IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *37790 Yukon Inc.* v. *Skookum Asphalt Ltd.*, 2007 YKSC 24

Date: 20070426
S.C. No. 06-A0113
Registry: Whitehorse

Between:

37790 YUKON INC.

Plaintiff

And

SKOOKUM ASPHALT LTD.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Richard Bereti — Counsel for the plaintiff
Peter Morawski — Counsel for the defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a motion by the defendant, Skookum Asphalt Ltd. ("Skookum"), for an order for security for costs pursuant to s. 254 of the *Business Corporations Act*, R.S.Y. 2002, c. 20. If that order is granted, Skookum also seeks to bar the plaintiff, 37790 Yukon Inc., from proceeding until the security for costs have been paid.

[2] The litigation between the parties arises from an allegation that Skookum breached its contract with the plaintiff by failing to pay for the installation and rental of a highway construction camp. Skookum's defence is that the plaintiff was not able to provide suitable camp facilities at the material time. Thus, Skookum says the plaintiff

repudiated the contract by anticipatory breach and that the contract was thereby terminated and rendered unenforceable.

ISSUES

[3] While a number of principles potentially come into play on such an application, on the facts before me, there are essentially only two issues:

1. Whether Skookum's statement of defence is *bona fide* and arguable; and
2. Whether the corporate plaintiff is impecunious, in the sense of lacking any means of raising money to post security for costs, such that it is unlikely the claim will be prosecuted if security is ordered.

OVERVIEW OF CIRCUMSTANCES

[4] While it is unnecessary on this pre-trial application to make any findings of fact, in order to decide the first issue above, I will provide an overview of the circumstances arising from the allegations of the parties.

[5] On or about October 13, 2005, Skookum was awarded a contract with the Yukon Territorial Government ("YTG") for the paving of a 19.9 kilometre section of the Haines Highway, west of Haines Junction. The contract required Skookum to provide camp living accommodations and other related facilities at Five Mile Creek, Km 78.4 Haines Road, in the Yukon Territory.

[6] A principal of Skookum, Darrell Stone, had discussions with Richard Gleason, the sole shareholder of the plaintiff, 37790 Yukon Inc., beginning in approximately February 2006, regarding the possibility of a sub-contract, whereby the plaintiff would provide and install a complete camp complex for Skookum's purposes in performing the road construction contract with YTG.

[7] By letter of February 17, 2006, Mr. Gleason wrote to Mr. Stone outlining the camp facilities and services to be supplied and pricing them at a total of $137,650.

[8] On March 13, 2006, Mr. Stone wrote to Mr. Gleason enclosing various items of information pertaining to the set up of the camp complex, including:

a) a sub-contract agreement for Mr. Gleason's perusal and signing; and

b) copies of YTG contract specifications, sections 10.10, 20.30, 20.40, 20.60.

[9] YTG's contract specification 10.10 stated that the various trailers to be provided for the engineer's staff camp "shall be no older than (5) years", although:

> "approval of older units may be given by the Engineer on the condition that their state of repair, completeness, furnishings, serviceability and cleanliness is equivalent to, or exceeds those of, units meeting the age requirements of this clause."

Specifications 20.40 and 20.60 provided that the camp trailers were to be "in new or near new condition". However, both of those provisions were subject to approval of older units, as just noted in contract specification 10.10.

[10] The sub-contract agreement enclosed with Mr. Stone's letter of March 13, 2006, was never signed by the parties. However, under item 5 "Time of Performance", it referred to a completion date of July 15, 2006.

[11] On April 17, 2006, the parties entered into a written sub-contract whereby the plaintiff agreed to provide Skookum with a camp suitable for accommodating up to 40 people, together with a kitchen and dining room equipped with tables and chairs, a range, refrigerator and freezer units, and hot water for up to 40 people (the "sub-contract"). Skookum agreed to pay $137,650 plus GST for the installation and rental of these camp facilities. The plaintiff also agreed to comply with YTG contract specifications 10.10, 20.30, 20.40 and 20.60, as enclosed in Skookum's letter of March

13, 2006. Notably, there was no mention in the sub-contract of the time for performance by the plaintiff.

[12] On an unspecified date in or between February and May 2006, Mr. Stone inspected the camp facilities which the plaintiff was attempting to purchase in order to fulfill its obligations under the sub-contract. At that time, he also took a number of photographs of the camp facilities.

[13] As a result of his discussions with Mr. Gleason between approximately February and May 2006, and his inspection of the proposed camp facilities, Mr. Stone came to the conclusion that the plaintiff could not obtain financing to purchase the camp facilities. Mr. Stone also concluded that, based upon the poor condition of the camp facilities, they would require substantial repair in order to make them suitable for use under the sub-contract. Mr. Stone's understanding was that the plaintiff could not afford these repairs.

[14] Based on these conclusions, Skookum took the position that the plaintiff was not able to provide the camp facilities and services as required, that the sub-contract had thereby been repudiated by the plaintiff and, accordingly, that Skookum could treat the contract as terminated.

[15] On November 27, 2006, the plaintiff sued Skookum for breach of the sub-contract, claiming damages of $137,650 plus GST. [1]

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[1] a) The plaintiff's statement of claim and Mr. Gleason's first affidavit, refer to the provision of camp accommodations under the sub-contract as being "at or near Stewart Crossing and Pelly Crossing, Yukon Territory." This specifically contradicts the wording in the preamble of the sub-contract referring to the camp being set up "at Five Mile Creek, Km. 78.4 Haines Road, Yukon Territory". That is in a completely different location than that alleged by the plaintiff. However, as there is only one sub-contract at issue between the parties, I assume that the location of the camp referred to by the plaintiff in its materials is simply an error.

b) The plaintiff also alleged in its statement of claim that, in or about April 2006, Skookum entered into a second oral contract with it for the provision of similar camp accommodations in 2007, for the same contract price of $137,650 plus GST. That allegation is flatly denied by Skookum and there were no further facts sworn to by Mr. Gleason in support of that claim.

[16] On January 3, 2007, Skookum filed its statement of defence, pleading that it was an express or implied condition of the sub-contract that the plaintiff would be able to supply the camp facilities by May 2006. Further, as the plaintiff was unable to satisfy that condition, the sub-contract was repudiated by the plaintiff's anticipatory breach. Finally, Skookum has pled that the sub-contract was therefore terminated and is unenforceable against it.

[17] Notwithstanding Mr. Stone's conclusions to the contrary, Mr. Gleason deposed in his first affidavit that the Royal Bank of Canada had accepted an offer from the plaintiff to purchase the camp facilities for $60,000. He further deposed that while the camp facilities required repairs, the plaintiff had the funding necessary to both purchase the camp facilities and effect any necessary repairs, but that Skookum purported to cancel the sub-contract "long before" those repairs were to be completed.

[18] The plaintiff has no assets, no liabilities and no income.

[19] Mr. Gleason also deposed that he personally has no assets, but has a number of liabilities totalling approximately $144,739.32. Further, Mr. Gleason swore that his personal income in 2006 was only $9,397.35 and that he currently earns about $1,300 per month by way of Old Age Security and the Canada Pension Plan.

ANALYSIS

[20] Skookum's application for security for costs is based on its concern that the plaintiff will be unable to pay any court costs awarded against it, should Skookum succeed with its defence, as both the plaintiff and Mr. Gleason are impecunious.

[21] Section 254 of the *Business Corporations Act*, cited above, provides:

> "In any action or other legal proceeding in which the plaintiff is a body corporate, if it appears to the court on the

> application of a defendant that the body corporate will be unable to pay the costs of a successful defendant, the court may order the body corporate to furnish security for costs on any terms it thinks fit."

[22] The British Columbia Court of Appeal in *Kropp (c.o.b. Canadian Resort Development Corp.)* v. *Swaneset Bay Golf Course Ltd.*, [1997] B.C.J. No. 593, dealt with a similarly worded provision in the British Columbia *Companies Act*. At para. 17, *Kropp* referred to the English Court of Appeal decision in *Keary Development* v. *Tarmac Construction*, [1995] 3 All E.R. 534, which set out the principles engaged in the application of such provisions:

> "1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
>
> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
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> 3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
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> 4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
>
> 5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
>
> 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
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> 7. The lateness of the application for security is a circumstance which can properly be taken into account."

[23] More specifically, the test to be applied on an application for security for costs was set out by Romilly J. in *Citizens for Foreign Aid Reform Inc.* v. *Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.), at para. 14, as follows:

> "1. Does it appear that the plaintiff company will be unable to pay the defendants' costs if the action fails?
>
> 2. If so, has the plaintiff shown that it has exigible assets of sufficient value to satisfy an award of costs?
>
> 3. Is the court satisfied that the defendants have an arguable defence to present?
>
> 4. Would an order for costs visit undue hardship on the plaintiff such that it would prevent the plaintiff's case from being heard?"

[24] The plaintiff's main response to this application is that Skookum's defence of anticipatory breach is not arguable, which gives rise to the first issue.

[25] Anticipatory breach occurs when a party indicates by words or conduct, or as a matter of implication from what it has said or done, that it repudiates its contractual obligations before they fall due. That conduct must be such that the other party is entitled to conclude that the repudiating party no longer intends to be bound by the contract: G.H.L. Fridman, Q.C., *The Law of Contract in Canada*, 5th ed. (Thomson/Carswell: 2006) at pp. 605-6.

[26] The onus of proving repudiation by way of anticipatory breach rests with the party alleging it, in this case Skookum. To discharge that onus, Skookum must establish that the plaintiff conducted itself in a manner from which it could reasonably be inferred that it could not meet its obligations as they came due *and* that its inability to do so could not be rectified over time without destroying the commercial purpose of the sub-contract.

[27] In *Blue-Moon Logging Ltd.* v. *Finning Ltd.,* [1995] B.C.J. No. 1226 (S.C.), at para. 41, Trainor J. discussed repudiation by anticipatory breach and in particular the allegation of inability to perform, at paras. 29 and 30:

> "Repudiation can occur where the breaching party either expresses an intention to no longer be bound by the contract or indicates that it is no longer capable of rendering performance under the contract. Repudiation, as a doctrine, is designed to promote economically efficient outcomes. Where one party determines that it is more advantageous to breach its contractual obligations than to perform them, it may opt to repudiate the contract and, absent an order calling for specific performance, cease performance and suffer the consequences in damages. Thus, repudiation more typically takes the form of an expression of an intention to no longer be bound. Repudiation by way of an expression of an inability to perform one's obligation when they come due is an accepted, but somewhat unorthodox species of the doctrine, which raises, in my view, some unique considerations in the context of an anticipatory breach.
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> … Where the expression of an inability to perform is anticipatory or otherwise, the court must consider, as was noted in Standard Precast, [(1989), 56 D.L.R. (4th) 385], at page 389:
>
> > ... whether [the deficiencies] could be remedied in a period which would not destroy the commercial purpose of the contract." (my emphasis)

[28] While I am cognizant that I should avoid going into detail on the merits of the claim and defence, I may still have regard to those merits, particularly where success or failure appears obvious. Without adjudicating the matter before trial, I am not satisfied that Skookum has an arguable defence based on anticipatory breach.

[29] First, there is no evidence before me that it was an express condition of the sub-contract that the plaintiff would supply the camp facilities by May 2006. On the contrary, there was evidence in the initial draft sub-contract forwarded by Skookum to the plaintiff that a contract completion date of July 15, 2006, may have been discussed.

[30] Second, there is no evidence, in my view, to support Skookum's contention that it was an implied condition of the sub-contract that the plaintiff would supply the camp by a date in May 2006. Skookum's counsel attempted to argue that it would be reasonable to imply such a term, as that is generally known to be the time of year when the road construction season begins in the Yukon Territory. However, I reject that contention as being necessarily implied. Rather, it is just as likely that the parties may have agreed that this specific job would take place over a limited period commencing at some other time during the summer. Once again, I note that it appears the 'camp ready' date of July 15, 2006, may have been originally contemplated by the parties.

[31] Third, a large part of Skookum's defence hinges on Mr. Stone's subjective opinion that the plaintiff was unable to purchase the proposed camp facilities. Once again, there is no factual support for that position. On the contrary, Mr. Gleason deposed that the Royal Bank had accepted an offer from the plaintiff to purchase the camp facility for $60,000 and that the plaintiff "had the funding necessary" to complete that purchase.

[32] Fourth, the final plank in Skookum's statement of defence is that the proposed camp facilities were not in good repair and that the plaintiff was "financially unable or unwilling to repair the camp facilities such that they would be delivered to the work site in a reasonable condition". While I acknowledge that the plaintiff agreed to supply camp trailers in a "new or near new condition", that obligation was also subject to the approval of older units in a suitable state of repair, serviceability and cleanliness. The photographs of the proposed camp facilities in Mr. Stone's affidavit of March 6, 2007, admittedly appear to show a trailer (or trailers) in need of repair. However, there is no

clear evidence to persuade me on a balance of probabilities that the units depicted could not be restored to a clean and serviceable condition prior to the anticipated date of delivery. While that date is not evidenced by the materials filed, Mr. Gleason's first affidavit deposed that Skookum purported to cancel the sub-contract "long before repairs were to be completed".

[33] Having said all that, I suppose the lack of clarity in the sub-contract as to the date or time of performance by the plaintiff might give rise to an alternative defence that the sub-contract is void for uncertainty. That, of course, would require an amendment to the statement of defence.

[34] In summary on this issue, I remain unpersuaded that Skookum has an arguable defence. However, I cannot predict how the evidence will ultimately unfold at trial and whether amendments to the pleadings could change Skookum's prospects. Therefore, I do not find my conclusion here to be dispositive of the application.

[35] The second issue on this motion is whether an order for security for costs would visit such undue hardship on the plaintiff that it would prevent the plaintiff's case from being heard. On the one hand, the plaintiff's counsel has submitted that neither the plaintiff nor Mr. Gleason have the means to post security for costs and that if same is ordered, the plaintiff would be unable to pursue its claim. On the other hand, Skookum submitted that once a defendant has shown that the corporate plaintiff will be unable to pay costs awarded against it, the onus shifts to the plaintiff to show that an order for security would stifle the action, by establishing not only that it has insufficient assets, but *also* that it has not means of raising money for security.

[36] In *Citizens for Foreign Aid Reform Inc.*, cited above, Romilly J. dealt with this point at paras. 21 – 23, where he stated as follows:

> "In exercising its discretion to order security for costs, the court must consider the interests of justice between the parties and balance those interests to try to insure that the substance of their dispute ends up properly litigated. As such, once a prima facie case is made out by the defendants, the court must consider whether an undue hardship would be visited upon the plaintiff if an award for security for costs was made. In other words, would the ordering of security for costs prevent justice from being done.
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> To succeed in showing that an order for security would stifle the action, the plaintiff must show that it has insufficient assets and no means of raising money for security: Kropp, supra. In the case at bar, there is dearth evidence as to the financial state of affairs of the plaintiff. There is also a dearth of evidence as to any access the plaintiff may have to resources. Consequently, though it appears that the plaintiff may be unable to pay costs of the action, it does not follow, in the absence of evidence, that such a state of affairs would result in stifling the advancement of the plaintiff's claim if costs were ordered to be secured.
>
> In sum, on an application for security for costs, once the defendants have established a prima facie case that the plaintiff lacks exigible assets, the plaintiff is required to respond with evidence to establish either that it will be able to pay the defendants' costs, that the defendants have no arguable case, or that an order for security will stifle the action. These tests serve to balance the possible injustice of stifling the corporate plaintiff's claim against the possible injustices of exposing the defendants to a law suit where they could not recover their costs if successful." (my emphasis)

[37] Here, there is significant evidence of the plaintiff's impecuniosity, with details as to the assets and liabilities of both the plaintiff and Mr. Gleason personally. However, I agree with Skookum's submission that the evidence falls short of establishing that the plaintiff is unable to *raise* the funds necessary to post security.

[38] While it may be dangerous of me to speculate, I am curious that, despite the apparent impecuniosity of the plaintiff and the relatively meagre means of Mr. Gleason, the plaintiff has nevertheless found the wherewithal to retain a reputable Vancouver law firm to prosecute its claim. Further, the plaintiff has indicated, through Mr. Gleason, that it was able to arrange financing to both purchase *and* repair the proposed camp facilities. To me, that signals an ability on the part of the plaintiff to raise at least some amount of money to post as security for costs, although perhaps not on a dollar for dollar basis, as formulated by Skookum in its draft party and party bill of costs. I note that s. 254 of the *Business Corporations Act* specifically gives the court discretion to order security for costs "on any terms it thinks fit".

[39] I am mindful here of the statement of the British Columbia Court of Appeal in *Kropp*, cited above, at para. 11, that the law "does not treat corporate plaintiffs with the same generosity and flexibility as natural persons" opposing such applications. I also share the concern of that Court in *Fat Mel's Restaurant Ltd.* v. *Canadian Northern Shield Insurance Co.*, [1993] B.C.J. No. 507, that the apparent impecuniosity of the plaintiff, which is the very basis for Skookum's application, should not be used to defeat its entitlement to that relief. At para. 28, the Court of Appeal quoted Master Joyce in *3473 Investment Ltd.* v. *Orr*, [1992] B.C.J. No. 1140 (S.C.), as follows:

> "In my opinion the impecuniosity of the plaintiff company, which is the very foundation of the defendants' application, cannot be used to defeat its entitlement to security. It appears to me that the plaintiff or its principals or investors or backers seek to retain the protection of the corporate veil in avoiding any exposure to costs while maintaining the action in the hope of recovering damages. They seek a win-win position. I am of the view they are not entitled to do so. I am simply not persuaded that if security is ordered the

> plaintiff will not be able to prosecute the claim." (my emphasis)

[40] The amount sought by Skookum as security for costs, based upon its draft bill of costs, is $22,428. I am satisfied on a balance of probabilities that such an amount would pose an undue hardship for the plaintiff and would likely stifle the action. However, I am not satisfied that the plaintiff has demonstrated *both* that it has insufficient assets at present *and* that it has no means of raising the money for security going forward.

CONCLUSION

[41] In an attempt to balance the possible injustice of stifling the plaintiff's claim with the possible injustice of exposing Skookum to a lawsuit where it could not recover its costs if it is ultimately successful, I order that the plaintiff provide security for costs in the limited amount of $5,000. That security is to be provided to the court in the form of a certified cheque, bank draft or letter of credit, unless counsel agree otherwise. These proceedings are stayed until the security is posted or counsel otherwise advise the court as to the arrangement made to do so.

[42] Given the somewhat mixed success on this application, I agree with the plaintiff's counsel that the costs of this application should be in the cause.

Gower J.