SUPREME COURT OF YUKON

Citation: *Kareway Homes Ltd.* v. *37889 Yukon Inc.,* 2012 YKSC 1

20111207
Docket S.C. No.: 09-A0095
Registry: Whitehorse

BETWEEN:

KAREWAY HOMES LTD.

Plaintiff

AND:

37889 YUKON INC.

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
James Tucker — Appearing for the Plaintiff
Michael Tatchell (via teleconference) — Appearing for the Defendant

RULING ON APPLICATION TO AMEND
DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the Plaintiff to amend point # 5 in the 'denials' portion of the Amended Statement of Defence to Counterclaim to read, "It prepared a budget and provided it to the Defendant or agreed to a budget," and also to amend para. 12 in the 'allegations' portion of the Amended Statement of Defence to Counterclaim by deleting the word "budget" where it appears in that paragraph, and substituting, therefore, the words "cost estimate". The notice of application in that regard is supported by the affidavit of Mr. Tucker, counsel for the Plaintiff, filed December 6, 2011.

[2] The sole objection to the application by the Defendant's counsel is that it should

not be allowed because the Plaintiff made a judicial admission in para. 12 of the Amended Statement of Defence to Counterclaim, which reads:

> "Even though Shaman, on behalf of 37889, verbally agreed to changes to the project, Shaman advised Wayne that he did not want the written budget for the project to be changed as he did not want any negative impact to result with respect to the financing he had obtained with 37889's bank for the project. The amendments to the budget for the project were not reduced to writing, specifically at the request of Shaman, on behalf of 37889." (my emphasis)

[3] The two references to, firstly, the "written budget for the project," and "the budget for the project" are what the Defendant relies on as a judicial admission as to the existence of a budget, which is at issue in this trial. The Defendant's counsel also notes that the Amended Statement of Defence to Counterclaim does not specifically deny either the original budget or the first amended budget referred to in para. 9 of the Amended Statement of Defence, which reads:

> "The original budget prepared by the Plaintiff and provided to the Defendant in May 2007 was for $4,268,000.00. The budget for the project was increased to $4,541,392.20 as of September 7, 2007 (the "first amended budget"). During the course of the project, the Defendant agreed to increase the costs over the first amended budget of $4,541,392.20 by $230,000 …."

There is also no specific denial of the "final amended budget" referred to in para. 10 of the Amended Statement of Defence.

[4] The Defendant's counsel does not assert prejudice on this application.

[5] Mr. Tucker deposed in his affidavit at para. 3:

> "When I drafted the Amended Statement of Claim and the

> Amended Statement of Defence to Counterclaim in the within matter, it was my intention to deny in the pleadings the existence of a budget in the Project which is the subject of this matter."

And at para. 4:

> "When I drafted paragraph 5 in the denials portion of the Amended Statement of Defence to Counterclaim, I did so in specific response to paragraph 9 of the Statement of Defence, which I read as alleging that the Plaintiff had both prepared a budget and provided it to the Defendant in May of 2007. I noted that further references to the budget in that paragraph and in paragraph 10 of the Statement of Defence discussed increases to the original budget." (emphasis added)

I digress by indicating that para. 5 in the 'denials' portion of the Amended Statement of Defence to Counterclaim as it presently reads is, "It prepared a budget in May 2007 and provided it to the Defendant," in other words, that is a denial by the Plaintiff that it did such a thing in that manner.

[6] Finally, Mr. Tucker deposed at para. 11 of his affidavit:

> "When I drafted the pleadings in the within matter, it was not my intention to admit the existence of a budget for the Project. I had no intention of doing so to narrow the issues or to particularly benefit the Defendant as I knew that the existence of a budget for the Project was in issue."

[7] The test for an admission of this sort is generally set out in *Canadian Premier Life Insurance Co.* v. *Sears Canada Inc.,* 2011 ONSC 1670, at paras. 18 and 19, and that is that the admission must be "an unambiguous deliberate concession."

[8] The test for a withdrawal of a judicial admission is set out in *Abacus Cities Ltd.* v. *Port Moody (City)*, [1981] B.C.J. No.1668, at para. 13, which is that the Court must be "satisfied that it is in the interest of justice to withdraw same…."

[9] There is further authority on the withdrawal of admissions, including deemed admissions, found in *Hamilton* v. *Ahmed*, [1999] B.C.J. No. 311, and in *Hurn* v. *McLellan*, [2011] B.C.J. No. 649. In the latter case, at para. 28, Master Bouck set out the principles from *Hamilton*, which govern an application to withdraw an admission of fact as follows:

> "1. Whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact;
>
> 2. In applying that test, all of the circumstances should be taken into account including whether:
>
> (a) the admission has been made inadvertently, hastily or without knowledge;
> (b) the fact admitted was not within the knowledge of the party making the admission
> (c) the fact admitted is not true.
> (d) the fact admitted is one of mixed fact and law
> (e) the withdrawal of the admission would not prejudice a party
> (f) there has been no delay in applying to withdraw the admission."

[10] With respect to the factor of mixed fact and law, Master Bouck says later at para. 31 that:

> "… whether the admission sought to be withdrawn is one of fact, law or mixed law and fact, the same legal test applies."

[11] Master Bouck then concludes by referring to the case of *374787 B.C. Ltd.* v. *Great West Management Corp.,* 2007 BCSC 582, at para. 29, indicating that the test

has more recently been articulated by the court in that case as follows:

> "As a general rule, the Court must consider whether in the circumstances of the case the interests of justice justify the withdrawal of the admission. The following facts, which are not exhaustive, are relevant: delay, loss of a trial date, a party is responsible for an erroneous admission, inadvertence in the making of an admission and estoppel ..."

[12] The primary point being made by Defendant's counsel in this application is that the judicial admission was not inadvertent. In that regard, he relies upon evidence that Mr. Wayne Cunningham, the principal of the Plaintiff, had an opportunity to read the Plaintiff's Statement of Claim before it was originally filed on November 25, 2009. The Defendant's counsel also asserts that Mr. Cunningham had an opportunity to read the Statement of Defence and Counterclaim after it had been filed and delivered, and that he did so before his counsel prepared and filed the Statement of Defence to Counterclaim. There is further evidence that Mr. Cunningham also had an opportunity to read the Statement of Defence to Counterclaim before it was filed.

[13] Notwithstanding those facts, Plaintiff's counsel explained that neither he nor Mr. Cunningham understood the import of the pleadings at that time in the manner currently being argued by defence counsel.

[14] It seems to me that to accept what is urged by the defence, that the judicial admission was truly advertent (or not inadvertent), I would have to assume that Plaintiff's counsel was acting on specific instructions to draft and file the pleadings as he did. However, for the purposes of this application, I cannot reconcile that prospect with the evidence under oath from Mr. Tucker, as counsel and an officer of this Court, that

that was not the case. Having said that, it is still open to the Defendant's counsel to make argument on the trial proper as to why and how this state of affairs should affect my assessment of Mr. Cunningham's credibility.

[15] Further, if I were to disallow the withdrawal of the judicial admission, it seems to me that the Plaintiff's case would be significantly impaired, if not destroyed. That is because the Plaintiff's claim is based primarily on the allegation that there was no budget, which the Plaintiff says is consistent with this arrangement being a cost plus contract and not a fixed price contract (the Defendant asserts the latter). That would mean that there would effectively be no triable issue left from the Plaintiff's perspective.

[16] Taking all of the circumstances in *Hurn*, *supra*, into account, I am satisfied on a balance of probabilities that the admission made was inadvertent, and that it would be in the interests of justice to allow the Plaintiff to withdraw it. In that event, there remains no further objection to the application to amend, and I will allow it as provided for in the notice of application. That is my ruling.

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GOWER J.