SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v Norcope Enterprises Ltd,* 2023 YKSC 17

Date: 20230403
S.C. No. 16-A0180
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON

PLAINTIFF

AND

NORCOPE ENTERPRISES LTD. and
INTACT INSURANCE COMPANY

DEFENDANTS

AND

TETRA TECH EBA INC.

THIRD PARTY

AND

NORCOPE ENTERPRISES LTD.
NORCON CONCRETE PRODUCTS INC.,
YUCAL PROPERTIES INC., and
DOUGLAS L. GONDER

FURTHER THIRD PARTIES

Before Justice A. Kent

Counsel for the Plaintiff Government of Yukon and the Third Party Tetra Tech EBA Inc.	I.H. Fraser and Lesley Banton
Counsel for the Defendant Norcope Enterprises Ltd., and the Further Third Parties Norcon Concrete Products Inc., Yucal Properties Inc., and Douglas L. Gonder	James R. Tucker
Counsel for the Defendant Intact Insurance Company	R. Nigel Beckmann

REASONS FOR DECISION

[1] This decision addresses two issues arising from my decision in this case, issued on November 14, 2022 (*Yukon (Government of) v Norcope Enterprises Ltd,* 2022 YKSC 57). The first issue is whether Intact Insurance Company ("Intact") has any liability under its bond, and the second is costs.

Intact's Liability Under Its Bond

[2] Intact's bond provides that the Contractor shall:

> rectify and make good any defect or fault that appears in the work or comes to the attention of the Engineer with respect to those part of the work accepted in connections with the certificate of Substantial Performance referred to in GC38.2 within 12 months from the date of the Certificate of Substantial Performance.

[3] The obligation under the bond was modified by the Yukon warranty letter of June 11, 2014. The letter modified Norcope's obligations in relation to the subsurface conditions.

[4] The 12-month period ended on August 22, 2015. Government of Yukon ("Yukon") notified Intact that Norcope Enterprises Ltd ("Norcope") was in default on August 21, 2015.

[5] Intact makes three arguments. The first has three components and arises from my findings. In my decision, I did not isolate the damage as between frost heave and poor construction. I said that the elevation change exacerbated the cracking, but that "I cannot find that it alone caused it." Intact says that because the plaintiff did not provide any evidence about which panels were damaged by frost heave and which by poor construction, it is not possible to assess Intact's liability.

[6] Intact is arguing that Yukon do the impossible, namely to identify which panels were damaged by frost and which by poor construction. As I said in my reasons, it is not possible to separate out the cause of the cracking. That means that both caused the cracking.

[7] The argument then proceeds on the basis of the report of Mr. Russ Riffel, one of Intact's experts. It concluded that only 19 panels were damaged by poor construction

and the primary cause of damage for the rest of the 48 panels was seasonal frost heave.

[8] It is correct that Mr. Riffel and his successor expert, Mr. Scott Cumming, identified only 19 panels that were caused by poor construction and all other cracking was caused by frost heave. However, I found that the other damage was caused in part by poor construction, exacerbated by frost heave. I did not find that any panels were damaged solely by frost heave, nor did I say that any were damaged mostly by frost heave. Poor construction was part of the problem for all the damage. Again, Intact is asking the impossible by arguing that I isolate the damage and then limit the damages to 19 panels. I reject that argument.

[9] Finally, Intact argues that for any cracking or other defects discovered after August 23, 2015, they are outside the period for which Intact is responsible under the Bond. Again, it is impossible to isolate the cracking temporally. The poor construction exacerbated by frost heave in some areas caused the damage.

[10] The second argument is that since Yukon was found partially at fault for failing to pay attention to what was happening on the project to the extent of 15% of the overall damage, and since its agent, Tetra Tech EBA ("Tetra Tech"), was found at fault for failing to properly carry out its QA function for Yukon, Yukon has not met its obligations under the bond. In this regard, the Bond says:

> Whenever the Principal shall be, and declared by the Obligee to be, in default under the Contract, **the Obligee having performed the Obligee's obligations thereunder**, the Surety shall… (emphasis added)

[11] In *Scott and Reynolds on Surety Bonds*, (Kenneth W. Scott, Q.C. and R. Bruce Reynolds, *Scott and Reynolds on Surety Bonds*, (Toronto: Thomson Reuters Canada,

2022) (loose-leaf release No. 1 December 2022), ch 7:3) it says that "[i]f the cause for the failure to perform the underlying contract is attributable to the obligee, then the surety is not responsible under its bond." Counsel also cites *Halton Region Conservation Authority v Toronto Underground Contractors Ltd* (1985), 12 CLR 139 (Ont CA), an endorsement dated February 19, 1985, to support this proposition. In that case, the court said that to the extent the contractor (like Norcope) was not liable, neither was the bonding company. In this case, there were failures by three parties, Yukon, Tetra Tech, and Norcope. To the extent that Norcope is at fault, Intact is liable.

[12] The third argument is that the Tetra Tech Report of July 27, 2015 ("the Report"), does not provide the specificity with respect to the deficiencies. Yukon did not demand that the entire apron be replaced. It further says that if the report was sufficient notice, Intact did act on it by retaining Mr. Riffel. Retaining an expert who in turn provides a report is not a sufficient response under the bond.

[13] Next it argues that if the Report was sufficient notice, I must consider the failures in the Report. This argument is essentially relitigating issues that arose during the trial about the intent of the Report's authors and Yukon in the preparation of the Report. I will not address these issues again.

[14] Finally, Intact argues that the demand to Intact was not clear and unequivocal and that it was prepared for discussion with Norcope. The letter of August 21, 2015, to Intact says the following after stating that the defects or fault are identified in the Report:

> In essence, the Report identifies three groups of major deficiencies found throughout the entire apron area as follows:
>
> > Panel edge spalling and ravelling and failure of the joint sealant;

> Cracking of the panels; and
>
> Poor surface finish of the panels.
>
> All of the panels are subject to poor concrete consolidations, inadequate air void characteristics, improper joint installation, and poor surface finish.
>
> The Report notes the lack of bond breaker between the lean mix concrete (LMC) and the Portland cement concrete (PCC).
>
> About 32% of the panels currently show signs of cracking. About 30% of the panels currently show signs of joint ravelling (sic).
>
> The deficiencies outline in the Report point to future increased maintenance costs to Government of Yukon, the need to replace the concrete apron sooner than should have been the case, and to an unacceptable increased risk to public safety due to the increased risks of debris coming off the concrete apron and striking aircraft.

[15] The letter coupled with the Report clearly identifies the nature of the deficiencies. It does not say that the entire apron needs replacing. It demands that Norcope "… rectify and make good the work." While much more was known at the time of trial, when Yukon was required to give notice in August 2015, the nature of the notice was sufficient.

[16] Finally, Intact submits, without opposition from Yukon, that its liability is coextensive with Norcope's liability, essentially that they are jointly and severally liable for 35% of the damages. They are correct that Yukon cannot recover the full amount twice, once from Norcope and once from Intact.

Costs

[17] Rule 60 of the Supreme Court of Yukon *Rules of Court* governs. The rule provides that ordinarily costs will be assessed as party and party costs under

Appendix B unless the court orders that they be assessed as special costs, increased costs, or the court awards a lump sum. Special costs may be awarded when "a party's conduct is reprehensible, scandalous or outrageous and the circumstances call for a rebuke." Increased costs may be awarded where an award of costs on a given scale would be "inadequate or unjust".

[18] Yukon is asking for one set of costs under Tariff Scale C (matters of more than ordinary difficulty) and second counsel costs for trial for a total of $554,227.22. Tetra Tech is asking for special costs, essentially Tetra Tech's counsel's fee, for a total of $275,716.65. The claim against Tetra Tech was intentional interference with contractual relations between Yukon and Norcope. The claim centered on the Report which Norcope and Intact said contained false and misleading statements. There were allegations during cross-examination of Yukon's witnesses that information that ultimately made it to the Report was made up by the authors. The professionalism of the engineers was questioned. It is on this basis that special costs, essentially full indemnity for Tetra Tech, are sought.

[19] Special costs do not automatically follow from a failed allegation of fraud or dishonesty. The purpose of special costs is "…to chastise a spectrum of misconduct that the court considers to be reprehensible or otherwise deserving of judicial rebuke: *Mayer v Osborne Contracting Ltd*, 2011 BCSC 914" (*Silver Peak Resources Ltd v Golden Arch Resources Ltd*, 2012 BCSC 346 at para. 7).

[20] This was a complex case because of the engineering and construction issues. Tetra Tech was not without fault because of their conflict of interest and failure to properly do their work. Yukon was not without fault because of its failure to pay

attention. However, none of those failings completely offset the unnecessary and time-consuming allegations of fraud and deceit. Neither do they compare with the unnecessary spectre of unprofessional and dishonest conduct that overlay the allegations made by Norcope and Intact. The conflict of interest does merit some recognition. In the result, Tetra Tech's costs are set at $200,000.

[21] The costs requested by Yukon are not unreasonable given that this was a 5-week trial involving complex engineering evidence, with over 700 exhibits put into evidence. There were two defendants at trial, each on cross-examining the Yukon's witnesses. Given that, it is not unreasonable for Yukon to have had two counsel at trial. Yukon will have its costs as proposed.

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KENT J.