

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Huband and Twaddle J.J.A.

B E T W E E N:

**DONALD KARL McKINNON and
MERVIN ERNEST SHINGLER**

(Plaintiffs) Appellants

- and -

**THE RURAL MUNICIPALITY OF
DAUPHIN**

(Defendant) Respondent

) **M. G. Tramley and**
) **D. Mokriy**
) **for the Appellants**
)
) **M. G. Finlayson** ✓
) **for the Respondent**
)
) **Appeal heard and**
) **Decision pronounced:**
) **September 17, 1997**
)
) **Written reasons:**
) **October 2, 1997**

HUBAND J.A.

This appeal was dismissed with costs at the time of the appeal hearing, with reasons to follow.

There are two aspects of the claim advanced by the plaintiffs. It is contended that the defendant Municipality must compensate them because their tender on a contract to crush and haul gravel was not accepted, even though it was the low bid. It is argued that this is a claim for damages for breach of contract, even though no formal contract was

approved of by the Municipality or entered into between the parties.

At the meeting of the council of the Municipality at which tenders were considered, one member of council made some comments which the plaintiffs contend were defamatory, and this forms the second branch of the plaintiffs' claim.

Clearwater J. dismissed both the claim for breach of contract and the defamation action. He assessed damages of \$50,000 in total for the former and \$10,000 for each plaintiff for the latter, and no appeal has been taken with respect to these amounts.

The Municipality advertised for tenders in *The Dauphin Herald* in March, 1991. The advertisement specified that the lowest tender would not necessarily be accepted. The instructions to bidders stated that the Municipality may accept or reject tender bids on the basis of the best interests of the Municipality.

When the various tenders were opened and examined by a committee of council charged with that responsibility, the committee recommended that the contract be awarded to the plaintiffs as low bidder. That same afternoon, at a meeting of council, concerns were raised as to whether the plaintiffs had the necessary equipment available to fulfil the terms of the contract on a timely basis. A telephone call by the Reeve of the Municipality to the plaintiff McKinnon did not allay those concerns.

The motion to award the contract to the plaintiffs was defeated, and a second motion awarded the contract to the second lowest tenderer.

On behalf of the plaintiffs it was argued that once a tender has been made which meets the contract specifications, even where it has been made clear that the low tender will not necessarily be accepted, a duty of fairness arises, which is said to be contractual in nature. It is contended that the Municipality breached this duty to be fair. (The duty to be fair is not to be confused with a duty of procedural fairness in an administrative law sense, which was neither advanced in the pleadings nor in argument.)

There are, indeed, a number of cases which support the plaintiffs' argument concerning a duty of fairness, but there also appears to be an equal number of authorities which suggest that the express wording of the advertisement, reserving the right to award the contract to a party other than the low bidder, is the paramount consideration.

Perhaps it could be argued that the Municipality cannot act under that reservation for reasons which are capricious or wholly unreasonable. But there was nothing of that nature in the present case. The council was properly concerned about the ability of the plaintiffs to fulfil the terms of the contract, and the Reeve's inquiries did not answer those concerns to the satisfaction of council. One might argue that their judgment was faulty, but that does not constitute unfairness of a kind which would displace the reserved right of the Municipality to award the contract

to a second bidder.

As to the alleged defamation, apart from any other arguments, this Court agrees with the submission made on behalf of the defendant Municipality; namely, that the Municipality cannot be held vicariously responsible for the statements of an individual member of council who may say something of an inappropriate nature during the course of a council meeting. There is nothing in the surrounding circumstances which would indicate that the member was speaking otherwise than for himself.

Chas R. Hill J.A.

I agree: [Signature] C.J.M.

I agree: [Signature] J.A.