

Date: 20140409
Docket: 13/09
Citation: *Eastern Regional Integrated Health Authority v.
Olympic Construction Limited*, 2014 NLCA 20

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

EASTERN REGIONAL INTEGRATED
HEALTH AUTHORITY APPELLANT

AND:

OLYMPIC CONSTRUCTION LIMITED RESPONDENT

Coram: Rowe, White and Hoegg JJ.A.

Court Appealed from: Supreme Court of Newfoundland and Labrador
Trial Division (G) 200901T3683 (2013 NLTD(G) 4)

Appeal Heard: December 4, 2013
Judgment Rendered: April 9, 2014

Reasons for Judgment by Hoegg J.A.
Concurred in by Rowe and White JJ.A.

Counsel for the Appellant: David Buffett, Q.C.
Counsel for the Respondent: John French and Kimberley MacKay

Hoegg J.A.:

INTRODUCTION

[1] At trial, Eastern Health Integrated Health Authority (Eastern) was found to have breached its tender contract with Olympic Construction Limited (Olympic) in relation to a project to build a gynecology extension to the Janeway Children's Health Care and Rehabilitation Centre (Janeway Project) in St. John's. The trial judge also found that Olympic ought to have been awarded the tender contract, and he consequently ordered Eastern to pay damages to Olympic for the loss of profit it would have made had it been awarded the project. Eastern appeals the trial judge's finding of liability, the amount of damages awarded and the prejudgment interest award.

BACKGROUND AND FACTS ESTABLISHED AT TRIAL

[2] On May 25, 2009, Eastern issued a call for tenders for construction of the Janeway Project. The tender call was for a stipulated price contract and the closing date was stated to be July 2, 2009. The Instructions to Bidders contained the following clause:

.1 Site Examination

- .1 A mandatory site assessment meeting will be held on Thursday, May 21, 2009 at 10:00 AM. Contractors shall meet at the Health Sciences Centre Main Entrance. Bidders are required to attend this session to fully ascertain the project scope and its intricacies. Tenders will not be accepted from Contractors failing to attend the assessment meeting.

[3] The Instructions to Bidders also provided that:

- .2 Addenda may be issued during bidding period. All addenda become part of the Contract Documents. Include costs in Bid Price.

[4] On June 2, 2009 Addendum #1 was issued by Eastern, which amended the closing date to June 18, 2009. Addendum #1 also replaced the previous site examination clause with the following clause:

- .1 A mandatory site assessment meeting will be held on Thursday, June 11, 2009 at 10:00 AM. Contractors shall meet at the Health Sciences Centre Lecture Theatre "D". Bidders are required to attend this session to fully ascertain the project scope and its intricacies. Tenders will not be accepted from Contractors failing to attend the site assessment meeting.

[5] On June 11, 2009, the site assessment meeting (the first site meeting) was held. The purpose of the meeting was to provide bidding contractors with an overview of the Janeway Project, to point out construction issues on-site, and to receive any specific questions arising from the contract documents and/or the site walk-through. The only bidder in attendance at this meeting was Redwood Construction Limited (“Redwood”).

[6] Eastern became concerned that it had not assured a competitive bid process because only one bidder was in attendance at the first site meeting on June 11. Consequently, an architect with AMEC, Eastern’s project consultant, suggested to a representative of Olympic that Olympic may be interested in submitting a bid on the Janeway Project. Olympic was interested, but before they submitted a bid they requested assurance from AMEC and Eastern that an extension to the tender would be granted and that they would qualify as a bidder. Eastern also communicated with another potential bidder, Anchorage Contracting Limited (Anchorage), which also expressed interest.

[7] In order to accommodate the interests of Olympic and Anchorage (as well as any other potential bidders) to qualify as compliant bidders, Eastern issued Addenda numbers 5 and 6. Addendum #5 provided for a site meeting to take place on June 22 (the second site meeting). Addendum #6 extended the closing date for bids to June 25, 2009. The relevant parts read:

Part A – General

.2 A Site Briefing Meeting will be held on Monday, June 22, at 2 p.m. – 3 p.m. in Room 2J619 Janeway.

...

.1 Bidders are hereby advised that the tender closing date has been extended, the tender now closes Thursday, June 25, 2009 at 3:00 p.m.

[8] On June 22, 2009, Olympic, Redwood and Anchorage attended the second site meeting. This second site meeting was conducted in the same manner and covered substantially the same issues as the first site meeting on June 11 did.

[9] Before the close of the tender on June 25, 2009, Olympic submitted a bid in tender form in the amount of \$6,725,458.87, inclusive of HST and bid bond. Redwood also submitted a bid, which was \$20,000 more than Olympic’s bid. Anchorage did not submit a bid. The bids from Olympic and Redwood were accepted and opened by Eastern after the tender closed on June 25, 2009.

[10] On June 30, 2009, Redwood wrote to Eastern stating that Olympic's bid ought to be disqualified because Olympic had not attended the first site meeting on June 11. In its correspondence, Redwood stated that the wording in Addendum #1 directed bidders that attendance at the first site meeting on June 11 was mandatory and if bidders did not attend it they would not qualify as compliant bidders, whereas the site assessment meeting held on June 22 was not designated as mandatory. Redwood added that the direction to bidders in Addendum #1 respecting the first site meeting had never been replaced or rescinded.

[11] On July 28, 2009, Eastern advised Olympic in writing that its tender was disqualified on the basis that it had not attended "a mandatory site meeting" and that the tender contract had been awarded to Redwood, the second lowest bidder. Olympic subsequently filed suit.

The Trial Judge's Decision

[12] The trial judge found ambiguity in the tender documents arising as a result of the difference in wording between Addenda numbers 1 and 5. The ambiguity concerned the inclusion of the word "mandatory" in Addendum #1 and the fact that it did not appear in Addendum #5, which raised the question of whether bidders who attended the second site meeting but not the first site meeting could be compliant bidders. To resolve this ambiguity, which was required in order to determine if the tender contract had been breached, the trial judge found it necessary to examine the context in which the second site meeting of June 22 was held. Examining the context required admitting and considering evidence extrinsic to the tender contract documents themselves.

[13] The trial judge found that representatives of Eastern had approached Olympic and suggested that Olympic bid on the project and that because Olympic was interested, subsequently Olympic had written to Eastern requesting an extension of the closing and another site meeting so that it could be a compliant bidder. He also found that Anchorage had written to Eastern specifically requesting another mandatory site meeting so it could be compliant if it chose to bid. The trial judge found that following Eastern's receipt of these correspondences, Eastern issued Addendum #5, which set up the June 22 site meeting, and Addendum #6, which extended the closing date, and that Eastern directly communicated the addenda to Olympic by faxing Olympic Addendum #5 on June 18 and Addendum #6 on June 19.

[14] In his decision, the trial judge stated the issue as “whether the second site meeting of June 22, 2009 was intended [by Eastern] to be a substitute for the mandatory site meeting” of June 11, 2009. He saw three possible answers:

[62] ... First that there was one mandatory meeting set for June 11th which if you did not attend then your bid would not comply. Second, there were two meetings either of which attendance by the parties would be in compliance with the tender document. In that case if Redwood Construction had not attended the second site meeting, they would still be compliant. Or thirdly, the second site meeting replaced the first site meeting and as such all contractors would have to attend the June 22nd meeting or be unable to bid.

[15] The trial judge decided on the second answer. He found that the second site meeting was intended by Eastern to be a job overview and site briefing and assessment meeting for potential bidders who had missed the first site meeting and that the second site meeting was held in order that those potential bidders could qualify as compliant bidders in accordance with the conditions of the tender call, reasoning that Eastern had no other reason to set up the second site meeting. The trial judge decided that the word mandatory was not included in Addendum #5 so as to avoid prejudice to Redwood by requiring it to attend the second site meeting. He found that the process of holding the second site assessment meeting did not prejudice Redwood in any way, for Redwood could elect to attend it (which it did), or not, and either way Redwood would still be a compliant bidder, yet “it would be highly prejudicial to Olympic and Anchorage to be encouraged by the owner to spend money on the preparation of a bid for which the owner knew would be non-compliant for a meeting already past.” He also found that following the second site meeting, the understanding of Olympic, Redwood and Anchorage was that they were all qualified to bid on the Janeway Project, and that Redwood had not expressed any dissatisfaction with the process.

[16] The trial judge concluded that Olympic would not have bothered to spend time and money engaging in a bid process unless it knew it would be a compliant bidder, and Eastern’s subsequent acceptance and opening of Olympic’s bid, along with Redwood’s bid, after the close showed that Eastern regarded Olympic’s bid as compliant with the tender contract.

[17] The trial judge went on to find that but for Redwood’s letter of complaint written after the closing date, Eastern ought to have, and indeed would have, awarded the contract to Olympic (as Eastern’s own representatives testified), because it was the lowest compliant bidder. He concluded that by not awarding the tender contract to Olympic, Eastern breached its duty of good faith to Olympic, saying “there is no good faith in a bid process that encourages bidders to spend monies only to be denied the fruits of their labours at the end of the day”

(paragraph 83). He concluded that if the doctrine of good faith is to have any integrity at all, good faith by owners has to mean something, as established in *Health Care Developers Inc. v. Newfoundland* (1996), 141 Nfld. & P.E.I.R. 34 (Nfld. C.A.), and he awarded Olympic damages for its loss of profit and prejudgment interest in accordance with the *Judgment Interest Act*, RSNL 1990, c. J-2 (the *Act*).

THE APPEAL

Issues

[18] Eastern appeals on the grounds that the trial judge erred in finding that Eastern was in breach of its tender contract with Olympic, arguing that the trial judge misinterpreted the tender contract. Eastern's position engages consideration of whether the trial judge properly admitted and considered extrinsic evidence in making his decision. Eastern also appeals the trial judge's award to Olympic composed of the loss of profit Olympic anticipated it would have made had it been awarded the Janeway Project.

[19] Eastern also seeks a ruling from this Court that interest on Olympic's damages award for loss of profit ought not to accrue from the date the contract was breached. Eastern argues that interest on Olympic's damages award ought to be calculated and proved in the same manner as interest on damages for loss of income as set out in subsection 4(2) of *Act*, and that because this was not done, no prejudgment interest should be awarded.

Standard of Review

[20] The standard of review for questions of law is correctness and for questions of fact and drawing factual inferences is palpable and overriding error. The standard of review for questions of mixed fact and law is correctness when the alleged error is an "extricable question of law", but otherwise it is palpable and overriding error. (*Housen v. Nicholaisen*, 2002 SCC 33, 2 S.C.R. 235, paras. 5, 8, 9, 10, 23, 25 and 26-36.)

[21] The issue in this case is whether Eastern breached its tender contract with Olympic. In order to determine whether a breach occurred, the tender contract must be interpreted so as to determine its legal effect. Eastern's appeal alleges that the trial judge erred in law by admitting and relying on extrinsic evidence in his interpretation of the tender contract; it argues further that in any event, properly interpreted, no breach of the tender contract occurred. Whether evidence going to the heart of a decision should have been admitted is a question of law to which the

correctness standard applies. The construction and interpretation of a written instrument leading to a determination of its legal effect is a question of mixed fact and law. (*Seadane International Inc. v. Morgan International Marketing Co.* (1999), 180 Nfld. & P.E.I.R. 97 (Nfld. C.A.) and *Oppenheim v. Midnight Marine*, 2010 NLCA 64, 302 Nfld. & P.E.I.R. 85.

Eastern's Position

[22] Eastern's position is that a court should interpret a written contract as a whole instrument and that it should not look beyond the actual written contract to determine the intention of the parties. In other words, Eastern maintains that the intention of the parties to the tender contract is to be determined solely by the way the parties express themselves through the natural meaning of the words in the written contract, and that external evidence of context relevant to the intention of the parties should not be admitted and considered. Eastern contends that this is accomplished by reading the tender contract documents as a whole, and considering the words of one contractual provision in harmony with the rest of the contract, as stated by Cromwell J. at paragraph 64 of *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69.

[23] In support of its position, Eastern points to Addenda numbers 1 and 5 of the tender contract, and argues that Addendum #1 states in plain language that attendance at the first site meeting on June 11 was mandatory for bidders, whereas the provision in Addendum #5 setting up the second site meeting does not stipulate that the second site meeting was either mandatory or mandatory for those who did not attend the first meeting. Eastern also points to the fact that Addendum #5 did not delete or rescind the mandatory clause in Addendum #1, and further that the provision in Addendum #5 respecting the second site briefing meeting does not stipulate consequences for non-attendance. Eastern maintains that had it intended the June 22 meeting to qualify as a mandatory attendance meeting for bidders who were not present at the June 11 meeting, it would have used other plain language in Addendum #5 to say exactly that. Eastern characterizes the communications among Olympic and Eastern and Anchorage and Eastern as "just that ... communications," and argues that as such, they could "not have had the effect of changing the tender contract documents," which Eastern says it had no ability to waive anyway. Eastern says it is plain that Olympic's bid had to be disqualified because Olympic did not comply with the tender contract's requirement to attend the first site meeting on June 11.

Olympic's Position

[24] Olympic's position is that the trial judge correctly found ambiguity in the contract documents which justified his consideration of extrinsic evidence respecting the context and circumstances surrounding the tender contract so as to determine the intention of Eastern and Olympic. Olympic argues that the trial judge properly admitted and relied on evidence of the circumstances surrounding Olympic and Eastern entering into a contract, and came to the correct conclusion that Eastern breached its tender contract with Olympic.

ANALYSIS

The Law

[25] In tender law, there are typically two contracts at play – Contract A and Contract B. Simply put, Contract A is the contract between the owner and a compliant bidder, and Contract B is the contract between the owner and the successful bidder.

[26] The concept of Contract A and Contract B was introduced into tendering law by the Supreme Court of Canada in *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. It is explained by Estey J. at pages 122-123 of *Ron Engineering*:

The tender submitted by the respondent brought contract A into life. This is sometimes described in law as a unilateral contract, that is to say a contract which results from an act made in response to an offer, as for example in the simplest terms, "I will pay you a dollar if you will cut my lawn". No obligation to cut the lawn exists in law and the obligation to pay the dollar comes into being upon the performance of the invited act. Here the call for tenders created no obligation in the respondent or in any one else in or out of the construction world. When a member of the construction industry responds to a call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. ... Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon acceptance of the tender. Other terms include the qualified obligation of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.

Cameron J.A. of this Court explained and applied the Contract A – Contract B concept in *Health Care Developers* at paragraph 31.

[27] In *Tercon*, the Supreme Court was not concerned with the consideration of evidence extrinsic to the tender contract documents. *Tercon* was concerned with the effect of an unambiguously worded exclusion clause in the tender contract which purported to permit an owner to escape liability for breaching express provisions of the tender contract by awarding work to an ineligible bidder. The trial judge had decided that the owner had considered a bid from a bidder who was not supposed to have participated in the tender process, and that the exclusion clause did not excuse the owner from liability *vis-a-vis* other compliant bidders. The Supreme Court agreed. In the result, the owner was determined to have breached the express provisions of its tender contract with *Tercon* as well as its implied duty to act fairly towards *Tercon*. At paragraph 64 of the decision, Cromwell J. spoke to how the exclusion clause, as one provision of the tender contract, ought to be considered in interpreting the tender contract:

The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context.

Justice Cromwell went on to quote from paragraph 44 of Iacobucci J.'s decision in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 2000 SCC 60, [1999] 1 S.C.R. 619, which reads:

The privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties.

At paragraph 70, Justice Cromwell explained why the implied duty of fairness in public tendering contracts is important by quoting paragraph 88 of the Supreme Court's decision in *Martel Building Ltd. v. Canada*, 2000 SCC 69, [2000] 2 S.C.R. 860:

Implying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process

[28] The implied duty of fairness in tender contracts was also addressed by Cameron J.A. in *Health Care Developers*. Although Justice Cameron rested her decision on the doctrine of good faith in contracting, she adopted the principles governing tendering law set out by Jenkins J. (as he then was) of the Prince Edward Island Supreme Court in *Murphy v. Alberton (Town)* (1993), 114 Nfld. & P.E.I.R. 34 (P.E.I. S.C.T.D.) at 43, which included that an owner has a duty to treat all bidders fairly. As well, at paragraph 44 of *Health Care Developers*, Justice Cameron reasoned that in addition to the applicability of the doctrine of good faith

in tendering law to that case, the obligation to act fairly could be implied as a term of the tender contract between Health Care Developers and Newfoundland, and that Newfoundland had breached that term.

[29] For many years, the law has permitted courts in certain situations to receive evidence extrinsic to contract documents themselves in order to assist in the interpretation of a contract or written instrument. One such situation is where ambiguity is found in the contract at issue. (See *Health Care Developers*, paragraph 9.) Another such situation presented in *Bowater Newfoundland Ltd. v. Newfoundland and Labrador Hydro* (1978), 15 Nfld. & P.E.I.R. 301 (Nfld. C.A.), where parol evidence was received to avoid an absurd or repugnant result.

[30] However, in the modern era, admission and consideration of contextual evidence to assist in the interpretation of contracts is not restricted to cases where ambiguity is found or where other situations described as exceptions to the parol evidence rule exist. The modern approach was described by Green J.A. at paragraph 26 of *Seadane*:

... A contract will rarely be able to be interpreted in the abstract, divorced from the evidentiary milieu within which it was created. Words take their meanings from their context. Thus, evidence of the factual matrix surrounding the making of the agreement and of the genesis and aim of the transaction will be relevant to a proper interpretation, in addition to the actual words used (*Atlific*), so as to enable the court to apply it to the facts which the parties were negotiating about. This is so whether the parol evidence rule has application or not. To ask an applications judge to strike a claim by determining the legal rights of the parties based on a sterile interpretation of a document (which is, itself, merely a piece of evidence), in the absence of any other relevant evidence or an agreed statement of facts pertaining to it, is to ask him or her to do an incomplete job.

[31] Cameron J.A. also spoke to the admission and consideration of contextual evidence in interpreting contracts. At paragraph 7 of *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21, 5 C.L.R. (3d) 55, she said:

... rarely is it truly possible to interpret a document without any knowledge of the context and the parol evidence rule does not prohibit a court from admitting evidence of a contextual nature.

Justice Cameron went on to describe this historical development by referring to Lord Wilberforce's words at page 239 of *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.):

That the time has long passed when agreements ... were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations.

and to his quote from *Reardon Smith Line Ltd. v. Hansen-Tangen et al.*, [1976] 3 All E.R. 570 (H.L.):

No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

Cameron J. also referenced the Supreme Court's approval of Lord Westbury's statement in *London & South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610 at p. 263, found at paragraph 20 of *Hill v. Nova Scotia Attorney General*, [1997] 1 S.C.R. 69:

It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.

[32] I add to the above statements Cromwell J.'s words "in light of its purposes and commercial context" in the above-referenced quote from *Tercon*, and interpret them to mean that the purposes and commercial context of any tender contract at issue should inform interpretation of that tender contract in appropriate circumstances. It is worth stating, however, that "contextual evidence" still does not extend to direct evidence as to what the actual intention of a party was.

Application of the Law to this Case

[33] In this case, Olympic submitted a bid on the tender for the Janeway Project to Eastern, which Eastern accepted and opened. Accordingly, Olympic and Eastern entered into Contract A. The terms of Contract A are found in the tender documentation, including all of the Addenda.

Extrinsic Evidence

[34] Ambiguity in contracts is described by Justice Cameron in *Eco-Zone* at paragraph 9:

As the term is used in the law of contracts, it implies that the parties knew fundamentally what they were contracting for or about but did not express it clearly when they put their intentions and agreement into writing.

The trial judge found that ambiguity presented in the tender contract around the difference in wording between Addenda numbers 1 and 5 of the tender documents,

as indicated in paragraph 12 above. At trial, Olympic maintained it had contracted with Eastern on the basis of Addendum #5 whereas Eastern relied on Addendum #1 to support its ultimate rejection of Olympic's bid. The wording of the two contractual provisions together respecting site meetings can admit of more than one meaning, and thus do not clearly express the intentions and agreement of the tendering parties. Accordingly, the trial judge was entitled, by virtue of finding the ambiguity as well by virtue of his general judicial authority, to consider evidence respecting the "genesis of the transaction" (*Reardon*), the "evidence of the factual matrix surrounding the making of the agreement" (*Seadane*) and the "purpose and commercial context" (*Tercon*) which surrounded Olympic's Contract A with Eastern extrinsic to the tender documents themselves (*Eco-Zone*).

The Breach

[35] Eastern summarily rejected Olympic's bid after Eastern had essentially invited, if not encouraged, Olympic to bid on the tender, and after Eastern had altered the tender contract in order to ensure that Olympic's bid could be compliant. Moreover, the rejection followed Eastern's acceptance and opening of Olympic's bid. Importantly, the rejection came after Eastern had secured the advantage of a competitive bid process. A competitive bid process is important to public tendering, for if a bid process is not competitive, a sole bidder on a project is in a position to highball its bid in the knowledge that the owner will have to accept it if it is compliant and unless the tender is legitimately withdrawn. In this case, after the first site meeting on June 11, Redwood, being the only bidder present, would have known that it would be the only bidder on the project because of the mandatory attendance requirement, and thus would be in a position to set its own price, as it were, in its bid. The accommodations which Eastern put into place to enable additional bidders to become compliant bidders (the extension of the closing date and the second site meeting) caused no prejudice to Redwood's compliant bid, and everyone understood that potential bidders present at the June 22 meeting were eligible to be compliant bidders. Eastern demonstrated its understanding of and concurrence with this process, which it created for its own advantage, by accepting and opening Olympic's bid. Simply put, Olympic relied on Addenda numbers 5 and 6 as forming part of the tender contract and went to the effort and expense of submitting a bid, which put it into a Contract A with Eastern. Had Addenda numbers 5 and 6 not been incorporated into the tender contract, Olympic would not have bothered to bid, because the mandatory site meeting had already passed by the time Olympic was approached about the project. In these circumstances, Eastern's rejection of Olympic's bid is a breach of its duty of fairness to Olympic.

[36] The duty of fairness animates the law of public tendering, and to condone Eastern's behaviour in this case would allow Eastern, as the owner in control of the tendering process and in a position to define the parameters for compliant bids and bidders, to make the rules and then break them. In this regard, the words of Orsborn J. (as he then was), at paragraph 35 of *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, are apt:

The owner ... is in control of the tendering process and may define the parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner ... sets the rules it must itself play by those rules in assessing the bids and awarding the main contract.

[37] Eastern's making of rules (by adding Addenda numbers 5 and 6 so that if Olympic went to the second site meeting it would be compliant) for its own benefit, then breaking them (by maintaining that Addenda numbers 5 and 6 had no effect on the contract) after gaining the benefit of a competitive bid process and after Olympic's reliance on Addenda numbers 5 and 6 to its detriment, violates the duty of fairness Eastern owed to Olympic. The acceptance of Eastern's argument in these circumstances would undermine the integrity of public tendering.

[38] The trial judge's decision that Eastern breached its tender contract with Olympic was based on his view that Eastern's awarding of the tender contract to Redwood after encouraging Olympic to bid, changing the tender contract to accommodate Olympic's bid and accepting and opening it, was a breach of Eastern's duty of good faith to Olympic. I do not disagree with the trial judge that Eastern breached its tender contract with Olympic. However, I am of the view that the basis of the breach was that Eastern breached its implied duty of fairness to Olympic. In *Health Care Developers*, Cameron J.A. drew a distinction between the implied duty of good faith in contracting and the implied duty of fairness, and rested her decision on the duty of good faith in contracting. Public tendering law respecting this distinction has evolved, and the implied duty of fairness, founded in both policy and presumed intention, is now settled law (see *Martel* at paragraph 73 and *Tercon* at paragraphs 67-73). In the result, the trial judge did not err in finding that Eastern breached its Contract A with Olympic.

Damages

[39] Olympic sought damages for the cost of bid preparation and loss of profits. The trial judge awarded Olympic its loss of profits on the tender, putting Olympic in the position it would have been in had it been awarded the contract. He did not

award damages for bid preparation because such costs would have been borne by Olympic as the cost of doing business if Olympic had been awarded the tender contract.

[40] The trial judge decided that Olympic would have been awarded the tender contract because it was the lowest compliant bidder. Eastern does not challenge the trial judge's decision in this respect, indeed it could not, for that was the evidence of its own representatives. Rather, Eastern challenges the amount of damages the trial judge awarded, arguing that he erred in awarding damages based on Olympic's anticipated 13 percent profit margin for the project. Eastern submits that the 13 percent was based on the significant risk associated with the project, and because Olympic did not actually assume that risk (because it was not awarded Contract B), the 13 percent should be discounted for negative contingencies. Eastern cites the six percent profit margin on the Caribou Pavilion Project (a project the subject of trial but not of appeal) as indicative of a more reasonable award.

[41] The president of Olympic, Carl Mallam, testified that Olympic anticipated a profit margin of 13 percent on the bid. He explained that it was based on four factors: (1) he had a supervisor readily available for the job; (2) there were only two bidders on the project and he did not anticipate that Redwood, the other bidder, would be aggressive in bidding because Redwood did not know much about it; (3) he knew the building inside and out because Olympic had built the main Janeway building to which the Janeway Project was to be attached; and (4) there are particular risks associated with building hospitals due to their nature and complexity. Mr. Mallam acknowledged that the risk associated with the Janeway Project was higher than the risk associated with the Caribou Pavillion Project. He explained this was because (1) the Janeway Project was a renovation and renovations take longer than new builds, (2) the Janeway Project was a hospital job and hospital jobs require more administrative resources than other jobs, and (3) the Janeway Project was a difficult job that had to be completed in a short period of time (one year). He explained that the Caribou Pavilion Project was a much easier project because it was essentially a new build residential facility as opposed to a hospital. Mr. Mallam said that the Caribou Pavillion Project was not as risky a project and pointed out that its demolition costs were estimated at \$16,000 whereas those for the Janeway Project were estimated at \$172,000.

[42] Eastern did not proffer any evidence of negative contingencies which would have presented had Olympic performed the project. Nor did Eastern proffer any evidence of negative contingencies which presented during Redwood's completion of the project, or that were otherwise known. Neither did Mr. Mallam reference

any negative contingencies. There was no evidence at all of negative contingencies respecting the Janeway Project.

[43] The only evidence on which Eastern relies to support its position that the damages award be reduced is the evidence of Olympic's witnesses that bidding on the Janeway Project involved assessment of risk and incorporating risk as one of the factors Olympic considered in anticipating its profit margin on its bid. This is a different situation from that which presented in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, on which Eastern relies. Naylor's suit for breach of tender contract at trial was not successful. On appeal, the Ontario Court of Appeal allowed Naylor's appeal respecting breaches of Contract A and Contract B, but discounted Naylor's anticipated loss of profits claim on the basis of two negative contingencies – one related to site conditions and the other related to a Labour Board ruling. At the Supreme Court of Canada the appellate court's decision respecting the negative contingency related to site conditions was not disturbed because the evidence supported the contention that Naylor's loss of profits would have been diminished due to problems with site conditions on the project. However, the Supreme Court overturned the appellate court's decision that the Labour Board ruling was a negative contingency justifying a discount because the Labour Board ruling had no potential to affect Naylor's profits and, thus, could not be used to justify reducing its damages award.

[44] The instant case also differs from *Maritime Excavators v. Nova Scotia (Attorney General)* (2000), 183 N.S.R. (2d) 236 (S.C.). In *Maritime*, the evidence indicated that the normal range of profits for the project in issue was between 10 and 25 percent, and the court gave reasons for awarding damages for loss of profit at the lower end of the normal range – that being 12.5 percent.

[45] The submission of a bid on a tender construction contract is an anticipatory exercise based on many factors. The general risk associated with the project is one such factor. It must be determined and assessed and then factored into a bid before it is submitted. This process operates to the owner's benefit for once a bidder submits its bid based on its assessment of risk associated with the tender contract, it is bound by it. If that bidder is ultimately awarded Contract B, and discovers as it is executing the project that it has misjudged its risk or run into trouble on the project, it is stuck with the bid price it submitted in its bid, unless the contract terms expressly provide otherwise. Eastern's position that Olympic's damages award ought to be discounted for the general risks associated with a project that have not materialized shows that Eastern wants it both ways – it wants to hold a bidder to its bid thereby getting the possible advantage of the bidder's misjudged risk assessment, and also to take away any possible advantage gained by the bidder

correctly judging its risks on the project. Eastern cannot have it both ways. The competitive bid process operates as a check on bidders and owners alike in this respect.

[46] Eastern's contention that a six percent anticipated profit margin like that which Olympic included in the bid for the Caribou Pavillion Project has no merit. It is clear from the evidence that the two projects were very different from each other, and in any event, anticipated profit on one project is not automatically applicable to another project. As Mr. Mallam testified, it's not like adding a set mark-up to the wholesale cost of a candy bar.

[47] The decisions respecting damages in *Health Care Developers Inc.* and *Starco Enterprises Limited v. Stephenville Airport Corp.*, 2005 NLTD 63, 246 Nfld. & P.E.I.R. 140, are not relevant. The damages awards for loss of profit in those cases were discounted because of uncertainty as to whether the litigating bidders would be awarded the tender contracts. In this case, there is no such uncertainty.

[48] The well-accepted principle of damages is that the respondent should be put in as good a position, financially speaking, as it would have been in had the appellant performed its obligations under the tender contract. The same principle applies to damages awards in cases of wrongful refusal to contract. The normal measure of damages in this context is the contract price less the cost of executing or completing the work, i.e. the loss of profit (*Naylor*, paragraph 73). In this case, Olympic was wrongly denied Contract B for the Janeway Project. Olympic therefore lost the opportunity to make its anticipated profit on the project and its damages would be the contract price less the cost of completing the work, i.e. its loss of profit.

[49] It was not shown at trial that the 13 percent profit margin on the Janeway Project ought to be discounted for any negative contingencies, which led the trial judge to conclude that it would be "arbitrary and without reason" for him to discount it. As well, Eastern has not pointed to any evidence respecting negative contingencies on which this Court could rely to discount the damages award based on 13 percent anticipated profit margin. Therefore, the trial judge did not err in holding that "it would be arbitrary and without reason" to discount Olympic's damages award reflecting the 13 percent loss of profit.

[50] Before leaving the issue entirely, I would observe that the normal measure of damages in wrongful refusal to contract cases does not really fully compensate a successful claimant for the loss of profits it would have made had it been awarded

the contract. In this regard, I reference Mr. Mallam's uncontroverted evidence to the effect that Olympic also lost the opportunity to make money on extra work and that the nature and complexity of hospital contracts usually generate a lot more change orders than other types of buildings. Nevertheless, the long-established damages calculation in wrongful refusal to contract cases restated in *Naylor* and referenced above in paragraph 48 is the law's way of calculating damages to give justice in this type of case.

[51] In the result, Eastern has not shown that the trial judge erred in awarding damages to Olympic for its loss of profits calculated at 13 percent of the project bid. Accordingly, the damages award to Olympic of \$684,712.71 (plus HST) is not disturbed.

Prejudgment Interest

[52] The trial judge awarded Olympic prejudgment interest on its damages award, saying at paragraph 96 of his judgment:

The Plaintiff is entitled to interest pursuant to the *Judgment Interest Act*.

[53] The awarding of prejudgment interest is governed by the provisions of the *Act*. Sections 3 and 4 speak to the issue before the Court:

3. (1) Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court shall award interest on the judgment calculated in accordance with this Act.

...

(3) Where it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or a part of the amount for which judgment is given,

(a) refuse to award interest under this Act; or

(b) award interest under this Act at a rate or for a period or both other than a rate or period determined under section 4.

4. (1) The court shall for purposes of section 3 calculate interest under this Act from the day the cause of action arises to the day of judgment at the rate determined by averaging the interest rates in effect during that period.

(2) Where a judgment includes damages for expenses incurred or income lost, the court shall

- (a) determine the total of those damages sustained within the 3 month period beginning on the day the cause of action arose and within each subsequent 3 month period; and
- (b) calculate interest from the last day of each 3 month period described in paragraph (a) to the day of judgment, on the total of the damages sustained within the 3 month period, at the interest rate in effect on the last day of the 3 month period.

...

[54] Eastern submits that interest on Olympic's damages award should not run from the date of the breach of contract, saying that Olympic would not have sustained any profits as of this date if it had been awarded the tender contract. Eastern argues that a damages award for loss of profits is akin to one for loss of income, and therefore interest on Olympic's damages for lost profits should be calculated in accordance with subsection 4(2) of the *Act*. Eastern bases its argument on the fact that Olympic's lost profits would have accrued in increments as the project progressed, which is how income losses accrue. Further, Eastern maintains that it was incumbent on Olympic to prove its entitlement to interest by proving how much profit it would have received from Eastern at three-month intervals as the project progressed, and because this was not done, Olympic is due no interest on its damages for loss of profits.

[55] Olympic's position is that interest on its damages award should accrue from the date of the breach of the tender contract in accordance with the provisions of subsection 4(1) of the *Act* and as is usual. Olympic argues that an award for loss of profits is not the same as a loss of income award because a loss of profits award is necessarily speculative whereas a lost income award is capable of precision. Alternatively, Olympic offers that if this Court is persuaded that interest on Olympic's damages should not accrue from the date of breach of the tender contract (that being the date on which Eastern notified Olympic that its tender had been disqualified) then interest on its damages award be ordered to accrue from, at a minimum, the date that the tender contract was scheduled to be substantially performed – that being twelve months from the date of notification of award.

Analysis

[56] As a preliminary point, Eastern's argument respecting prejudgment interest arises for the first time in this Court. While it is understandable why this may be so, Olympic has been precluded from adducing evidence in accordance with the formula proposed by Eastern. Accordingly, Eastern's argument that Olympic

should not get any interest because it did prove its entitlement in accordance with subsection 4(2) or otherwise of the Act cannot be entertained.

[57] Eastern's argument that interest should not accrue from the date of breach has a certain attraction, for it is true that had Olympic been awarded Contract B, it would have received payments incrementally as the work was performed, billed and paid for during the course of the contract. Nevertheless, I am not persuaded that interest on Olympic's award should be calculated according to subsection 4(2) of the Act.

[58] The difference between loss of income and loss of profits was considered in *National Containers and Recycling Ltd. v. Gerrard-Ovalstrapping Ltd.* (1995), 34 C.P.C. (3d) 330 (MBQB). In that case, Master Goldberg decided that damages for profits are not the same as damages for lost income because a claim for loss of profits is a claim that has to be estimated whereas a loss of income claim is capable of more precise determination. For the purposes of this case, I share Master Goldberg's view that damages for loss of profits are fundamentally different from damages for lost income.

[59] Subsection 4(2) stipulates that interest on lost income is arrived at by determining the damages sustained in each three-month period from the day the cause of action arose, applying the interest rate in effect on the last day of each of the three-month periods to each of the three-month totals, and adding the totals together. These calculations would be relatively easy to compute, given that damages for loss of income are generally capable of precise calculation. Damages for loss of profits, however, are speculative by nature. Proving what percentage of the total profits on a construction project would have been earned, paid and therefore lost in three-month intervals following the date of breach of a tender contract would require adducing evidence as to what portion of Olympic's work on the Janeway Project would be completed by what date, what part of that payment was profit and when Eastern would make payment for that work. Evidence respecting these matters would be next to impossible to acquire for a claimant who did not get the contract and, in any event, artificial. For example, proving, in hindsight, whether and when labour and materials were or would have been available at certain times and what their costs were or would have been and establishing that there were no issues which could have affected the timing of the project work would be difficult, as would proving what part of a progress payment was profit and how and when that payment would have been received. A defendant would also have to be prepared to challenge this hindsight evidence, and adduce contradictory hindsight evidence. When disagreement is added to this mix, it is not hard to see that proving what profits would have been made within the

three-month intervals following breach of a tender contract would likely turn into a protracted, expensive and burdensome task for plaintiffs and defendants, and the ultimate result of the artificial exercise would still be speculative and in most cases disproportionate to the costs and judicial resources it would consume. To my mind, the practical realities of having to prove entitlement to interest in this manner would likely cause successful claimants to abandon their claims in the majority of cases, causing the process to be regarded as a denial of justice.

[60] Accordingly, Eastern's argument that interest ought to be awarded to Olympic in accordance with the provisions of subsection 4(2) must fail.

[61] There remains the part of Eastern's argument respecting when prejudgment interest should accrue on a damages award for loss of profits, recognizing that there has been no loss of profit until at least the point in time when Olympic would have received its first progress payment for the work.

[62] In a claim for loss of profits, the informing principle is of compensation. Compensation is also the informing principle behind prejudgment interest. Prejudgment interest is part of a damages award because it assists in putting a successful claimant into the position, financially speaking, that he, she or it would have been in if they had not been done wrong.

[63] In *Young v. Dawe* (1998), 160 Nfld. & P.E.I.R. 219 (Nfld. C.A.), Green J.A. addressed the rationale for awarding prejudgment interest in the context of a personal injury claim. At paragraph 69, he said:

The underlying purpose of the [*Judgment Interest*] Act is to compensate successful claimants for the loss of use of money to which they have been found entitled, and for the decline in value of the money, from the time the cause of action arises to the time of judgment.

Accordingly, the trial judge's award of prejudgment interest on Olympic's damages award addresses the goal of compensation by making up, in some measure, for Olympic's loss of use of its money (its damages award) had the money been in its hands when it should have been, and for the decline in value of this money between when Olympic ought to have had it and when Olympic is actually getting it, i.e. following judgment. In this way, an award of prejudgment interest assists in putting Olympic, the deserving claimant, into the position it would have been in had it not been wrongly denied the contract.

[64] In many civil claims, the loss occurs at the time the cause of action arises, and prejudgment interest is typically awarded from that date. In a claim for

wrongful refusal to contract, the damages award is the loss of profits, which is a pecuniary loss. Pecuniary losses do not usually occur as of the date of the wrong, but rather, when the actual loss is incurred. In this case, it would be when Olympic would have begun to receive lost profits. A successful claimant cannot have lost the use of its money unless it would have had that money to use. Likewise, that successful claimant can only say that its money has been devalued by inflation from the point in time when it ought to have had its money. It follows that in order to accord with the rationale for awarding prejudgment interest, it must accrue from the time when the successful claimant would have received profits if it had been awarded the tender. So, the question in this case is when did Olympic lose its profit on the Janeway Project.

[65] One answer might be that Olympic would not have had any loss of profit until after the tender contract was completed and all of the project expenditures had been paid, for Olympic would not truly know whether it had made a profit on the contract until the project books were closed. Another answer might be that Olympic's progress payments would have included some percentage of profits and Olympic would have had and could have used these monies while the project was ongoing.

[66] I favor the second option. The damages award has already determined that there has been a loss of profits. To say that Olympic would not have sustained any lost profit until its books would have been closed on the Janeway Project ignores the commercial realities of construction projects. Few contractors can take on long construction projects without any prospect of receiving some portion of anticipated profit until the final accounting is done. Prejudgment interest is awarded to compensate the successful claimant for its loss of use and the declining value of the money. Although a contractor may not know for sure whether or how much actual profit the project will generate in the final analysis, he or she does not have to wait for the final accounting to enjoy the use of the money.

[67] In *Envoy Relocation Services Inc. v. Canada (Attorney General)*, 2013 ONSC 2622, a large and complicated wrongful-refusal-to-contract case, I note that the Court determined the award of prejudgment interest as though the profits arose over the life of the contract. *Envoy Relocation* shows that lost profits in tendering cases can accrue over time.

[68] In my view, it is reasonable to assume that some degree of profit accrues regularly and linearly during the lifetime of a construction contract. I see this assumption as fair and simple and free from artificial and costly speculation. It also avoids a windfall to a successful claimant which would occur if prejudgment

interest were awarded from the date of the breach. As well, it enables litigation to be dealt with in a timely and efficient manner in cases where there has been a wrongful refusal to contract respecting a lengthy project that would still be ongoing at the time of judgment.

[69] Accordingly, prejudgment interest on a damages award for a pecuniary loss of this nature where there has been a wrongful refusal to contract in a building case can be calculated on the basis that the loss accrues regularly and linearly over the course of a contract pursuant to subsection 3(b) of the *Act*. As long as the award involves a fixed rate of interest and does not involve compound interest (which is the case under the *Act*), the interest on linearly accruing profits over the life of a contract will be equal to the interest that would accrue on the whole sum if it is awarded from the date representing the halfway point in the life of the contract. This simple and practical methodology, which obviates the need for expert evidence, applies in this case and would apply in many cases, but I leave open the opportunity for parties to seek to bring forward evidence which might substantially affect the accrual of interest in particular cases.

[70] The tender documents in this case provided that the contract was to be substantially performed within 12 months from the date of notification of Contract B. The date of notification of the Janeway Project Contract B was July 29, 2009. Accordingly, Olympic is awarded prejudgment interest on its damages award from January 29, 2010, which is the date representing the halfway point in the life of the contract.

DISPOSITION

[71] I would dismiss Eastern's appeal respecting liability and damages. I would allow its appeal respecting prejudgment interest on Olympic's damages and award prejudgment interest on Olympic's damages from January 29, 2010. I would grant Olympic its costs on the appeal.

L. R. Hoegg J A.

I Concur: _____
M.H. Rowe J.A.

I Concur: _____
C.W. White J.A.