

SUPREME COURT OF YUKON

Citation: *P.S. Sidhu Trucking Ltd. v. Yukon (Department of Highways and Public Works)*, 2017 YKSC 52

Date: 20171006
S.C. No. 13-A0136
Registry: Whitehorse

BETWEEN

P.S. SIDHU TRUCKING LTD.

PLAINTIFF
(Respondent)

AND

GOVERNMENT OF YUKON
(DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS)

DEFENDANT
(Applicant)

Before Mr. Justice J.A. Menzies

Appearances:
Dana Nowak
Ian Fraser

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] In July 2013, Yukon issued a public tender for the replacement of the Tatchun Creek bridge. The deadline for the tender was August 15, 2013. On August 15, 2013, Sidhu attended the Yukon Procurement Centre and submitted a bid on the public tender (the “Sidhu bid”). Although the Sidhu bid was the highest ranked bid, the tender was not awarded to Sidhu as Yukon determined that the Sidhu bid was not submitted in accordance with the public tender.

[2] Sidhu has presented a Statement of Claim before the Supreme Court of Yukon claiming damages as a result of not being awarded the tender. Yukon applies to strike portions of that Statement of Claim.

[3] Both parties to this application agree on the test to be applied on a motion to strike. Assuming the facts plead to be true, a claim should only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action or that the claim has no reasonable prospect of success. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17. However, a claim that is arguable albeit novel should be permitted to proceed to a trial on its merits. *Imperial Tobacco, supra*, at para. 21.

[4] The purpose of a motion to strike pleadings was explained in *Imperial Tobacco, supra*, by McLaughlin C. J. as follows:

[19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[20] This promotes two goods - efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

Basket Clauses

[5] At the hearing of this matter, both parties agreed that certain portions of the Statement of Claim should be struck. Those portions were:

- 1) Para. 24.k.: such further particulars as may be proven in a trial of this action.
- 2) Para. 29.d.: such further particulars as may be proven in a trial of this action.
- 3) The portion of para. 35 which reads: including but not limited to...
- 4) Para. 36.e.: such other relief as the Plaintiff should request and this Honourable Court may deem appropriate to grant.

[6] These clauses, more commonly referred to as “basket clauses”, cannot stand alone absent assertions of fact capable of constituting a cause of action. Counsel for Sidhu admits there are no facts alleged which could support the relief claimed in these clauses. These clauses will be struck from the statement of claim in this action.

Paras. 24.a.i. and 24.a.ii.

[7] These paragraphs read as follows:

24 The YG was negligent in implementing its tendering process and its negligence constitutes a breach of YG’s duty of care to Sidhu. The particulars of YG’s negligent conduct include:

- a. negligently drafting the Tender Documents resulting in various iterations of the deadline for Tender Closing: including but not limited to;
 - i. failing to ensure that a legal opinion prepared by Miller Thomson LLP in 2009 (the “Legal Opinion”) establishing appropriate language regarding deadline for the Tender Closing was incorporated into the Tender Documents by the governmental department responsible for preparing same;

and

- ii. failing to implement a process to ensure that the YG Procurement Centre and the governmental department who prepared the Tender Documents were referring to the same deadline for the Tender Closing in accordance with the Legal Opinion.

[8] In *Martel Building Ltd. V. Canada*, 2000 SCC 60, the Supreme Court of Canada made the following comments:

[118] ...Absent negligent misrepresentation upon which Martel would have relied to its detriment in entering into Contract A, we believe that it would be contrary to the underlying principles of the tender regime to accept that the Department owed it a duty of care in drafting the tender documents.

[119] Finally, recognizing a duty of care in such a context could have significant repercussions on the tendering process and create many uncertainties. In this case, contiguous space was explicitly required in the tender specifications. Martel is essentially asking this Court to import a common law duty of care in the drafting of the call for the express purpose of avoiding this contractual provision. Accepting Martel's argument would have the effect of providing an out for those people who do not submit compliant bids. Indeed, other unsuccessful, non-compliant bidders could attempt to sue in negligence and argue that various terms of contract A "did not reflect the reality of the situation". We believe that this further consideration clearly illustrates why a duty of care should not be imposed on the tender calling authority in drafting the tender documents.

[9] Paras. 24.a.i. and 24.a.ii. allege the very cause of action which the Supreme Court of Canada rejected in *Martel*, supra. No duty of care is owed by Yukon to Sidhu in the drafting of the tender documents. That being the status of the law, these particular clauses do not disclose a reasonable cause of action with any prospect of success.

[10] Accordingly, paras. 24.a.i. and 24.a.ii. will be struck.

Para. 31

[11] Para. 31 alleges a number of actions taken by Yukon and its legal counsel Ms. Lawson and Mr. Yap by way of particulars of Yukon`s failure to act in good faith. These allegations concern a meeting following the awarding of the tender contract to another party.

[12] I am presuming the allegations against Lawson and Yap were in their capacity of representatives of Yukon as they are not parties to this action.

[13] In paras. b., c. and d., Sidhu alleges Yukon breached its duty of good faith by failing to disclose the legal opinion respecting the drafting of tender documents. This is in the context that Yukon does not owe Sidhu a duty of care in the drafting of the tender documents.

[14] At the time the meeting between Sidhu and the representatives of Yukon took place, this legal opinion was subject to solicitor-client privilege. Counsel for Sidhu could not point to any legal authority in which the duty of good faith in contractual relationships requires the disclosure of privileged information.

[15] Paras. 31.e. and f. claim Yukon was not acting in good faith in soliciting information from Sidhu to prepare an agreed statement of facts to proceed for a legal opinion from the Supreme Court of Yukon and in failing to disclose the legal opinion or wording error in the agreed statement of facts. It was acknowledged that an agreed statement of facts was presented to the Supreme Court of Yukon, which issued a decision on the tendering process (2013 YKSC 105). At the time of the hearing before Veale J., Sidhu was represented by counsel. The Statement of Claim does not allege that the agreed statement of facts were in error or in any way prejudicial to Sidhu.

[16] Para. 31.g. alleges Yukon and its representatives failed to act in good faith in failing to advise Sidhu to obtain independent legal counsel. Although at the time of the meeting Sidhu was not represented by legal counsel, he did subsequently hire legal counsel. There are no particulars as to how Yukon's failure to advise Sidhu to obtain legal counsel at the earliest stages of this dispute caused any damage or prejudice to Sidhu.

[17] On a consideration of para. 31 of the Statement of Claim, I find the entire paragraph fails to disclose a reasonable basis for a claim that Yukon was not acting in good faith. Para. 31 will be struck in its entirety.

Para. 32

[18] Para. 32 alleges that Yukon, through its legal counsel, failed to disclose the particulars alleged in para. 31 to the Supreme Court of Yukon and the Court of Appeal of Yukon. The Supreme Court of Yukon was asked to rule solely on whether or not Sidhu's bid had been tendered in accordance with the tender documents. Any allegation of bad faith or negligence was not before the court. The information was still subject to solicitor-client privilege. This paragraph does not disclose any reasonable cause of action and will be struck.

Para. 33

[19] This paragraph alleges the deputy minister of Highways and Public Works for Yukon met with Sidhu and advised him to sign a document agreeing to the court process to determine the deadline for the tender documents. The deputy minister did not advise Sidhu to seek legal counsel. It is not contested that at some point Sidhu did retain legal counsel and did proceed with the legal proceeding based on the agreed

statement of facts. There are no particulars of any prejudice suffered by Sidhu as a result of the legal proceedings or the lack of legal counsel early in the negotiations between these parties. This paragraph will be struck.

Para. 34

[20] Para. 34 is a claim for exemplary damages as a result of the allegations made in paras. 31 - 33. As these allegations have been struck from the Statement of Claim, para. 34 lacks a factual foundation. Para. 34 will be struck.

Para. 36.b.

[21] Para. 36.b. claims damages for a breach of duty to act in good faith. I agree that the duty to act in good faith is a duty imposed on parties to a contract. The duty to act in good faith is not a “stand alone” duty upon which a claim in damages can be founded. As such, a failure to act in good faith gives rise to a claim for damages for a breach of contract. A claim for breach of contract is already presented under para. 36.a. Para. 36.b. is duplicitous and therefore should be struck.

CONCLUSION

[22] Following the foregoing Reasons, paras. 24.a.i., 24.a.ii., 24.k., 29.d., 31, 32, 33, 34, the wording “including but not limited to” from para. 35, the wording “or such other amount as may be proven at trial” from para. 36.a., 36.b., and 36.e. shall be struck from the Statement of Claim.