

Date: 20141119
Docket: 13/95
Citation: *Marine Atlantic Inc. v. Topsail Shipping
Company Limited*, 2014 NLCA 41

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

BETWEEN:

MARINE ATLANTIC INC.

APPELLANT

AND:

TOPSAIL SHIPPING COMPANY LIMITED

RESPONDENT

Coram: Welsh, Rowe and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
Trial Division (General), 2013 NLTD(G) 163

Appeal Heard: June 16, 2014

Judgment Rendered: November 19, 2014

Reasons for Judgment by Harrington J.A.

Concurred in by Welsh and Rowe JJ.A.

Counsel for the Appellant: Edward J. Shortall Q.C.

Counsel for the Respondent: Christopher E. Gill

Harrington J.A.:

INTRODUCTION

[1] This appeal involves the award of a short term charter party contract by Marine Atlantic Inc. (MAI), a federal Crown corporation, for a vessel to

perform freight and passenger services to ports on the Labrador coast in 1996.

[2] The appeal engages the issues of: (i) whether the procurement process conducted by MAI constituted a call for proposals or a call for tenders, and what is the legal significance of the distinction; and (ii) whether the summary trial judge erred in finding that the substance of the process conducted by MAI was a tender call. The summary trial judge held that, having found the procurement process to be a tender call, MAI breached its contractual duty to award a charter party to the Respondent, the lowest bidder. For the reasons which follow, the appeal is dismissed.

BACKGROUND

[3] MAI and its predecessors have contracted for freight and passenger transportation services between Newfoundland and the Labrador coast (Labrador Service) since 1949. Prior to 1997, MAI charter parties, usually awarded for a five-year term, were preceded by a public call for tenders.

[4] MAI had previous charter parties with Topsail, including one for its vessel, the *M.V. Duke of Norfolk* (later the *Duke of Topsail*). One of these charter parties was extended for an additional five years by a letter dated November 26, 1991 and was due to expire on December 31, 1996. A larger vessel, the *M.V. Astron*, owned by Canship Limited (Canship), was also on charter to MAI for the Labrador Service and its charter party was also due to expire at the same time. A third charter party with Puddister Shipping Limited (Puddister) for the *M.V. Northern Cruiser* expired in 1993 and was not extended or renewed.

[5] In the fall of 1996, the federal and provincial governments were engaged in discussions as to which level of government would have future responsibility for the Labrador Service. This situation prevented MAI from entering into any new five-year charter parties when the two existing charter parties with Topsail and Canship expired. As an alternative, MAI requested proposals for two one-year charter parties with a possible one-year extension. The request was made to the three vessel owners with which it had either prior or soon-to-be expired charter parties. All vessel owners were aware that MAI intended that the *M.V. Astron* would be renewed but two smaller vessels owned by Topsail and Puddister would be competing for the second charter party.

[6] Topsail's President, Captain Lloyd Bugden, was contacted in October 1996 by John Baker, Manager of Coastal Services for MAI, to make a proposal for the extension of the *Duke of Topsail* charter party for a one-year term with a possible extension for a second year. At that time, Captain Bugden informed MAI that Topsail had listed its vessel for sale but replied that if Topsail's charter party was extended he could withdraw the vessel from the market. Captain Bugden was told that a decision would be made within two weeks.

[7] MAI sent what it termed a "request for proposals" to all three vessel owners who had participated in the Labrador Service until the service was downsized to two vessels in 1993 when the Puddister charter party expired and was not renewed. The record confirmed that the previous charter parties generally had been awarded following a public call for tenders.

[8] Written submissions were received by MAI from Topsail and Puddister in November of 1996. The evidence revealed MAI's expectation that Topsail's response would be based upon its expiring charter party and Puddister's would be based on its expired charter party. The evidence of Arthur Puddister, managing director of Puddister, when questioned regarding the amount of negotiation of the terms of a new charter party answered, "none whatsoever, they (MAI) called the shots" (see Appeal Book, Vol. II, p. 78). Puddister confirmed his expectation that the terms and conditions would be the same as the charter party which expired in 1993, with the exception of day rates which would be higher.

[9] Puddister submitted a higher day rate than Topsail for its vessel and also submitted an additional rate for time working cargo of \$96.00 per hour. Puddister proposed a higher day rate for the optional second year plus the same hourly rate for working cargo as quoted for the first year. Topsail offered its 1996 day charter rate plus a five percent increase for the 1997 season and sought a further five percent increase for the optional second year of the charter party. MAI's internal evaluation document confirmed that Topsail was the low bidder in relation to Puddister's proposed rates. Upon submission of the rates for their vessels, Topsail and Puddister were told that MAI's decision regarding the award of the charter party would be made by December 2, 1996.

[10] However, MAI later notified the companies that the decision regarding the proposals would be delayed until January 31, 1997 due to continuing discussions between governments regarding future management

of the Labrador Service. Captain Bugden's summary trial evidence confirmed that Topsail was told that while the second charter party had not yet been assigned, most of the "leg work" to renew the contract for the 1997 season was complete. Captain Bugden also testified that he turned down an offer to sell the *Duke of Topsail* for \$900,000.00 while he awaited MAI's decision. Topsail was advised by MAI on February 10, 1997 that it was not successful and was made aware of MAI's decision to award charter parties to Puddister and Canship.

[11] Topsail's position at the summary trial was that: (i) the vessel hire rates was the only criterion for selection of a second vessel, and (ii) its bid was the lowest and MAI was bound to award the charter party to the lowest cost bidder. It further claimed that MAI engaged in bid shopping or manipulation with Puddister by allowing it to reduce its rates from those in its original tender by the deletion of a separate rate for handling cargo and lowering its day rate.

[12] Topsail subsequently sold its vessel in May, 1997 for \$822,000.00 resulting in a loss of opportunity given the previous offer which it alleged to have rejected.

[13] Topsail commenced a proceeding seeking loss of profits respecting the charter party and loss of opportunity regarding the lower price it ultimately accepted on the sale of its vessel. A summary trial did not take place until June 2013 after which a judgment in favour of Topsail was rendered granting a damages award for loss of profit to be assessed. A loss of opportunity claim with regard to the loss associated with the delayed sale of the vessel at a lower price was dismissed.

Summary Trial Judge's Decision

[14] The Trial Judge's findings of fact and law with respect to the nature of the procurement process are succinctly set out in the following paragraphs.

[46] I am satisfied on the evidence each of the parties knew what they were bidding on. The plaintiff and Canship knew they were bidding on an extension of their existing charter arrangements save and except for price. Puddister Shipping, while MAI did not discuss with it the specific general form of the charter party, considered that if it were the successful bidder its charter party agreement would be the same as a previous one which it had entered into with MAI. Mr. Puddister has testified that MAI was inflexible with respect to its charter contract general terms and would not consider any changes. Therefore, in light of Topsail and

Canship existing charters having been arranged at that time in close proximity to when the Puddister charter was still in place it is reasonable to assume that all were substantially similar and there is no evidence to suggest that any charter terms were changed from the previous ones entered into by Puddister when the ultimate charter contract was entered into in this matter between MAI and Puddister. I am therefore satisfied that nothing turns on the issue of the contract terms of the charter and that the defendant's argument that there can be no contract 'A/B' scenario where there is not a formal contract 'B' appended to the call for proposals does not succeed.

...

[60] One can look at all of the listed 13 conditions set out by the *Tercon* case as considerations as to whether or not there was a tender call or a call for proposals. No one of those considerations is necessarily determinative. The key condition is whether the parties intended to enter into contractual relations if they were the successful bidder. The answer to that question is clear subject only to the right of MAI to not award any contract if it was not to continue the Labrador Services. It was clear that MAI intended to award contracts as a result of this process and that the basic contractual form of previous charter parties was to constitute the general terms of the contract tailored only with respect to the prices tendered.

...

[62] In considering the evidence before me I am satisfied that a contract 'A/B' scenario was created and that MAI breached a duty to the plaintiff when it allowed Puddister to amend its bid by including overtime and purser's cabin/captain costs in the bid price as opposed to charging extra therefore; and when it entered into a comparison of the two vessels namely, the Duke of Topsail and the Northern Cruiser, when such a comparison was not contemplated by the parties nor were they given an opportunity to deal therewith. I am satisfied on the evidence that these improper considerations swung the bid process in the favour of Puddister Shipping over Topsail Shipping and were improper in the process which was established. In this regard the principles set out by the Supreme Court of Canada in *Ron Engineering* and *M.J.B. Enterprises* were violated.

ISSUES

[15] The appellant bases its appeal on the following issues:

- 1) Whether the learned trial judge erred in finding that MAI's procurement process constituted a call for tenders rather than a request for proposals;

- 2) Whether the summary trial judge erred in finding that MAI breached a duty of good faith owed to Topsail because MAI had conducted a “Contract A / Contract B course of dealings” with Topsail and Puddister which required MAI to award the charter party to the lowest bidder;
- 3) Whether the summary trial judge erred by finding that MAI engaged in “bid shopping” or “bid manipulation” with respect to Puddister’s quoted rates; and
- 4) Whether the trial judge erred in holding MAI liable in damages for Topsail’s loss of profits.

STANDARD OF REVIEW

[16] 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. (See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 5, 8-10, 23 and 25-37.)

ANALYSIS

Call for Proposals or Call for Tenders

[17] Cromwell J. wrote for the majority of the Supreme Court in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 SCR 69:

[67] To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e.g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116, “it is imperative that all bidders be treated on an equal footing Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder.”

[68] This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their

purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *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, at para. 35:

The owner — in this case the government — 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 — here the government — sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

(Emphasis added.)

[18] In *Mellco Developments Ltd. v. Portage La Prairie (City)*, 2002 MBCA 125, 166 Man. R. (2d) 285, the Manitoba Court of Appeal dealt with whether a request for proposals for the sale and development of certain lands by the City of Portage La Prairie was intended to create a binding contractual relationship between the municipality and the winning bidder. The Court of Appeal upheld the findings of the trial judge that the City had acted in good faith with the stated intent of conducting negotiations with the applicant that presented the most attractive proposal. The Court of Appeal affirmed that the City had acted in good faith by looking at factors of concept and detail in addition to price given the broad wording of the written criteria. The Court of Appeal outlined the indicia which differentiate a tender call from a call for proposals beyond the lowest bidder criterion as follows:

[82] ... in a formal tendering context there is now ample authority for the proposition that bidders should be treated fairly, equitably, and in good faith. Conveniently the cases are reviewed in *Martel Building per Iacobucci and Major JJ.* Implying such a term is justified based on the presumed intentions of the parties. As noted by Peter Devonshire, *Contractual Obligations in the Pre-Award Phase of Public Tendering*, (1988), 36:2 Osgoode Hall L.J. 203, it may be that the content of fairness will simply be defined by the parties' reasonable expectations. ...

[83] In the formal tendering process these expectations include the obligation of the owner to disclose any preference or criterion that may affect selection. See *Chinook Aggregates Ltd. v. Abbotsford (Mun. Dist.)* (1989), 40 B.C.L.R. (2d) 345 (C.A.), to accept only conforming bids and to refrain from the wording of a form of contract that is materially different from Contract B. ...

[84] But this is not a formal tendering situation. As we have seen, the principles of fairness and good faith are not determined in a vacuum, but rather

are implied based on the intentions and expectations of the parties. In a *Ron Engineering* type of tendering process, the requirement of good faith and fairness is a term that is implied into Contract A. But there is no Contract A in this case. It is merely a request for proposals opening up a process of negotiation. Even if the absence of a Contract A is not an obstacle to finding some duty of good faith and fairness, I am not at all persuaded that the plaintiffs were treated unfairly or that the City acted in bad faith. ...

(Emphasis added.)

In *Eastern Regional Integrated Health Authority v. Olympic Construction Limited*, 2014 NLCA 20, 348 Nfld. & P.E.I.R. 141 this Court elaborated upon the duty of good faith in a tender process at paragraphs 25 to 28.

[19] The fact that a process was stated to be a call for proposals is not definitive. Green C.J. (as he then was) in *Labrador Airways Limited v. Canada Post Corporation* (2001), 198 Nfld. & P.E.I.R. 116 (Nfld. S.C.T.D.) stated:

[20] ... In principle, a request for proposals may mature into a unilateral Contract “A”, as described in the tender cases, provided the application of the principles relating to the formation of contracts, applied to the specific facts of the case, lead to that conclusion. In other words, the fact that the document issued is described as an RFP [request for proposals] and not a tender call does not preclude the possibility of a unilateral contract arising upon the submission of a response to the request. ...

[20] Dunn J. in *MRK Holdings Limited v. Newfoundland and Labrador Housing*, 2005 NLTD 24, 245 Nfld. & P.E.I.R. 177 at para. 15 relied on the reasoning in *Labrador Airways* to find that an alleged call for proposals in connection with the sale of a number of apartment units by the provincial housing corporation was “... akin to a tender call, the result of which the law applicable to the latter will be applied” (at paragraph 15).

[21] The jurisprudence has established that when a procurement process is found to be effectively a call for tenders, any subsequent award must be made to the lowest bidder in the absence of a privilege clause. In *The Queen (Ontario) v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 at 122-123 Estey J. wrote with respect to Contract A:

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 the acceptance of the tender. Other terms include the qualified obligations 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.

(Emphasis added.)

In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, Iacobucci J. concluded:

[48] Therefore, I conclude that the privilege clause is compatible with the obligation to accept only a compliant bid. As should be clear from this discussion, however, the privilege clause is incompatible with an obligation to accept only the lowest compliant bid. With respect to this latter proposition, the privilege clause must prevail.

[22] In *M.J.B. Enterprises*, the Supreme Court addressed the effect of presence or absence of a privilege clause. The decision confirmed that the usual privilege clause which has wording to the effect that, “the lowest or any tender shall not necessarily be accepted” is a valid term to be imposed in a public or private procurement process. Its presence helps to set the rules for the process. On the other hand, the absence of any privilege clause, which was the case here, has serious negative implications for the owner, especially when the process is found to be effectively a tender call.

[23] In *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, the Supreme Court reversed a decision of the Federal Court of Appeal allowing a tort claim by an unsuccessful building lessor who had a lease renewal. The grounds of the Court of Appeal for permitting recovery included a finding that the federal government’s Chief of Leasing deprived the appellant of the opportunity to participate fully in the tender process.

[24] The Supreme Court reiterated that valid claims for unfairness in tendering had to be grounded in contract and not tort law. Iacobucci and Major JJ found that:

[87] ... Following the analysis in *Ron Engineering* and *M.J.B. Enterprises*, Contract A clearly came into being in the circumstances of this case. ...”

They concluded:

[88] ... we believe that implying a term to be fair and consistent in the assessment of the tender bids is justified based on the presumed intentions of the parties. Such implication is necessary to give business efficacy to the tendering process. ...

[25] Further, they, writing for the Supreme Court, held:

[88] ... this Court agreed to imply a term in *M.J.B. Enterprises* that only compliant bids would be accepted since it believed that it would make little sense to expose oneself to the risks associated with the tendering process if the tender calling authority was “allowed, in effect, to circumscribe this process and accept a non-compliant bid” (para. 41). Similarly, in light of the costs and effort associated with preparing and submitting a bid, we find it difficult to believe that the respondent in this case, or any of the other three tenderers, would have submitted a bid unless it was understood by those involved that all bidders would be treated fairly and equally. This implication has a certain degree of obviousness to it to the extent that the parties, if questioned, would clearly agree that this obligation had been assumed. 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, and benefits all participants involved. Without this implied term, tenderers, whose fate could be predetermined by some undisclosed standards, would either incur significant expenses in preparing futile bids or ultimately avoid participating in the tender process.

[26] The summary trial judge found that MAI had conducted a narrow tender call among three ship owners rather than a public tender call. They were all familiar with the MAI standard charter party. He found applying the criterion in *Tercon* that Contract A came into being.

[27] *Martel* affirmed at paragraph 88 that, “... [i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process, and benefits all participants involved.” The Court further held: “[a] privilege clause reserving the right not to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly” (at paragraph 89).

[28] The procurement process conducted by MAI was not complex. The three vessels which were invited to make proposals had prior charter parties with MAI. The Canship charter was expected by all parties to be extended if MAI still had a mandate to operate the Labrador Services. However, Puddister’s charter party had ended in 1993 and had not been extended. Topsail’s charter party was near its end date. The future of MAI’s management of the Labrador Services was uncertain.

[29] MAI submitted that the summary trial judge erred because there was no Contract B underpinning its call for proposals, the terms of which the parties could execute upon acceptance of a bid from Puddister or Topsail. All parties knew that Canship was certain to have its vessel retained if

MAI's mandate continued. The only issue was which one of the other two vessels would be chartered. Captain Budgen of Topsail and Arthur Puddister of Puddister's both understood that any new charter party would be based on the terms of the expiring charter party in the case of Topsail and the expired charter party in the case of Puddister. Both gentlemen testified that in their prior dealings with MAI, standard charter party terms were prescribed and were non-negotiable. While there would be some difference in technical specifications of each vessel because they were not sister ships, both were of similar tonnage.

[30] The evidence before the summary trial judge supported his finding that price was the sole criterion for granting a new or extended charter party to either Puddister or Topsail. While MAI had concerns about: (i) Topsail's reluctance to double stack containers on deck to enhance cargo capacity, (ii) the lifting capacity of the vessel's crane and (iii) the docking process, no mention of these issues was made in the request for proposals by MAI. The summary trial judge found that Topsail and Puddister had effectively been pre-qualified to submit their rates and other surcharges that would be binding if and when MAI confirmed that it was required to continue to manage the Labrador Services governed by the standard terms of previous MAI charter parties.

[31] The summary trial judge found that Topsail's evidence proved that not only did MAI request Puddister to lower its rates by deleting its hourly rate for working cargo but MAI also negotiated a further reduced day rate which, ultimately, was approximately ten percent higher than Topsail's original quoted day rate.

Bid Shopping or Manipulation

[32] The summary trial judge correctly concluded that MAI effectively conducted a call for tenders by three vessel owners where price was the primary concern with the remaining terms and conditions constituting Contract A to be found in their expired charter party agreements which Messrs. Bugden and Puddister confirmed in testimony to be consistent with MAI's standard charter party terms. MAI's correspondence with the vessel owners made the award of the two charter parties conditional solely upon its continued responsibility for the operation of the Labrador Service. However, MAI did not expressly reserve a right to award the charter party to a bidder other than the lowest bidder presumably because its representatives assumed it was a valid proposal call and would be subject to further

negotiation. I agree with the summary trial judge that the procurement process here was in substance a tender call and not a call for proposals.

[33] In the circumstances, MAI was prohibited from negotiating the price with Puddister. Evidence at trial established MAI's clear preference for Puddister's vessel and that MAI engaged in a process of negotiation with Puddister consistent with a preference for the latter's vessel while also seeking to reduce its quoted rates without the knowledge of Topsail, the lowest cost bidder.

[34] The negotiation by MAI of reductions in segments of Puddister's bid price breached its obligation to treat bidders fairly.

[35] The summary trial judge did not make a specific finding that the evidence demonstrated MAI's preference for Puddister on the basis of an undisclosed criterion, though the record indicates that MAI was unhappy with Topsail for its continued refusal to double stack containers on the deck of its vessel. Puddister was willing to continue its previous practice of doing so when on charter to MAI. MAI's evaluation documents also recorded a preference for Puddister because of the higher lifting capacity of its deck crane.

[36] MAI's bid review document appears to have treated these operational considerations in its assessment of the two vessels that justified an award to a higher price bidder. The jurisprudence is clear that relying on such criteria which have not been disclosed during the procurement process constitutes a breach of the duty of good faith and would also support Topsail's claim to damages for lost profits.

[37] Topsail ought to have been awarded the charter party given that it was a pre-qualified bidder with the lowest tendered price, even after the rate reductions improperly negotiated by MAI with Puddister.

[38] The summary trial judge dismissed Topsail's claim for damages for the loss of opportunity related to the final price realized on the sale of its vessel on the basis that it would constitute double recovery.

SUMMARY AND DISPOSITION

[39] The summary trial judge did not err in:

- (i) finding that MAI had, in effect, conducted a tender call for the continuation of the Labrador Service;
- (ii) finding that MAI was obligated, absent inclusion of an appropriate privilege clause, to award the charter party to the lowest cost bidder;
- (iii) determining that Contract A / Contract B aspects of the tender call were linked principally to cost in the form of day rates together with the terms of the standard MAI charter party;
- (iv) finding that MAI engaged in bid shopping or bid manipulation by negotiating with Puddister for the omission and reduction of rates which constituted a breach of Contract A; and
- (v) awarding damages for loss of profits respecting the charter party and rejecting the claim for loss of opportunity.

[40] In the result, the appeal is dismissed and the respondent shall have its party and party costs to be taxed under Column III of the Scale of Costs here and in the Trial Division.

M. F. Harrington J.A.

I concur: _____

B. G. Welsh J.A.

I concur: _____

M. H. Rowe J.A.