6676.

Construction Lien Act, R.S.O. 1990, c. C.30.

Ledcor Construction Limited v. Northbridge Indemnity Insurance Company, [2013] A.J. No. 1088, 2013 ABQB 585.

Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority, [2013] N.J. No. 22, 2013 NLTD(G) 4 (N.L.S.C.–T.D.).

Olympic Construction Ltd. v. Eastern Regional Integrated Health Authority, [2014] N.J. No. 105, 2014 NLCA 20.

Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, [2010] S.C.J. No. 33, 2010 SCC 33.

Swift v. Eleven Eleven Architecture Inc., [2014] A.J. No. 96, 2014 ABCA 49.

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2010] S.C.J. No. 4, 2010 SCC 4.

Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] S.C.J. No. 2, [1995] 1 S.C.R. 85.

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