

SUPREME COURT OF YUKON

Citation: *Directional Mining & Drilling Ltd. v.
City of Whitehorse et al*, 2010 YKSC 52

Date: 20100917
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

And

**Yukon Engineering Services, Inc.,
EBA Engineering Consultants Ltd.,
The Corporation of the City of Whitehorse and
14899 Yukon Inc. o/a Castle Rock Enterprises**

Third Parties

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 (Court Costs)

INTRODUCTION

[1] Directional Mining and Drilling Ltd. ("DMD") filed a temporary garnishment and applied for the issuance of a writ of garnishment before judgment pursuant to s. 7 of the

Garnishee Act, R.S.Y. 2002, c. 100. The DMD application was dismissed on July 7, 2010, with Reasons for Judgment in *Directional Mining and Drilling Ltd. v. City of Whitehorse, at al.*, 2010 YKSC 37.

[2] This is an application by Castle Rock Enterprises for court costs. Castle Rock Enterprises was represented by outside counsel. No evidence has been presented to support an outside counsel order. I advised the parties that as per *Minet et al. v. Kossler*, 2009 YKSC 18, the general rule is that the onus is on the party incurring outside counsel costs to satisfy the court that they have been necessarily or properly incurred.

THE LAW OF COSTS

[3] In the case of *Martel v. Wallace*, 2008 BCSC 436, Chamberlist J. provided a very helpful review of the general principles applicable in the case before me.

[4] They are set out at para. 28 of *Martel v. Wallace* as follows:

- (1) Costs in the cause serve generally to maintain the balance that should be preserved between litigants until final judgment is rendered;
- (2) It is preferable to have only a single assessment of costs, at which time all aspects of the litigation may be considered by the assessing officer;
- (3) However, if the circumstances warrant, the court may order that costs be payable forthwith in any event of the cause in order to control its own process. For example, the court may make the order to deter unnecessary or unreasonable conduct in the proceedings;
- (4) Costs may also be payable forthwith if it is unlikely that the matter will proceed to trial, or if the motion deals with a discrete issue that is severable from the remaining claims; and

(5) In making such an order, the court must remember that the order may prevent or hinder a meritorious claim from proceeding.

[5] I adopt the above principles as the appropriate law of costs in this Court.

However, I add one additional factor to be taken into consideration on costs applications, and that is in cases where one party has an overwhelming imbalance of financial assets and the other party has modest assets. In those circumstances, a costs award may be made in any event of the cause to ensure that a meritorious claim proceeds.

[6] Counsel for DMD cited the case of *Ross River Dena Council v. Canada (Attorney General)*, 2009 YKSC 4, in which the Court awarded costs to Ross River Dena Council who had succeeded on the interim application, but indicated that those costs should follow the event. That was an appropriate decision on the particular facts of that case, because the issue at stake was not a discrete issue that was severable from the merits of the case. In addition, there is no question that the *Ross River Dena Council's* case will proceed, so there will ultimately be a court costs reckoning.

[7] In the case at bar, the application for the issuance of a writ of garnishment before judgment is completely severable from the issue in dispute, which is whether or not DMD could apply forced account rates under a contract for directional drilling services for the benefit of the City of Whitehorse. The DMD application for the writ of garnishment was not essential to its claim for forced account rates, particularly when the City of Whitehorse accepted a pass through liability should DMD succeed against Castle Rock Enterprises.

DECISION

[8] Therefore, in the circumstances of this case, Castle Rock Enterprises shall have its costs payable forthwith in any event of the cause. I do not rule out a further costs application from Castle Rock Enterprises if they wish to apply for outside counsel costs.

VEALE J.