SUPREME COURT OF YUKON

Citation: *North America Construction (1993) Ltd. v. Yukon Energy Corporation*, 2019 YKSC 42

Date: 20190814
S.C. No. 11-A0114
Registry: Whitehorse

BETWEEN

NORTH AMERICA CONSTRUCTION (1993) LTD.

PLAINTIFF

AND

YUKON ENERGY CORPORATION

DEFENDANT

Before Madam Justice S.M. Duncan

Appearances:
H. David Edinger — Counsel for the Plaintiff
Morgan L. Burris and Todd Shikaze — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The defendant brings this application to strike pleadings in the context of the re-trial of this action after appeal. The action is a contractual dispute arising from North America Construction (1993) Ltd.'s ("NAC") installation of a third turbine, new switchgear and associated equipment, as well as additional power cables for the redundancy project to the Aishihik generating station owned by Yukon Energy Corporation ("YEC"). Four claims decided at the first trial were overturned by the Court

of Appeal of Yukon and sent to the Supreme Court of Yukon for re-trial scheduled to start November 18, 2019.

[2] The main ground of this application is YEC's argument that NAC's claim for damages for breach of Schedule D of the contract should be struck for no cause of action or abuse of process (Rule 20(26)(a) or (d)) without leave to amend. Both of these arguments rely primarily, although not exclusively, on a deemed admission by NAC in its reply to the amended statement of defence.

[3] A second ground of the application to strike part of NAC's claim for the costs of compiling a list of cables and supplying and installing certain additional cables is based on an inconsistency between the pleading in the amended amended statement of claim and reply, and the absence of evidence at the first trial in support of the claim (Rule 20(26)(c) and (d)).

[4] A third ground is that the liability of NAC for failure to provide new cabinets according to the contract specification is an improper issue for the second trial because it was decided at the first trial and not appealed. Only the amount of damages is at issue in the second trial (Rule 20(26)(c) and (d)).

[5] A fourth ground of the application is NAC's allegation in its defence to YEC's counterclaim of YEC's general failure to mitigate its deficiencies is prohibited from litigation at the second trial because the issue was fully decided at the first trial and upheld on appeal (Rule 20(26)(d)).

[6] For the reasons that follow, I dismiss YEC's application to strike the Schedule D claim in whole or in part. I allow NAC to amend its pleadings to clarify the claim for costs of compiling the cable list, and supplying and installing the cables. I allow NAC to

amend its pleadings to remove its allegation of YEC's failure to mitigate by refusing to permit NAC to attend at the Aishihik site. I confirm that the parties have agreed that NAC will amend its pleading to remove its denial of liability for the new cabinets that did not meet the contract specification and I will add this to the order.

[7] NAC offered, in its written outline in response to this application and orally at the hearing, to amend its pleadings to clarify the issue of who prepared the cable list and any effect on its claim for costs. NAC also offered to narrow its pleading on the failure to mitigate issue to address only those aspects of the mitigation not yet litigated. Rule 24 of the Yukon *Rules of Court* ("Rules") allows for amendments to pleadings to be made without leave of the Court up to 90 days before trial. However, given the issues between the parties to date, I direct that all of the proposed amendments be provided in draft to the defendant and the Court at a case management conference to be arranged as soon as possible.

LEGAL TEST ON APPLICATION TO STRIKE

[8] Rule 20(26) of the Rules provides:

> (26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,

> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[9] The test to strike a claim for failure to disclose a reasonable claim or cause of action was most recently stated by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, as follows:

> [17] … A claim will only be struck if it is **plain and obvious**, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has **no reasonable prospect of success**. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D*., 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 [emphasis added].

[10] In Yukon, the Court of Appeal recently described the test under Rule 26(a), (b) and (d) in *Wood v. Yukon (Occupational Health and Safety Branch)*, 2018 YKCA 16, as follows:

> [9] The test for striking a claim as disclosing no reasonable claim, set out in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, is **whether it is "plain and obvious", assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if the action is "certain to fail".** If there is a chance that a claimant might succeed, then she should not be "driven from the judgment seat" (at 980) [emphasis added].
>
> [10] A pleading is vexatious under this Rule where it is groundless or manifestly futile, not in an intelligible form, or instituted without any reasonable grounds or for an ulterior purpose: *McDiarmid v. Yukon (Government of)*, 2014 YKSC 31 (at para. 15).

> [11] The doctrine of abuse of process engages a court's inherent power to prevent the misuse of its procedures in a way that would bring the administration of justice into disrepute. It is a flexible doctrine that applies in a variety of legal contexts, and it often includes attempts at relitigation: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paras. 36–37; *Behn v. Moulton Contracting Ltd*., 2013 SCC 26 at paras. 40–41.

[11] The test for a strike for no reasonable cause of action was also summarized in *McDiarmid v. Yukon (Government of)*, 2014 YKSC 31, at para. 14:

> [14] … The essential elements are: (i) that a claim should be struck out only if it is plain and obvious that the claim is bound to fail; (ii) the mere fact that a case is weak or not likely to succeed is not a ground to strike; (iii) if the action involves serious questions of law or fact then the rule should not be applied; and (iv) the court, at this stage, must read the statement of claim generously, with allowances for inadequacies due to deficient drafting.

[12] The Court in *McDiarmid* noted the approach to such applications set out in the case law over the years at para. 17:

> [17] … the authorities establish that, when considering an application to strike a claim in a summary fashion, **caution and prudence** must be exercised. It is a power which must be used sparingly and only in the clearest of cases. And particularly **where, as here, the case depends upon the facts, the court should be loath to determine the case in a summary fashion.** … [emphasis added].

[13] No evidence is admissible on an application for failure to disclose a reasonable cause of action under Rule 20(26)(a) (*Imperial Tobacco*, para. 22). Evidence is admissible in a consideration of the applicability of the other subsections of Rule 20(26).

[14] There are very few Yukon cases interpreting the *Rules* relating to reply pleadings and none is helpful here. One historical case, *Irwin et al v. Turner et al*., [1894] 16 P.R.

349 (O.N.H.C.), has set out the principles governing the purpose of a reply pleading as follows:

> [18]… **the silence of a pleading as to any allegations contained in the previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation**; and that any allegation introduced for the purpose of preventing such implied admission and not for the purpose of making intelligible the grounds of defence, is to be considered impertinent [emphasis added].

[15] Similarly, in another historical case, *Dingle v. World Newspaper Co. of Toronto* (1918), 57 S.C.R. 573, the Court held that the failure of the plaintiff to plead in its reply that the defendant did not comply with a certain statutory provision (s. 15(1)) was not considered to be an admission that it had been complied with. The Court wrote:

> … Even if the defendant had expressly averred compliance with sub-sec. 1 of sec. 15 in his statement of defence, the **failure of the plaintiff in his reply to deny that allegation would not amount to an admission of its truth** under the Ontario practice [emphasis added].

[16] In my view, the current *Rules* codify and should be read consistently with these principles. Specifically, joinder of issue is implied when no reply is filed (Rule 23(6)). The *Rules* do not permit a reply that is a simple joinder of issue (Rule 23(7)). The purpose of a reply is generally accepted as allowing the plaintiff an opportunity to set out a version of facts different from that pleaded in the defence, if it has not already been pleaded in the statement of claim (see *D. Crupi & Sons Ltd. v. Toronto (City)*, 2018 LNONLPAT 396). This has been codified in Rule 20(22), which states that a general denial of allegations that have not been admitted is sufficient and only where a party intends to prove material facts that differ from those pleaded by an opposite party shall that party plead its own statement of facts, **if those facts have not been**

previously pleaded. It follows from this that the filing of a reply responding to certain parts of a statement of defence does not require the party filing the reply to join issue with every paragraph of the statement of defence in order to preclude an argument that they have impliedly admitted all of those paragraphs.

[17] On the question of the extent of additional facts to be pleaded in a reply, there is a limit to the details to be provided. The Court wrote in *Verscheure v. Verscheure*, [2006] O.J. No. 595, at para. 10:

> [10] … Reply pleading is intended to respond to claims made in an answer, not to make statements that could have been made in the application. However, there is nothing requiring counsel to plead each and every fact upon which he or she intends to rely at trial …

In that case, parts of the reply were struck for providing too much detail in response to a denial in the statement of defence of one of the claims. It was not necessary in the Court's view to detail each and every event on which the party intended to rely.

DISCUSSION

i. Schedule D Claim

Positions of Parties

[18] NAC's claim alleges that YEC has not complied with Schedule D of the contract. Schedule D requires YEC to pay NAC any adjustment to the price of the work arising from the change in the completion date of the contract. It is not disputed that the original completion date of the contract, June 19, 2011, was changed to November 30, 2011, because of YEC's change to the shut-down schedule. Instead of one six-week shutdown starting May 1, 2011, YEC required two shut-downs between June 1 and June 30, 2011 and tentatively scheduled between October 1 and October 31, 2011 (see

amended statement of defence). As a result, NAC revised its construction schedule. NAC alleges it incurred additional costs for which it has not been compensated, because of the change in completion and shut-down dates. YEC denies that NAC incurred additional costs, but if it did, YEC says in its amended statement of defence that those costs were from delays caused by NAC, or by events beyond NAC's control, or by extra work required by the contract. NAC has specifically denied that it caused any delays.

[19] YEC says NAC has not specifically denied in its reply to the amended statement of defence that any costs were incurred by delays beyond NAC's control or by extra work. This failure to deny those specifics, YEC says, is the deemed admission by NAC and forms the basis for the application to strike the entire Schedule D claim. In other words, the Schedule D claim discloses no reasonable cause of action because by not pleading in its reply specifically to those two subparagraphs (para. 26(b) and (c)) in YEC's amended statement of defence, NAC has admitted that they remained on site for extra days for reasons other than the new completion date.

[20] Alternatively, YEC says NAC's Schedule D claim is an abuse of process under Rule 20(26)(d), again relying on the deemed admission in the amended reply. YEC further says that any costs claimed by NAC for delays caused by events beyond NAC's control or by the extra work have already been determined, either by the judge at the first trial (and not appealed) or by the settlement entered into before the first trial. YEC says it would be an abuse of process to allow NAC to pursue the same costs under a different guise. NAC is estopped from claiming costs for which they were compensated in the 2016 settlement.

[21] YEC further argues that NAC's deemed admission is not a technical defect that can be cured by an amendment. This is because NAC did not plead and does not intend to plead any material facts that differ from YEC's pleading that NAC was on site for the additional work period because of delay and extra work. NAC must prove that the only reason for its additional claimed costs is the new completion date. This situation makes the reply admission a complete bar to NAC's claim, according to YEC.

[22] YEC argues that NAC has misinterpreted Rules 20(21),(22), 23(6) and (7). YEC interprets them together to mean that where a reply to a statement of defence is delivered, if an allegation in that statement of defence is not denied or not admitted in that reply, it shall be taken to be admitted.

[23] YEC says that it argued at the first trial that the Schedule D claim duplicates the costs claimed in the delay claim (settled before trial) and the other change of work claims (decided at the first trial or settled before trial), contrary to NAC's assertion that this was not argued. YEC further says that NAC pleaded in its delay claim that the delays caused by YEC design changes and YEC changes to the work, occurred throughout the period of additional work, which further supports their argument that the costs claimed in the Schedule D claim duplicate costs that have already been determined.

[24] NAC responds that it made no admissions in its reply. It argues that all of the pleadings must be read as a whole. NAC points to the amended amended statement of claim, the particulars, and the whole of the reply, particularly paragraph 3, in support of their position that there were no admissions. NAC notes that the Schedule D claim was argued at the first trial successfully by NAC, the wording in the pleadings was similar

(though not identical), and YEC did not raise any arguments about admissions then. The amended pleadings being challenged in this application were filed for clarity and simplicity on order of this Court, for the purpose of the re-trial of four claims, including the Schedule D claim.

[25] NAC argues that Rule 20(22) applies to its reply pleading. As noted above, this Rule provides that a specific denial of every allegation made in the preceding pleading is not required, except where a party intends to prove material facts that differ from those pleaded in a defence, and then the party shall plead his own statement of facts. NAC says that material facts to support its claim were pleaded in its amended amended statement of claim and do not have to be repleaded.

[26] NAC also relies on Rule 20(17) to support its position that it is not required to plead specific facts in reply to YEC's amended statement of defence. This Rule states that a reply requires a party to plead any matter of fact that might take the other party by surprise or raises an issue of fact not arising from the preceding pleading. In this case, NAC says there are no facts that will take YEC by surprise. Further there is nothing required in the reply that would raise an issue of fact that does not arise from the preceding pleading.

[27] NAC notes that Rules 23(6) and (7) imply joinder of issue on the defence where no reply is delivered; and prohibit the filing of a simple joinder of issue. NAC says it cannot be taken to have admitted YEC's amended statement of defence just because it did not set out its position on all the reasons YEC alleges NAC was on site during the additional work period.

[28] NAC states that even if the Court accepts NAC did admit that its costs were not incurred because of a change in the completion date of the contract, issues remain to be determined on the Schedule D claim between the parties. Those issues include whether the contract entitles NAC to be paid costs for its work during the additional work period; what extra work and delays beyond NAC's control occurred during the additional work period; and whether proven extra work and delays beyond NAC's control affected the Schedule D agreement.

[29] Finally, NAC says it is not trying to pursue a claim that has already been determined. In any event this issue would be better determined by the Court at the second trial because of the need to assess the factual bases in the analysis.

Analysis

[30] Applying these principles and *Rules* to this case, I find the combination of Rules 20(21), (22), 23(6) and (7) means that it is not necessary in NAC's reply to deny specifically every paragraph in YEC's amended statement of defence. Here, I agree with NAC that they did not make the admission as alleged by YEC (in effect negating their Schedule D claim) by failing to plead specifically to sub-paragraphs 26(b) and (c) of the YEC amended statement of defence. In my view, the *Rules* do not require a reply to address every single aspect of the preceding pleading, in this case, the amended statement of defence.

[31] If NAC relies on material facts that differ from those in the amended statement of defence, and those facts have not been previously pleaded, then they should be plead in the reply. I find NAC did plead facts in the amended amended statement of claim in support of their Schedule D claim. Paragraph 9(a) sets out the alleged debt from YEC

to NAC for the adjustment to the Price of the Work required by Schedule D. Schedule A to the amended amended statement of claim includes details of NAC's change to its construction schedule because of the change in completion date and shut-down windows and the resulting additional days of work on site and increased costs (see Schedule "A", pages 8 and 8a of the amended amended statement of claim). YEC may successfully argue at trial that those alternate facts pleaded by NAC are insufficient to support the Schedule D claim as it relates to costs caused by the change in completion date. However, that is an argument for trial after hearing evidence and argument. It is not a ground to strike the pleading as it does not meet the "plain and obvious" test set out in the jurisprudence.

[32] I turn to whether or not NAC can be found to have made an admission on a basis other than the failure to plead specifically to YEC's amended statement of defence in its reply.

[33] On an application to strike, the pleadings must be read generously and the facts in them are to be assumed to be true. In this case, I find that NAC has not made any admission for the following additional reasons:

a) the Schedule D claim was a main issue litigated at the first trial; it is now being relitigated after appeal. Without an explicit statement by the plaintiff that it is no longer pursuing this claim, it is unreasonable to conclude that an implicit admission has been made that puts an end to the entire Schedule D claim;

b) the amended amended statement of claim clearly pleads damages owing for a breach of the Schedule D claim – see paragraph 9(a) and Schedule A;

c) most significantly, paragraph 3 of the reply states: "… the New Completion Date and the two shutdown periods required NAC to incur additional costs as a result of the required extended mobilization on site ..."

These factors all contradict YEC's assertion that NAC made an admission that advertently or inadvertently results in their inability to bring the Schedule D claim.

[34] While YEC may have valid defences to the Schedule D claim, including some or all of the arguments raised by YEC on this application, a pleadings motion to strike is not the forum to assess these claims. YEC asserts, without evidence, that it is prejudiced if this claim is allowed to proceed to trial by the additional work it will have to do. This is insufficient to justify a striking of the claim.

[35] In my view, the arguments to strike the Schedule D claim made by YEC are dependent upon an interpretation of the contract, details of the factual contractual dispute between NAC and YEC, requiring an assessment of the evidence, details of other matters that have been settled between the parties, a detailed understanding of the facts in the current pleadings, as well as a detailed understanding of the matters argued and decided at the first trial and on appeal. It is not plain and obvious that there is no reasonable cause of action.

[36] For similar reasons, the argument that the Schedule D claim is an abuse of process is not persuasive. In order to determine whether parts of the claim have already

been litigated and decided, or settled, it is necessary to review the facts and hear evidence in more than a summary fashion.

ii. Cable List Pleading

Position of Parties

[37] YEC argues that NAC's pleadings are inconsistent on the matter of who prepared the cable list. In its amended amended statement of claim, NAC wrote that it compiled a final cable list intended to summarize the "as constructed" cable arrangement. In its reply to YEC's denial of this allegation, NAC stated that it was not able to prepare an as-constructed cable list because YEC did not permit it to return to the Aishihik site. At the first trial, a NAC witness identified a document in evidence at trial as the cable list used, in comparison with an earlier document provided by YEC. YEC argues this was not a NAC document and so cannot support NAC's pleading. This was the only evidence provided by NAC in support of its claim.

[38] YEC says that this inconsistency means the pleading should be struck on the basis of Rule 20(26)(c) – it prejudices, embarrasses or delays the fair trial or hearing of this matter. Alternatively, it is an abuse of process because of its inconsistency (Rule 20(26)(d)).

Analysis

[39] I agree with NAC that whatever happened at the first trial with testamentary or documentary evidence on this issue is not for this Court to consider now. The relevance of the first trial proceeding is that it provided to YEC significant disclosure of the nature of NAC's claims, which will be of assistance to them in the second trial.

[40] I do not agree that this ambiguity in NAC's pleadings amounts to an abuse of process. On its face, though, there does appear to be clarification required by NAC as to whether it compiled the list independently (as the amended amended statement of claim suggests) or whether the list was compiled to the extent possible on the basis of other documents prepared by YEC and it was incomplete. NAC has offered to amend its pleadings to provide clarity based on YEC's concerns to ensure YEC knows the case it has to meet. This is a fair way to resolve the issue. If the claim remains unclear or unsupported by evidence after the pleading amendments and evidence at trial, YEC can argue this at trial. It is not a significant enough matter to constitute a "misuse of [the court's] procedures in a way that would bring the administration of justice into disrepute" (*Wood*, para. 11).

iii. Litigation of Liability for Change of Work Item 111

[41] YEC argues that this issue was determined at the first trial, not appealed and therefore not an issue for the second trial. NAC agrees, and has drafted an amended pleading to this effect. YEC says the amendment addresses more than the liability issue. This is not a reason to disallow the amendment. The current pleading may be amended to remove NAC's claim for liability.

iv. Failure to Mitigate

[42] YEC says that the Court of Appeal of Yukon's decision to deny NAC's cross-appeal on the deficiencies counterclaim prohibits NAC from now claiming failure to mitigate by YEC at the second trial. The Court of Appeal held that the trial judge did not err in finding that YEC did not fail to mitigate its damages by refusing to permit NAC to return to the site to remedy deficiencies (*North America Construction (1993) Ltd. v.*

Yukon Energy Corporation, 2018 YKCA 6, at para. 76). NAC says there may be other examples of YEC's failure to mitigate such as the cost of repairs of the deficiencies and the steps taken by YEC to do the repairs, and they should be allowed to litigate those aspects.

[43] The whole of the deficiencies counterclaim has been sent to be re-tried. The Court of Appeal's decision on mitigation was confined to upholding the trial judge's finding that YEC did not fail to mitigate by refusing to let NAC come on site to do repairs. The trial judge and the Court of Appeal did not make findings on other aspects of mitigation and so they are not part of *res judicata* or issue estoppel. NAC is entitled to raise other general mitigation arguments at the second trial.

[44] NAC has offered to amend its pleading to limit its failure to mitigate allegation so it does not include YEC's refusal to allow NAC to return to the site. Once again, this is an appropriate resolution to this issue. The current pleading may be amended in order to limit NAC's failure to mitigate allegation.

CONCLUSION

[45] I order as follows:

1. YEC's application to strike the Schedule D claim in whole or in part is dismissed.
2. NAC may amend its pleadings to clarify the claim for costs of compiling the cable list and supplying and installing the cables.
3. NAC may amend its pleadings to remove its allegation of failure to mitigate by refusing to permit NAC to attend at the Aishihik site.

4. NAC may amend its pleading to remove its denial of liability for the new cabinets that did not meet the contract specification.

5. All proposed amendments will be delivered to YEC and to the Court at a case management conference.

[46] Costs may be spoken to if necessary.

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DUNCAN J.