

SUPREME COURT OF YUKON

Citation: *Royal Bank of Canada v. Robertson*,
2021 YKSC 1

Date: 20210108
S.C. No. 18-A0054
Registry: Whitehorse

BETWEEN:

ROYAL BANK OF CANADA

PLAINTIFF

AND

DAVID STEPHEN ROBERTSON AND LARRY DEAN TURNER

DEFENDANTS

Before Madam Justice E.M. Campbell

Appearances:

Lance Williams

David Stephen Robertson

Larry Dean Turner

Counsel for the Plaintiff
Appearing on his own behalf
No one appearing

RULING

(On Application for Further Production of Documents)

INTRODUCTION

[1] The defendant, David Stephen Robertson, (“Mr. Robertson”) applies for further production of documents from the plaintiff, the Royal Bank of Canada (“RBC”). Mr. Robertson makes this application in the context of an action in which RBC seeks to enforce guarantees that Mr. Robertson provided with respect to funds RBC loaned to Crocus Glen Developments Inc. (“Crocus Glen”).

[2] More specifically, RBC alleges that it entered into loan agreements with Crocus Glen and Grey Wolf Builders Inc. (“Grey Wolf”). At the time, Crocus Glen was the

owner of a residential real estate development in Whitehorse and Grey Wolf was the builder of the homes in the development.

[3] It is alleged that Mr. Robertson, a director of Crocus Glen, and Mr. Turner, a director of Crocus Glen and sole director of Grey Wolf, provided limited Guarantees and Postponements of Claim to RBC with respect to funds RBC loaned to Crocus Glen.

[4] RBC alleges that Crocus Glen defaulted on its loans and failed to comply with the terms of the loan agreements, and that, as a result, RBC made demands to Crocus Glen, Mr. Robertson and Mr. Turner to repay the amount owed to RBC.

[5] RBC alleges that Crocus Glen, Mr. Robertson and Mr. Turner have failed, refused or neglected to repay the outstanding amount due to RBC, or any part thereof.

[6] It is further alleged that Crocus Glen's indebtedness to RBC surpasses the amount guaranteed by Mr. Robertson and Mr. Turner.

[7] I note that, on December 13, 2017, Gower J. appointed a receiver to take possession and control over all of Crocus Glen's and Grey Wolf's current and future assets, undertakings and property (S.C. File No. 17-A0127). The receivership proceeding is still ongoing.

[8] On June 2, 2020, I partially granted Mr. Robertson's application for the production of a number of documents in the possession of RBC. More specifically, I ordered RBC to produce all documents relating to the loans and/or credit facilities provided by RBC to Crocus Glen and Grey Wolf up to the date when the credit facilities were made available by RBC to the two companies (the "pre-funding documents").

[9] Following receipt of the documents produced by RBC pursuant to the June 2, 2020 Order, Mr. Robertson filed a further application, this time seeking:

- 1) that RBC produce for examination the further documentation he requested in his letter of July 5, 2020 to counsel for RBC;
- 2) that he be granted leave to cross-examine an RBC bank officer regarding the documents provided, the documents referred to in those documents, and RBC's policies regarding the retention of documents.

[10] In his letter of July 5, 2020, Mr. Robertson asked a number of follow-up questions to counsel for RBC, and requested that RBC produce the following:

- i) financial statements for Crocus Glen and Grey Wolf;
- ii) annual personal statement of affairs for all guarantors who are individuals;
- iii) other financial and operating statements and reports;
- iv) construction budget and schedule;
- v) construction contracts;
- vi) documents regarding the independent project monitor requirement;
- vii) notarized statutory declaration of Larry Turner and David Stephen Robertson;
- viii) three attachments to a document entitled "Transaction Requested"; and
- ix) insurance documents.

[11] RBC refused to produce the requested documents on the basis that they were either outside the scope of the June 2, 2020 Order, or irrelevant to the question of Mr. Robertson's liability under the guarantees he provided to RBC, and that, in any event, some of the documents requested should already be in the possession of Mr.

Robertson, as a director of Crocus Glen. Hence Mr. Robertson's application for further production of documents.

POSITIONS OF THE PARTIES

The applicant/defendant

[12] Mr. Robertson acknowledges that he received some documents from RBC following the June 2, 2020 Order. However, he believes that RBC should be in possession of the additional documents he requested in his July 5, 2020 letter as those documents are mentioned in the documents he received. In addition, if RBC is not in possession of those documents, it should explain why they were not obtained or retained.

[13] Mr. Robertson acknowledges that, as a guarantor and as a director of Crocus Glen, he should be in possession of some of the documents he is seeking to obtain through this application. Nonetheless, he submits that those documents are material to his defence, that they should be in the possession of RBC, and, therefore, should be produced to him. Mr. Robertson submits that the documents he is seeking speak to the care RBC took with the loans and are relevant to his defence that RBC did not manage and administer the loans diligently.

[14] Mr. Robertson submits that the parties would not find themselves in the current situation had RBC been diligent in administering and managing the loans. For example, Mr. Robertson submits that RBC failed to verify information it had about a contractual dispute involving Grey Wolf, and Grey Wolf's profitability.

[15] Mr. Robertson submits that the documents he received reveal that RBC did not comply with its internal rules by approving the loans and making funds available to Crocus Glen and Grey Wolf without first obtaining from them the documents and/or

information which RBC identified as a requirement or a pre-condition to making the loans.

[16] In addition, Mr. Robertson questions RBC's assertion that it provided him all the documents still in its possession. Mr. Robertson submits that it does not make sense that RBC would not have retained all the documents that pertain to an unpaid loan. For example, Mr. Robertson submits that he would have expected RBC to have kept the exchange of correspondence between Mr. Turner and his banker regarding his request for loans on behalf of the companies and the proposed structure of the loans.

[17] As such, Mr. Robertson submits that he should be permitted to examine an RBC representative to determine whether certain information or documents were requested or existed, and if so, why RBC did not retain them; and to obtain information regarding RBC's decision not to investigate the information they had about Grey Wolf's lack of profitability.

[18] Finally, I note that Mr. Robertson indicated in the course of his submissions that he did not understand the June 2, 2020 Order to be limited to the production of pre-funding documents.

The respondent/plaintiff

[19] Counsel for RBC submits that his client has fully complied with the June 2, 2020 Order and has provided to Mr. Robertson all the pre-funding documents that are still in its possession as outlined in the affidavit of Mr. Masson, a representative of the bank, and that RBC has nothing else to provide. Counsel submits that Mr. Robertson has not provided any basis to challenge the sworn statement of Mr. Masson. As such, counsel for RBC submits that the defendant should not be permitted to examine a representative

of the bank in that regard. Furthermore, counsel submits that a representative of RBC would not be in a position to answer questions as to whether specific documents were requested by RBC or were in RBC's possession at some point, if there is no indication to that effect in the documents already provided to Mr. Robertson.

[20] Counsel for RBC submits that, while the bank did not keep every piece of correspondence it had in this matter, it did retain all the documents relevant to the credit facilities and disclose them to Mr. Robertson. Those documents include the credit request(s), the bank's analysis and approval, and the agreements. Counsel for RBC notes, for example, that emails regarding internal risks were disclosed to Mr. Robertson.

[21] Counsel for RBC points out that Mr. Robertson only brought his first application for production of documents after RBC filed its application for summary judgment and, in the alternative, summary trial on the basis that nothing pled in the Statement of Defence (i.e. that the loans were unlawfully called by RBC; that the receivership proceedings wasted and devalued Crocus Glen's assets; and that a full and complete accounting of Crocus Glen's and Grey Wolf's accounts as well as of the Receiver's activities are required prior to proceeding with this action) is relevant to a guarantee action. He also points out that Mr. Robertson was represented by counsel when he filed his Statement of Defence.

[22] In addition, counsel for RBC submits that Mr. Robertson's new lines of reasoning:

- (i) that RBC made a bad loan and that he, therefore, should not have to repay RBC; and
- (ii) that Mr. Turner improperly moved money between Crocus Glen and Grey Wolf;

are not pled in his Statement of Defence and, in any event, are not valid defences to a guarantee action.

[23] Without conceding that Mr. Robertson pled in his Statement of Defence that RBC owed a duty of care to him, as a guarantor, in the administration of the Crocus Glen loan, counsel for RBC recognizes that Mr. Robertson raised more generally, at para. 37 of his Statement of Defence, that RBC owes a duty of care to him as a guarantor.

[24] However, counsel for RBC submits that Canadian jurisprudence has clearly established that the relationship between a financial institution and a guarantor is purely a commercial relationship governed by the express terms of the guarantee (contract); and that financial institutions, such as RBC, do not owe guarantors a duty of care in the administration of the guaranteed loan, even more so when the guarantor is a director of the borrower, as is the case in this matter. As such, counsel for RBC submits that there is no liability in negligence or in any other type of tort.

[25] Counsel for RBC submits that the defendant has not identified any contractual obligation on the part of RBC to do anything other than to advance the funds agreed to, if the conditions precedent were met. Counsel for RBC points out that conditions precedent to a loan are for the sole benefit of the financial institution and can be waived by the bank at its sole discretion.

[26] Furthermore, counsel for RBC also points out that the guarantees signed by Mr. Robertson contain provisions allowing RBC to deal with Crocus Glen as it saw fit, without limiting or lessening the guarantor's liability under the guarantee.

[27] Finally, counsel for RBC submits that his client has fully complied with the June 2, 2020 Order and that the additional documents sought by Mr. Robertson are not

relevant to a matter at issue in this action. Counsel for RBC submits that Mr. Robertson's application should be dismissed.

[28] At the end of the parties' oral submissions, I invited them to file case law in support of their respective positions.

[29] In the cover letter accompanying his authorities, Mr. Robertson submitted that the issue of how RBC managed and monitored Crocus Glen's loan is a valid defence as the bank:

- (i) has an obligation to inform a guarantor of any material changes to the loan;
- (ii) an obligation to not take any action that might increase the risk to a guarantor; and
- (iii) a duty to not cause the guarantor to suffer direct, concrete and real damages.

[30] Counsel for RBC maintains in his response that RBC's relationship with its guarantor is a contractual relationship. He also opposes Mr. Robertson being permitted to raise further and additional defences that are not pled in his Statement of Defence more than a year after the filing of his defence.

ANALYSIS

[31] Rule 25 of the Supreme Court of Yukon *Rules of Court* governs the discovery of documents in civil matters before this Court.

[32] Rule 25(3) provides that:

- (3) Every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in this

rule whether or not privilege is claimed in respect of the document.

[33] The question is whether the documents sought by Mr. Robertson relate to any matter in issue in this action. However, this question cannot be answered without considering the scope of Mr. Robertson's first application for production of documents and the decision I made on that application.

[34] On May 26, 2020, after RBC had filed its motion for summary judgment/summary trial, Mr. Robertson filed an application for production of documents seeking, among other things: Crocus Glen's and Grey Wolf's loans, including the loan application(s) and all material relating to the loans, all communication between Mr. Shane Nisbett of RBC and Mr. Larry Turner relating to the loan, all communication between Mr. Arnold Masson of RBC and Mr. Larry Turner relating to the loan, all communication between Mr. Masson and Mr. Nisbett relating to the loan, and all information RBC collected regarding David Stephen Robertson.

[35] Mr. Robertson's submissions at the time were focussed on obtaining documents relating to:

- (i) what his former business partner did with the RBC funds;
- (ii) the nature of his former business partner's relationship with RBC and the role it played in RBC's decision to loan funds to Crocus Glen and Grey Wolf; and
- (iii) the validity of the loan agreements and the guarantees he provided to RBC, based on the fact that his decision to personally guarantee the Crocus Glen loan was based on Crocus Glen and Grey Wolf

functioning properly and honestly, which he now suspects was not the case.

[36] Mr. Robertson also submitted that those documents are relevant in this action because they relate to his ability to honour the guarantees.

[37] Based on Mr. Robertson's submissions and stated reasons in support of his first application, I ordered RBC to produce all pre-funding documents in its possession and control as I found that those documents are relevant to the validity of the guarantees (contract) at issue in this action. I dismissed Mr. Robertson's application for production of post-funding documents in the possession of RBC, as I found that Mr. Robertson's reasons to obtain those documents did not relate to a matter in issue in this action, but instead related to the conduct of his former business partner and his use of the RBC funds. I also denied other parts of Mr. Robertson's first application for production on the basis that the documents sought were not relevant to a matter in issue and/or his request was too broad.

[38] As noted, Mr. Robertson is back before the court this time seeking production of specific documents, which, he submits, are identified in the documents he received from RBC pursuant to the June 2, 2020 Order as reporting requirements, insurance and conditions precedent to funds being made available to Crocus Glen. Those documents, he submits, are directly related to the care RBC took in managing and administering the Crocus Glen loan and the duty of care it owes him as a guarantor.

[39] Mr. Robertson bears the burden of demonstrating that the documents of which he seeks production are relevant to a matter in issue in this action.

[40] Whether a document is relevant is determined by reference to the pleadings.

However, I note that counsel for RBC did agree to not oppose Mr. Robertson raising as a defence that RBC owes a duty of care to him, as a guarantor, in the administration of the guaranteed loan (the Crocus Glen loan) even though it is not pled in Mr.

Robertson's Statement of Defence.

[41] It appears that the main issue between the parties at this point is not simply whether certain documents are relevant to a matter in issue in this action but whether Mr. Robertson's argument regarding the existence of a duty of care constitutes a valid defence to a guarantee action. However, this legal issue is not one that should or would usually be determined in the context of an application for production of documents but rather in the context of an application for summary judgment.

[42] Considering the fact that Mr. Robertson filed his application for production of documents after RBC filed its application for summary judgment and, in the alternative, summary trial, I am of the view that it is appropriate in this case to hear and make a determination on RBC's application for summary judgment/summary trial before ruling on Mr. Robertson's application for further documents.

[43] Finally, I note that some of the documents identified by Mr. Robertson as conditions precedent to RBC making the credit facilities available to Crocus Glen and Grey Wolf appear to constitute pre-funding documents, which were subject to the June 2, 2020 Order. The evidence before me is that RBC produced all the pre-funding documents contained in its electronic and paper files as per the June 2, 2020 Order. There is nothing before me that would make me question the sworn statement of RBC's representative to that effect. Nonetheless, this conclusion is not determinative of Mr.

Robertson's request to examine an RBC's representative on whether RBC ever requested those documents or simply did not retain them. Again, considering the particular circumstances of this case, I am of the view that it is more appropriate in this case to rule on Mr. Robertson's application after I make a determination on RBC's application for summary judgment/summary trial.

CONCLUSION

[44] Mr. Robertson's application for further production of documents and request to examine an RBC's representative will be considered after my decision on RBC's application for summary judgment, and in the alternative, summary trial. I note that RBC's application is already set to proceed before me in a short period of time.

CAMPBELL J.