

Date: 20080729

Docket: T-1740-04

Citation: 2008 FC 923

Montréal, Quebec, July 29, 2008

PRESENT: Richard Morneau, Prothonotary

**ACTION *IN REM* AGAINST THE VESSEL M.V. “GRATEFUL ONE”
ACTION *IN PERSONAM* AGAINST THE OWNERS –
THANKFUL TOO FAMILY FISHERIES INC.**

BETWEEN:

D'EON BOATBUILDING LIMITED

Plaintiff

and

**THANKFUL TOO FAMILY FISHERIES INC.,
THE VESSEL “GRATEFUL ONE”, AND
THE OWNERS AND ALL OTHERS INTERESTED
IN THE VESSEL M.V. “GRATEFUL ONE”**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a judgment rendered following the trial on the merits, which took place on July 8, 2008. The plaintiff, D'Eon Boatbuilding Limited (hereinafter D'Eon Boatbuilding), had

instituted a simplified action asking this Court to allow its action and to order the defendants, Thankful Too Family Fisheries Inc. and its vessel “Grateful One” (hereinafter collectively the defendant), to pay the sum of \$27,979.23 representing, according to D’Eon Boatbuilding, the unpaid balance of the final construction costs incurred in constructing the fishing boat “Grateful One” for the defendant.

Procedural background

[2] In an order dated December 12, 2007, following the pre-trial conference in this matter, the issues to be determined at trial were identified as follows:

- (a) Was the contract between the parties one of a fixed price to be adjusted in accordance with agreed changes made and material supplied or was the contract one of a cost plus nature *ab initio*?
- (b) What is the value of the material supplied by the Defendant?
- (c) What is the value of the changes made during the construction of the vessel?
- (d) What is the amount owed by the Defendants to the Plaintiff, consequent upon the Court’s rulings on the above issues?

[3] Both parties swore detailed affidavits and at trial, the deponents were also called upon to provide rebuttal evidence orally. Each deponent was also cross-examined by counsel for the

adverse party. The General Manager of D'Eon Boatbuilding, Michel Herman Surette, and the actual owner of the company, Maurice Camille d'Eon, testified for the plaintiff.

[4] Rodney Charles MacDonald testified for the defendant.

Facts

[5] The facts concerning the key aspects of this case can be summarized as follows.

[6] Seeking to purchase a new fishing vessel to accommodate one of his sons' more aggressive fishing, Mr. MacDonald approached Mr. Surette in November 2003 at D'Eon Boatbuilding to find out how much it would cost to build such a boat.

[7] This was not the parties' first experience of this nature since it appears that D'Eon Boatbuilding had built fishing vessels for Mr. MacDonald twice before.

[8] Beginning in November 2003, negotiations took place between the parties during which Mr. Surette of D'Eon Boatbuilding prepared a certain number of quotes. One of these quotes constitutes the basic contract between the parties. However, they do not agree which one it is.

[9] According to the defendant, it is the quote dated February 5, 2004, which was filed at tab 14 of the joint book of documents (hereinafter JBD) whereas D'Eon Boatbuilding contends

that it was the quote dated April 21, 2004, filed at tab 20 of the JBD. This is one of the three major substantive issues dividing the parties, which our analysis will seek to resolve.

[10] Whichever quote is accepted as the contract between the parties, there is no dispute that during the construction of the vessel, Mr. MacDonald asked for changes to the quote. This resulted either in additions entailing more costs (the parties spoke of extras) or credits in favour of the defendant; in the latter case, material described in the quote was not used or, more often, Mr. MacDonald, on behalf of the defendant, provided the equipment himself. Each party tendered in evidence its accounting of extras and credits. This is the second factual issue dividing the parties.

[11] Last, on September 15, 2004, members of Mr. MacDonald's family, acting under his instructions, seized the vessel before the defendant had paid the final balance that was still being discussed by the parties. In fact, on September 15, 2004, discussions on this point took place but later in the day. This is the third issue dividing the parties.

I The contract between the parties

[12] It is common ground that at the outset, most of the discussions between Messrs. Surette and MacDonald focused on the construction of a vessel with a 45-foot hull to be provided and paid by D'Eon Boatbuilding.

[13] Thus, the quote of February 5, 2004, (tab 14 of the JBD) refers to those facts and also provides that this quote was valid for a 60-day period, which means that it was valid until around April 5, 2004.

[14] The evidence shows that Mr. MacDonald ultimately wanted and obtained a vessel with a hull that was five feet longer, i.e., a total length of 50 feet. The final agreement also stated that Mr. MacDonald himself would provide the said 50-foot hull to D'Eon Boatbuilding. This hull was delivered to D'Eon Boatbuilding on or about April 21, 2004, after the February 5, 2004, quote had ceased to be valid.

[15] Mr. Surette maintained in his affidavit and testified confidently that he had given the said quote to Mr. MacDonald on April 21, 2004.

[16] Although Mr. MacDonald testified that the first time he saw this April 21, 2004, quote was during his discussions with representatives of D'Eon Boatbuilding on September 15, 2004, I do not accept this version. In fact, Mr. Surette seemed to me much more sure of himself when he testified that he had given the said quote to Mr. MacDonald on April 21, 2004. Furthermore, each of the four partial payments totalling \$263,000 that Mr. MacDonald made to D'Eon Boatbuilding while the work was being carried out on the vessel corresponds roughly to 25% of the price or total cost that appears on the quote dated April 21, 2004. Regarding this schedule of payments, I also do not accept Mr. MacDonald's version that these payments were made somewhat randomly after sporadic requests by Mr. Surette to Mr. MacDonald. Rather, I believe that these payments complied with the schedule of four payments that the parties had agreed to.

[17] Last, I believe that the various increases set out in the April 21, 2004, quote were justified and were accurately communicated to Mr. MacDonald by Mr. Surette during conversations they had before the quote was drawn up. The Court concludes that Mr. MacDonald accepted all the information in the quote.

[18] The above facts are all facts that lead this Court to find that the April 21, 2004, quote, which refers to a total cost, before modifications, of \$263,000 constitutes the basic contract between the parties.

[19] This first finding enables the Court to comment on the significance of a note at the end of the April 21, 2004, quote (this note is also found on all the quotes exchanged between the parties). The note reads as follows:

This project is based upon a “Cost + 10%” basis. If any modifications or alterations are required it will reflect the “Cost + 10%” basis.

[20] In response to questions by the Court, Mr. Surette testified that it must be understood that the cost of \$263,000 in the quote of April 21, 2004, already included the “Cost + 10%”. Thus, if no additions had been made to the April 21, 2004, contract, this sum of \$263,000 would have been considered the final firm price. In the case before me, since there were extras, the second part of the note beginning with “If any” means that any extra was to be calculated at “Cost + 10%”. This explanation is accepted by the Court and is provided here to respond in the

affirmative to the first equation in question (a) that the Court had listed following the pre-trial conference in this matter (see paragraph [2], *supra*).

II The accounting of extras and credits prepared by the respective parties

[21] As stated above, each party acknowledged that there were extras and credits to take into account. Each of them prepared a document reflecting that party's accounting in this regard. D'Eon Boatbuilding's is at tab 22 of the JBD and the defendant's is an exhibit to the affidavit of Mr. MacDonald.

[22] The parties did not really use Mr. Surette or Mr. MacDonald as witnesses in Court to attempt to extensively undermine the accounting exercise of the other party.

[23] The only specific exercise that took place in Court in this regard dealt with a deduction claimed by Mr. MacDonald in the final amount of \$9,200 (\$14,000 - \$4,800) relating to a hydraulic system. Mr. Surette testified that this deduction was too high since Mr. MacDonald only provided the pump for the system (not the entire system) and that the cost claimed by Mr. MacDonald for this pump would be too high based on the appropriate market.

[24] Here again, the self-confidence in Mr. Surette's testimony and the reasonableness of tab 22 of the JBD lead me to accept D'Eon Boatbuilding's version and to extend it to all the extras and credits to be calculated. Thus, the Court accepts the accounting of the extras and credits prepared by D'Eon Boatbuilding at tab 22 of the JBD.

[25] Although that document states that the defendant still owes \$30,328, I intend to limit D'Eon Boatbuilding's claim to \$27,979.23 since that was the amount claimed by D'Eon Boatbuilding in its statement of claim. This finding responds to questions (b) to (d) in paragraph [2], *supra*.

III The events of September 15, 2004

[26] Two series of events come under this heading.

[27] The first series of events has to do with the \$63,000 payment made by Mr. MacDonald on September 15, 2004, i.e., the fourth partial payment discussed earlier, and an agreement that the parties entered into the same day, which provided that the balance of \$27,979.23 would be reduced by \$5,000 if payment was made in the next two days.

[28] Given that the Court has determined that the defendant must pay \$27,979.23 to D'Eon Boatbuilding, it does not seem necessary to analyze in depth whether the payment of \$63,000 made by Mr. MacDonald on September 15, 2004, was based on the contract of April 21, 2004, or whether the parties were in agreement or not about the prompt payment of \$27, 979.23. The evidence that I heard leads me to answer those two issues in the affirmative. The testimony of Messrs. Surette and d'Eon was more convincing than the sometimes hesitant testimony of Mr. MacDonald about this sequence of events.

[29] Even if it did not affect any of the remedies in D'Eon Boatbuilding's statement of claim, the other series of events of September 15, 2004, that should be mentioned involves Mr. MacDonald taking possession of the vessel that day.

[30] On the morning of September 15, 2004, although Mr. MacDonald was well aware that he had not paid the full balance owing for the construction of the boat, he nonetheless went to D'Eon Boatbuilding's shipyard around 5:30 a.m., accompanied by one of his sons and his brother-in-law.

[31] On the specific instructions of Mr. MacDonald, the two men broke the padlock on the vessel that prevented access to the pilot's cabin and, it must be inferred, tampered with the vessel's ignition so that they were able to start it without having the keys. The men who assisted Mr. MacDonald escaped with the boat to a location in New Brunswick.

[32] After the vessel left the shipyard, Mr. MacDonald himself left the shipyard. Several hours later when the representatives of D'Eon Boatbuilding realized that the boat had left, they had great difficulty trying to reach Mr. MacDonald to see if he was the person who had seized the boat without their consent.

[33] D'Eon Boatbuilding was right in denouncing this unprecedented situation that Mr. MacDonald was unable to justify in any way when he testified. In this regard, he put forward, *inter alia*, the fact that the tides in the Bay of Fundy forced him to act quickly that

morning. However, on cross-examination, counsel for D'Eon Boatbuilding made it clear that ultimately there was no emergency requiring Mr. MacDonald to act on the sly as he did.

IV Conclusion

[34] Accordingly, D'Eon Boatbuilding's action will be allowed based on its findings, and the defendants shall pay to the plaintiff the sum of \$27,979.23, with post-judgment interest and costs in accordance with column III of Tariff B.

JUDGMENT

The action of the plaintiff D'Eon Boatbuilding Limited is allowed based on its findings, and the defendants shall pay to the plaintiff the sum of \$27,979.23, with post-judgment interest and costs in accordance with column III of Tariff B.

“Richard Morneau”

Prothonotary

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1740-04

STYLE OF CAUSE: D'EON BOATBUILDING LIMITED
Plaintiff
and
THANKFUL TOO FAMILY FISHERIES INC.,
THE VESSEL "GRATEFUL ONE", AND
THE OWNERS AND ALL OTHERS INTERESTED
IN THE VESSEL M.V. "GRATEFUL ONE"
Defendants

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: July 8, 2008

**REASONS FOR
JUDGMENT BY:** PROTHONOTARY MORNEAU

DATED: July 29, 2008

APPEARANCES:

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