

**SUPREME COURT OF YUKON**

Citation: *Directional Mining & Drilling Ltd. v. City of Whitehorse et al*, 2010 YKSC 37

Date: 20100707  
Docket S.C. No.: 09-A0104  
Registry: Whitehorse

BETWEEN:

**DIRECTIONAL MINING & DRILLING LTD.**

Plaintiff

AND:

**THE CORPORATION OF THE CITY OF WHITEHORSE and  
14899 YUKON INC. o/a CASTLE ROCK ENTERPRISES**

Defendants

AND:

**WESTERN SURETY COMPANY**

Defendant by Counterclaim

Before: Mr. Justice R.S. Veale

Appearances:  
James Tucker  
Karen Martin

Counsel for the Plaintiff  
Counsel for the Defendant 14899 Yukon  
Inc. o/a Castle Rock Enterprises

**REASONS FOR JUDGMENT  
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral): This is an application by Directional Mining and Drilling Ltd. (“DMD”) for the issuance of a writ of garnishment before judgment pursuant to s. 7 of the *Garnishee Act*, R.S.Y. 2002, c. 100. That section permits the filing of a temporary garnishment under s. 9 of the *Act*, pending the hearing under s. 7(3) as

qualified by the s. 8(2) presumptions. For the purposes of this application, s. 7(3) says that to issue a garnishment before a judgment the Court must be satisfied that:

- (a) there are reasonable grounds for believing that, if a judgment is obtained by the creditor, it may not be satisfied if the writ is not issued;
- (b) having regard to the potential hardship and inconvenience to the debtor and to the potential benefit to the creditor, issuance of the writ will achieve a result that is equitable in the circumstances;

[2] Section 8(2) presumes that (a) and (b) above will be in favour of the creditor "unless the debtor gives evidence to the contrary."

### **Background**

[3] DMD entered into a contract for directional drilling services with Castle Rock for the benefit of the City of Whitehorse in March 2009. The contract provided that DMD could apply for forced account rates, which is payment based on time spent if the actual ground conditions differed from the geotechnical information provided in the information to tender. It is not necessary for the purpose of this application to go into this issue in great depth except to say that the City of Whitehorse would not agree to the application of forced account rates and hence this court action.

[4] DMD applies to garnish \$1,169,351.59, which is the holdback funds the City owes to Castle Rock. The City takes no position on the application and Castle Rock says the Court should not be satisfied that Castle Rock could not pay a judgment or that issuing the writ of garnishment will achieve an equitable result.

[5] I find the following facts for the purpose of this application:

1. Castle Rock has provided a redacted March 31, 2010 balance sheet indicating assets of approximately \$7,000,000 and liabilities of approximately \$4,000,000;
2. The City agrees that the Castle Rock contract creates a pass through liability for the City if the DMD claim for force account rates is valid;
3. Castle Rock has professional liability insurance of \$2,000,000 for its engineering consultants;
4. Castle Rock has a labour and material payment bond of \$2,000,000, which DMD cannot pursue because of a missed limitation period. The existence of this bond was referred to in the instructions to bidder material;
5. Castle Rock filed a builder's lien which had to be vacated because the City did not consent to it under s. 369 of the *Municipal Act*, R.S.Y. 2002, c. 154;
6. There is no evidence of outstanding judgments against Castle Rock or pending litigation or an inability to pay debts generally and carry on business generally;
7. There is evidence that the approximate \$1.1 Million at issue here has reduced the bonding available to Castle Rock for future contracts.

[6] Master Groves, now Groves J., sets out a summary of the extraordinary nature of pre-judgment garnishing orders in *Flintstone Concrete v. Peace River et al.*, [2003] BCSC 1137, at paragraph 89:

Pre-judgment garnishing orders are an extraordinary remedy granted by the Court. A pre-judgment garnishing order allows a plaintiff in an action to force the defendant to pay into Court all or a portion of the debt being sought in an action prior to any determination in the action being made. The rationale behind these orders is to prevent the defendant from disposing of, absconding with or in any other manner disavowing themselves of the funds available to satisfy that debt. It is a remedy granted only where particular circumstances are alleged to exist and where it is relatively clear that there is a definitive debt owing to the plaintiff.

That quote was made in the context of the *British Columbia Court Order Enforcement Act*, R.S.B.C. 1996, c. 78.

[7] I am advised that the B.C. Legislation applies only to liquidated sums. The Yukon Legislation may be somewhat unique as it also applies to unliquidated sums, which is the case in this application. However, the point being made by Justice Groves is that the remedy of pre-judgment garnishment is extraordinary and the application must come within the pre-conditions set out in s. 7(3) in the *Garnishee Act*, as aided by the presumption in s. 8(2).

[8] It is not the intent of this judgment to set out what is required under s. 7(3)(a) but rather to say that I am not satisfied that if a judgment is obtained against Castle Rock that it may not be satisfied if the pre-judgment writ of garnishment is not issued. Castle Rock has provided sufficient evidence to displace the presumption in s. 8(2), and that evidence satisfies me that there are reasonable grounds to believe that a judgment against Castle Rock may be satisfied if the writ of garnishment is not issued.

[9] In making this finding, I do not suggest in any way that any evidence to the contrary will suffice to displace the presumption. However, in this case, Castle Rock does not appear to be in any financial difficulty, except perhaps for the dispute at bar. It has also put in place a labour and material bond, professional liability insurance, and the ultimate liability of the City of Whitehorse if DMD is successful in its court action. I am satisfied that there are no reasonable grounds for believing that a judgment may not be satisfied if a writ of garnishment is not issued.

[10] Given my view on s. 7(3)(a) I do not find it necessary to decide whether I am satisfied under s. 7(3)(b) that the writ will achieve a result that is equitable in the circumstances. Accordingly, the temporary writ of garnishment is set aside and the application for a writ of garnishment for a judgment is dismissed.

[11] Anything arising, counsel?

[12] MR. TUCKER: No, Your Honour. Thank you.

---

VEALE J.