
CANADA / JUDGMENT

Titan Construction v. Surrey City Center Mall

2007 BCSC 1920

COURT

Supreme Court of British Columbia

DECIDED

21 August 2007

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2007 BCSC 1920 Titan Construction v. Surrey City Centre Mall

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Titan Construction v. Surrey City Center Mall,

2007 BCSC 1920

Date: 20070821

Docket: S98749

Registry: New Westminster

Between:

Titan Construction Company Ltd.

Plaintiff

And:

Surrey City Centre Mall Ltd.

Defendant

Before: The Honourable Mr. Justice Crawford

Oral Reasons for Judgment

In Chambers

August 21, 2007

Counsel for the Plaintiff:

P. Selinger

Counsel for the Defendant:

D. Thompson

Place of Hearing:

New Westminster, B.C.

- [1] THE COURT: This matter before me comes by way of petition and seeks a declaration as to the contract between the parties, and if I find that the standard form stipulated price contract CCDC-2 is part of the contract, then that an arbitrator be appointed to deal with the remaining issues between the parties.
- [2] The parties are Titan Construction and Surrey City Centre Mall. Titan is the contractor that built the structure that now houses the Best Buy outlet near the corner of King George Highway and 100A Avenue in Surrey.
- [3] Surrey City Centre Mall (I will call them "Surrey Mall" now) is the land owner. In late 2004 they sought bids for construction of the building. The initial design called for a steel frame. In October, Surrey Mall and the architect and Titan met. Surrey Mall said the bids were too high. Surrey Mall asked Titan how cost savings might be achieved. The architect noted some matters were being taken or controlled by the City of Surrey. In other words, they had some input into the design features.
- [4] Titan was asked to investigate and report on possible cost savings. They came back proposing a method of construction they were familiar with: concrete tilt-up construction. They proposed other cost savings. Other meetings took place. Titan says that by the 22nd of November they had proposed potential savings of some \$340,000.00 compared to its base stipulated price in its tender of the 19th of October 2004. They built-in a \$50,000.00 cost contingency to allow for error and redesign savings that had been made in a relatively short timeline and would be taken on promptly.
- [5] This information was passed on to Surrey Mall. They called a meeting for the 24th of November. Mr. Riley and Mr. Hodges attended for Surrey Mall; Mr. Coleman, the President, and Mr. Bennett, the Project Manager for Titan attended.
- [6] Titan put forward its list of savings and a construction timetable; what they call a critical path method schedule, with work beginning immediately and finishing by the middle of 2005. Mr. Riley tabled a letter dated 19th November 2004 which is the centre of the dispute and I will read it:

We are pleased to confirm our intention to enter into a guaranteed maximum price contract with Titan Construction for the construction of the Best Buy store at the above location substantially in accordance with the Project Manual dated 2004 and addendums 1 to 7 prepared by Wensley Architecture Limited. The drawings and specifications for the work will be as listed in the Project Manual but revised to include the list of revisions to the scope of work as listed in Titan's transmittal letter of November 22nd, 2004 and any other revisions agreed to between the parties.

The GMP [which is the abbreviation for guaranteed maximum price] is in the amount of \$2,369,345.00 plus GST determined as follows:

Titan's tender dated October 19th, 2004 bid price

\$3,000,000.00

Titan's letter dated October 19th, 2004 bid price decrease

\$ 264,338.00

Titan's transmittal letter dated November 22nd, 2004 total savings except for item 26: storm drain relocation

\$ 316,317.00

Additional savings to be achieved

\$ 50,000.00

GMP Total

\$2,369,345.00

This form of contract is intended to provide Titan with the means to formalize any further savings and to control the development of the revisions to the specifications and drawings to ensure the GMP does not exceed \$2,369,345.00. Any savings realized below the GMP amount [and then there is an insertion which reads:] due to a reduction in scope [and continues] will be shared on a 60/40 Titan/Surrey Mall basis.

The only increases to the GMP will be for revisions to the scope of work requested by the tenant and authorized in writing by Surrey Centre Mall Ltd. [and then there is an addition] or for cancellation of agreed savings.

Work is to commence immediately and be completed by May 31st, 2005.

Please provide to the architect for his review insurance certificates, WCB clearance certificates and all other pre-construction documentation.

A CCDC-2 form of contract requires your immediate preparation.

Please indicate your acceptance of this agreement by signing in the place provided below.

We are delighted to have reached this agreement with you and look forward to maintaining a good working relationship through the successful conclusion of the project.

- [7] Because the matter has come on before me by way of petition, the evidence is by way of affidavit respectively from Mr. Riley for the Surrey Mall and Mr. Bennett for Titan.
- [8] In Titan's first affidavit from Mr. Bennett there is really no discussion of the letter of award because the focus is on the post-award conduct of the parties. With respect, the focus, given the nature of the question put to me, has to be on the contract and its immediate context.
- [9] Mr. Riley's affidavit is plain. I note it is made in May of 2006 and so a year has gone by. His affidavit says this in para. 7:
- (7) At the meeting I presented a letter dated November 19th, 2004 setting out the basis on which Surrey was willing to award the contract for the project to Titan. Titan and Surrey then engaged in an extensive and detailed discussion of the letter of intent and the basis on which the contract would be awarded. I stress that Surrey had no additional funds available and Titan must guarantee that the costs would not increase. I stated there would be one exception to this, namely changes in scope which were requested by the tenant for whom the building was being built since Surrey would be able to recover that cost from the tenant so the costs to Surrey would not increase.
- (8) Mr. Coleman was concerned that the price in the letter of intent was based on certain proposed cost savings items and that Titan's costs would increase if any of those cost savings items were cancelled and Titan was not entitled to additional payment under the letter of intent. As a result, the letter of intent was modified by hand to provide for the second circumstance under which the amount to be paid to Titan would increase in addition to tenant requested changes and the cancellation of agreed savings.
- [10] I then have trouble though with some of the next paragraphs because he starts making conclusionary statements rather than saying what the evidence is in for instance para. 9 which reads this way:
- (9) At the meeting it was expressly agreed and understood between Titan and Surrey that Titan was knowingly taking the risk that costs could increase as a result of necessary changes to the drawings as the design proceeded or as a result of unforeseen circumstances. Although a contractor would be entitled to extra payment for such items under a typical construction contract, it was expressly agreed and understood that Titan would not be entitled to additional payment with respect to such items. Titan would have to find additional cost savings to offset any increased costs resulting from any other cancellation of agreed savings or tenant requested changes in scope or else Titan would end up with a reduced profit.

- [11] He set out in para. 11 that after the two changes had been made following discussions with Mr. Coleman and Mr. Bennett, Mr. Coleman stated he was sufficiently comfortable with the state of the design, with the magnitude of the risk of unforeseen circumstances, and he was willing to take the risk that non-compensable extra costs could exceed additional cost savings and he signed the letter of intent which I have already read, and they started work immediately.
- [12] He then goes on to the letter of intent stating that Titan was to prepare a CCDC-2 form of contract. He said it was his intention that Titan would expeditiously modify an industry standard CCDC-2 form of contract to reflect the payment terms contained in the letter of intent. However, instead of doing that, Titan simply attached the letter of intent to an unmodified CCDC-2 form and sent it to Surrey for execution at the end of January 2005. His evidence then is that they went to the architect and sent a memorandum and the issue was engaged between the parties.
- [13] Mr. Bennett's second affidavit is in August of 2006 and if I can summarize a fair part of it, it was really focussed on putting their mind to the achievable cost savings with changing from a steel construction to a concrete tilt-up and in the various other changes. They note that there were still other ideas being developed as they got to the meeting of 24th November 2004: use of glass; use of traditional stucco; different kinds of paint, and use of the parking lot.
- [14] Mr. Bennett's affidavit lists a large number of factors that were discussed and obviously brings a different aspect of the discussion and again I will read it beginning at para. 13, and again some of it is declaratory or commentary rather than what was happening at the time of the meeting.
- [15] In para. 13 he notes the letter of award and notes that for the first time reference was made to guaranteed maximum price. That concept had not been proposed or discussed before that time. The contract amount, he notes, was derived from Titan's stipulated price tender and list of savings that they had already presented two days earlier. They note that one of the savings for the existing storm line was out. They note that the \$50,000.00 contingency for redesign had been effectively deleted. They say there is discussion in terms of a general savings plan to use only native cut fill and native trench fill material for the underside of the reclaimed ground asphalt base material. There is a discussion about risks being dealt with by doing the work only in good weather and they would require some flexibility. They say that Surrey Mall noted the City was not likely to permit change of a parapet feature which was a proposed saving. They agreed on the changes that were made in interlineations in para. 18 of Mr. Bennett's affidavit.
- [16] In para. 19 he says it was discussed between Surrey and Titan and each party understood the interlineations made provision for change orders to the contract to accommodate the reversal of the November 22nd savings items and that corresponding contract adjustments would follow in the usual manner. Titan was familiar with the change order process set out

in the CCDC-2 contract and was comfortable with this process in relation to necessary changes affecting the GMP. Titan accepted the letter of award on this basis and would not have signed the letter of award if the basic CCDC-2 provisions were not incorporated.

- [17] They say further, and I have probably said enough from the affidavit to show how the issue was being engaged but there is further evidence at para. 22. He says upon receiving assurances from Surrey the change request orders would be honoured pursuant to the manual revisions made in the letter of award and with the knowledge of the CCDC-2 provisions governing the changes in scope they felt the budgetary risk for uncontrolled costs in relation to Titan's proposed savings measures and potential for further savings was well balanced. They were confident that the tilt-up building redesign concept and the other matters that they saw as savings in the budgeting and the idea of a guaranteed maximum price for these things seemed reasonable to Titan.
- [18] They then began to get into the immediate post-November 24th processes including the instructions that Surrey gave to the architect to change the plans to incorporate the savings they had identified and that they began their change order request files and in January things started to come to a head.
- [19] I note that when Titan sent over the standard construction document, CCDC-2 1994 commonly used in the industry, they included a number of pages from the Project Manual. They listed the items. For instance, in the tender the geo-technical assessment, the tender drawings, the addendums, the formal bid; tender revision; total savings presentation; the bar chart; those are the documents that they had come up with and presented 22nd and 24th of November. The letter of intent of November 19th is changed and then CRX of the first change order.
- [20] What is a very important document in the overall picture is a communication from the architect, Mr. Smith. On the 8th of December, within a couple of weeks of the meeting of the parties, he sends a transmittal regarding the Best Buy project to Mr. Hodges of Surrey Mall, and he says:

Fred,

Please find attached certificate of payment number 1. With regards to changes to the contract or spec changes or scope changes including the change for lamp standards [so there is already a change in the offering] we will be issuing proposed change notices and Titan will provide costs (extras or credits). The contract price will be adjusted to suit both up and down with each change order. I will issue the document to Titan; they will price the change; attach the back-up; sign and date the proposed change form, and forward it to me for review. If I am in agreement with costs I will sign and date the form and fax it to you for your signature. Once you have signed this the contract price will be adjusted to suit (independent of the GMP). Titan will continue to search for savings which will hopefully counter any extras that may be incurred as a result of any changes.

Regards,

Joe

- [21] By the end of January, if I read the documents correctly, it was already apparent there were soil conditions that were of a concern to the parties. There had been meetings on site and then the CCDC-2 was sent over to Surrey Mall and Surrey Mall looked at that and their evidence is they were of the view this was erring from their letter agreement. They went to the architect and they asked the architect to write a memorandum back to Titan, and that was written by the architect Barry Weih and this was the message:

Regarding GMP reconciliation we understand that the contract between Titan Construction Co. Ltd. and Surrey Centre Mall has a GMP based on the letter of intent signed by both parties dated November 19th, 2004. The letter sets out the GMP price and indicates that any savings realized below the GMP will be shared on a 60/40 basis between Titan and Surrey Mall.

1. Reconciliation of the contract amounts at the end of the contract should be transparent and will establish the value of any savings. The procedure will be proposed as follows: except for changes that are per item 2 below, all instructions to the contractor during the course of the construction will be issued as site instructions. The contractor will provide pricing identifying costs or credits relating to the work identified in the instructions and will issue these in the form of a CRX. Consultants as in the normal change process will reveal the CRX pricing. Once all the changes have been reviewed and the amounts approved, the balance will be calculated between credits and extras to establish any savings which will then be apportioned as per the agreement. Changes that increase the GMP will be allowed for in the letter of intent (scope of revisions requested by the tenant and approved by Surrey Mall or cancellation of agreed savings) will be issued as change orders.

- [22] Surrey Mall took a while to write back. Their memorandum is dated February 21st. They in effect are saying they disagree; that they had agreed on a maximum price, and that there would be an offset for the savings. They also say this:

To be fair to Titan we cannot be held responsible to either find savings to offset other types of unforeseen and hidden costs with further savings.

- [23] It goes on to say that if these other types of unforeseen cost changes are not clearly covered and administered by a standard CCDC-2 contract, the contract must be updated and he lists a number of things that had already occurred: the parking lot features, the excavation problems, the sanitary line issue and so on.
- [24] As I note by the 24th of January, Titan had already raised issues about the unknown site conditions and were requiring further sub-excavation. At least they had put a process into place to deal with matters and the contract has continued on.

- [25] It is apparent the contract was completed. The parties had met and discussed the various change orders, they had even tried mediation without resolution, and now they seek arbitration, but the arbitration was denied by Surrey Mall simply on the basis that there is no agreed CCDC-2 in place and that the letter of agreement is the only contractual nexus between the parties. Titan began these proceedings in 2006 and it finally came on before me on the 15th of August 2007.
- [26] By reading the affidavit material, one can already sense the arguments that arise. Titan say the tender documents include a standard CCDC-2; they were the low bidder; they accepted the letter of award; that the letter of award basically included everything that was in the contract or the Project Manual specifications and addendums; that the price had simply taken into account their proposed savings, and that the CCDC-2 was left for them to draw, and that in the circumstances, taken as a whole, the contract comprises the Project Manual, the tender, the savings list, the letter of agreement, and the standard CCDC-2. Thus, they seek a declaration that that is the contract between the parties and as it includes the standard form CCDC-2 and there should be a direction to go to arbitration.
- [27] Surrey Mall on the other hand say there is only the letter of intent and that has the whole of the contract. They say that they intended to have a modified CCDC-2. They say that they never agreed on the terms of the CCDC-2. They say that accordingly the CCDC-2 forms no part of the agreement and thus there are no terms for dispute resolution. They say the real issue is that Titan is attempting to renegotiate a term of the agreement as to allowable changes in price and that they intended the letter of award was to close off any changes that might occur, save for those stipulated in the letter.
- [28] At the end of the argument, Mr. Thompson raised the issue that clearly there is a triable issue before me; that this is a petition process and the evidence is such that there being a triable issue, the matter should go to the trial list.
- [29] The CCDC-2 1994 is a standard form of contract widely used in the Canadian construction industry. It was part of the tender documents that Surrey Mall put forward in the tender proposal and Project Manual. Surrey drew the letter of intent. Clearly, they tried to fix the price. That is what they surely meant by guaranteed maximum price. But they are the writer of the letter and when I come back to that they simply put the CCDC-2 form requirement in this fashion: "A CCDC-2 form of contract requires your immediate preparation".
- [30] When I look at the first memorandum from the architect, it reflects ordinary change orders being contemplated.
- [31] When Titan finally gets around to acting on that requirement of the letter in January, they simply put together the various documents that had accumulated to date, filled in the blanks, and sent it over with their signatures on it.

- [32] The actions that everyone takes subsequent to that really are reflecting their views. It becomes a question of interpreting the matter in its immediate context and that in my view drives the result.
- [33] If Surrey Mall meant to gut -- and I mean that in the fishing sense -- the CCDC-2 form of its ordinary industry terms that the CCDC-2 provides, then it seems to me it was for them to stipulate that clearly. It is not made clear in the affidavit material before me that they did that. The CCDC-2 -- and I am probably talking to gentlemen that work on it on a far more regular basis than I -- but it covers and it provides for most of the events that happen on a construction site in Canada.
- [34] Part 6 deals with changes in the work and provides a method that was used and indeed it seems to have been followed on this particular construction site. It deals with situations that are not envisaged. The standard general condition 6.4 is entitled "Concealed or Unknown Conditions". General condition 6.5 deals with delays and how it may be affected by either side. Part 7 sets up default notices and gives either party the right to perform the work, to stop the work, or terminate the contract. Again, all are standard terms which the industry recognizes. Part 8 provides for dispute resolution.
- [35] The reality of the industry is that more than 90 per cent know that any disputes on a construction site do not come near a courtroom. Conflicts in construction lead to speedier dispute resolution. That is what the standard forms provide for. They get projects completed on time because the owners and contractors have set up methods using experienced, knowledgeable and wise construction experts be they engineers, architects, lawyers or whomever, as mediators and arbitrators to speedily resolve most issues on a summary basis.
- [36] When I look at what was being attempted by the parties on the 24th of November, the contract included the Project Manual documents; it included the architectural drawings; it included the amendments and savings that were being proposed; it included the letter of intent which was trying to fix the price, but it still left in place the standard form CCDC-2.
- [37] Surrey Mall did not specify any change that they could have and should have specified other than what was in the letter. Rather, they left it to the contractor. They did not reserve to themselves for instance the right to disagree. It does not say for instance that it is negotiable. It does not say that some parts are in and some parts are out. There is in my view no ambiguity here. If there is ambiguity, I would construe against the maker of the letter of intent. It was in their hands to limit the CCDC-2 and they did not. The only sensible meaning to be given to this to make it an effective agreement is that the standard form CCDC-2 was to be part of the agreement. They had the parties, they had the work, they had a stipulated or guaranteed price and for matters that were not envisaged, they had the standard form CCDC-2.
- [38] It seems to me to say otherwise would mean that Surrey Mall could have passed on all costs, even due to its own delay, or its own redesign, or unanticipated changes that were in the hands of other parties, for instance the City of Surrey, or perhaps the working unions. They

did not take into account unknown field conditions. They did not take into account unknown costs not anticipated in the contract documents. Those are the precise areas where the experienced mediator or arbitrator can assess the issues in dispute and make a prompt and pragmatic ruling. They could resort to what I would think the reasonable officious bystander might think and I am of the view that again by leaving the reference in the letter to a CCDC-2 to be prepared by Titan, left that solely in Titan's hands. They proposed a standard form and that they seek to nullify the standard terms to be included in the agreement between the parties.

- [39] It follows then in my view an arbitrator should be appointed and I imagine the parties are able to do that promptly without my input.
- [40] I should say I have not overlooked another argument that Mr. Thompson made shortly and effectively on behalf of Surrey Mall. He rightly points to the differing descriptions of the meeting of 24th of November and I have noted the differences in the material provided from Mr. Riley and Mr. Bennett. He says the conflicts are such I should send the matter to the trial list.
- [41] The difficulty I had with that was that while the parties had put their hands to it, they seem to be reflecting different intentions and that was not communicated; not clearly. It seems to me that Surrey Mall did not, for instance, put a CCDC-2 onto the table and say, "This goes, this goes, this goes". Mr. Bennett's affidavit seems to show there was such a focus on the savings that they were trying to achieve that they did not give it a lot more thought either.
- [42] So we have a contract, we have the parties, we have what is to be built, and has been built, we have plans, we have cost savings, we have an architect who seemed to issue and receive change requisitions along the way and certified substantial completion in the middle of 2005. All of those actions largely would be in accord with that standard form CCDC-2.
- [43] Mr. Thompson referred me to the leading case *Douglas Lake Cattle Company v. Smith*, a decision of the Court of Appeal at (1991), 54 B.C.L.R. (2d) 52. The question is whether I am satisfied that there is a triable issue.
- [44] It is a different test from Rule 18A and I make it clear I am conscious of the difference here. But like Mr. Justice Robinson in the first instance in the *Douglas Lake Cattle*, *supra*, case I find the answer lies not so much in what the parties said but what they did and in their documents and in the application of contract principles.
- [45] I am of the view the parties do not need to take the process to trial to arrive at the same conclusion. It is one of those issues which in my view is manifestly clear.
- [46] Gentlemen, that is my decision. Anything to follow?
- [47] MR. THOMPSON: No, My Lord.
- [48] MR. SELINGER: No, My Lord.

[49] THE COURT: Thank you both.

"Crawford J."

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