16098 Yukon Inc. v. Burgess et al, 2002 YKSC 25

Date: 20020429
Docket: S.C. No. 98-A0135
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

16098 YUKON INC.

PLAINTIFF

AND:

HUGH W. BURGESS, operating as ASSOCIATED BUSINESS GROUP and ASSOCIATED MORTGAGE FUNDS (1996) INC.

DEFENDANTS

REASONS FOR JUDGMENT OF MR. JUSTICE HUDSON

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[1] This is an application brought by the plaintiff for judgment under Rule 18A(1)(a).

FACTS

[2] 16098 Yukon Inc. ("16098") is a corporation duly incorporated under the laws of the Yukon Territory. It was incorporated on December 10, 1997. At that time, there were two directors and two shareholders of 16098, Maurice Byblow ("Byblow") and Charles Ballard ("Ballard"). The corporation was set up to carry on a property development business, namely purchasing, developing and selling mobile home lots on a parcel of land adjacent to the Alaska Highway in Whitehorse.

[3] The defendant Hugh W. Burgess is the principal of the defendant Associated Mortgage Funds (1996) Inc. (“AMF 1996”), which is alleged to be the successor corporation to Associated Mortgage Funds Inc. (“AMF”), but there is no evidence to support that assertion. Associated Business Group (“ABG”) is an unincorporated entity. Constituents and officers of this entity are, on the evidence, uncertain. (All three defendants will be collectively called the “Defendants”, unless the context demands otherwise.)

[4] Ballard was the principal of another Yukon corporation, Capital Tire & Service Centre Ltd. (“Capital Tire”). Capital Tire owned a parcel of land described as Lot 433-4, Group 804 [Yukon], Plan Number 52173 (“the Land”).

[5] The land had been purchased from Tower Acceptance Corporation Ltd. (“Tower”) in February 1996. At the time of purchase a mortgage had been granted back to Tower in the amount of $395,000.00 at an interest rate of 6.75 percent. Capital Tire defaulted on that mortgage in August 1997. Tower commenced foreclosure proceedings against Capital Tire and Charles Ballard personally. An Order Nisi was granted on August 26, 1997 with a redemption period of six months to February 26, 1998, a significant date.

[6] 16098 purchased the Land from Capital Tire on December 8, 1997, with a view to developing a mobile home park. 16098 and Capital Tire entered into an Asset Purchase Agreement for the Land for the stated consideration of $470,000.00. 16098 assumed the mortgage with Tower and paid the balance of the purchase price. How that balance was paid to Capital Tire is uncertain.

[7] Mr. Byblow and Mr. Ballard entered into discussions with Yukon Housing Corporation ("YHC") with respect to the mobile home project. YHC assists mobile home lot developers through both debt and equity participation. On December 23, 1997, 16098 and YHC executed a Letter of Intent in which they agreed to mutually develop a mobile home park on the Land. This Letter of Intent is Exhibit F to Byblow Affidavit No. 1.

[8] In December 1997 and January 1998, Mr. Byblow and Mr. Ballard met with Lynn Ogden of Ogden Feledichuk Financial. The purpose of meeting with Mr. Ogden was to assist Mr. Ballard and Mr. Byblow (actually 16098) in securing financing in order to pay off the mortgage on the Land to Tower and allow the project to proceed. Mr. Ogden introduced the project to Mr. Hugh Burgess, who is, on the evidence, the President of AMF and Chief Executive Officer of ABG. Mr. Byblow, in his affidavit, stated that AMF was a lender, however Mr. Burgess in his affidavit stated that he never informed the plaintiff or it's principals that AMF was a lender. Mr. Burgess' evidence is further bolstered by the fact that the parties entered into a "Mandate and Directive" on January 24, 1998 in which 16098 directed AMF to find a lender. Mr. Byblow acknowledged in his affidavit that the purpose of the Mandate and Directive was for AMF to obtain the funding for provision to 16098 to pay off the Tower mortgage.

[9] 16098 paid AMF a fee of $4,700.00 by bank draft on February 12, 1998. This fee does not appear to be covered by the Mandate and Directive, however Mr. Byblow stated in his affidavit that 16098 was required to pay one percent of the funding sought to secure the services of AMF. It was never satisfactorily explained what the payment

covered, but it clearly shows that the Defendants involved in the payment were acting as brokers, not lenders, at that time.

[10] On February 17, 1998, Mr. Burgess sent 16098 a letter entitled “Letter of Understanding and Commitment” on ABG letterhead. Promotional materials provided to Mr. Byblow by Mr. Burgess indicates that ABG is a group of independent professionals. There appear to be three member companies that make up ABG and AMF is one of those member companies. These documents also confirm that Mr. Burgess is the Chief Executive Officer of ABG, but there is no indication that he is a principal or a participant in this alleged partnership.

[11] The February 17, 1998 Letter of Understanding and Commitment was the start of a series of drafts to the ultimate Letter of Understanding and Commitment executed by both parties on February 25, 1998.

[12] The Letter of Understanding and Commitment of February 25, 1998 is hereby reproduced:

> February 25, 1998
>
> 16098 Yukon Inc.
> c/o 29 Firth Road
> Whitehorse, Yukon
> Y1A 4R5
>
> Dear Sirs:
>
> Re: Letter of Understanding and Commitment
>
> We acknowledge receipt of the property appraisal recently completed by Mr. Terry Darke, AACI, on the subject property on the Alaska Highway next to the Byers Transport lot in Whitehorse, Yukon (described as Lot 433-4, Group 804,

Yukon, Plan No. 52173). We understand that the subject property will be foreclosed on February 26, 1998.

We are prepared to offer a loan for the refinancing of the said property subject to the following terms and conditions:

1. The borrower will be 16098 Yukon Inc.

2. The total amount of the financing will be $420,000.00 (more or less) of which $400,000.00 will be advanced by March 16, 1998, leaving a balance of $20,000.00 (more or less) to be retained to cover interest payments to September 30, 1998.

3. The borrower will provide the lender with a registered first mortgage and opinion of the borrower's counsel.

4. The borrower will either buy out the interim lender within one year of the contract, extend the contract by a further six (6) months by mutual agreement, or alternatively, arrange other financing.

5. The maximum financing cost of the loan will be bank prime rate of interest plus five (5) percent per annum (subject to a maximum rate of two percent (2%) per month in the event that bank prime increases or if financing is from a non-banking source) from the date of the loan.

6. The loan will have a provision for interest-only payments from the date of the advance of the loan to the 30th day of September, 1998; thereafter, blended principal and interest payments will be due on the first day of each month following with an amortization period of twenty (20) years. The borrower may make principal payments at any time and may, without penalty, repay the loan in full at any time after six (6) months.

7. All legal costs, disbursements, appraisal costs, transfer costs, application fees, brokers fees and agreed upon lender's fees will be at the cost of 16098 Yukon Inc.

8. We will make the initial advance of $400,000.00 to the borrower's counsel in trust on March 16, 1998 on the trust condition that after our mortgage is registered, counsel will use the funds first to pay out any

> mortgage, lien and tax accounts that may rank ahead of our mortgage and for no other purpose.
>
> We understand the urgency of the situation and look forward to working with you towards the satisfactory closing of this transaction.
>
> If the foregoing is acceptable to you, please indicate your acceptance by signing in the space below and faxing a signed copy back to us.
>
> With Kindest Regards,
>
> ASSOCIATED BUSINESS GROUP
>
> "Signed by Hugh W. Burgess"
>
> cc: L. Ogden
>
> Accepted by 16098 Yukon Inc.
>
> Per: "Signed by Maurice Byblow"
> Authorized Signatory
>
> Dated: February 25, 1998

[13] The position of 16098 is that the February 25th Letter of Understanding and Commitment was a binding contract, obligating one or more of the Defendants to actually lend funds, or alternatively, to provide funds in exchange for obligations in favour of an unknown lender. This is evidenced by the letter of March 17, 1998 from Mr. Byblow to Mr. Burgess of AMF in which he says:

> I must say that we are in disagreement about what the Letter of Commitment & Understanding of Feb 25 constituted; I believe you are in default for not having provided the funds by the end of yesterday …

[14] The position of the Defendants is that the agreement was not a contract between borrower and lender and that, at best, it was an agreement to enter into a future agreement. In the further alternative, it was most likely an agreement to act as a broker, but was very poorly worded.

THE ISSUES

1. Is the February 25th Letter of Understanding and Commitment (Exhibit W of Byblow Affidavit No. 1), a valid and binding contract obligating the defendants, or one of them, to supply funds to the plaintiff by March 16, 1998, either as lender or otherwise?

2. If so, was there a breach of this contract?

3. If so, what damages flow from the breach?

THE LAW

[15] The current leading case cited in the area of the formation of contracts is *Langley Co-Cost Builders Ltd. v. 474835 B.C. Ltd.*, [2000] B.C.J. No. 1187 (C.A.)(QL).

[16] In determining whether or not there was an intention to create legal relations McEachern C.J.B.C., for a unanimous court, stated the following:

> One of the leading cases is *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607, where Blackburn J. wrote:
>
> > If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other part (sic) and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.
>
> This dictum is often quoted as authority for the proposition succinctly stated by McLachlin J. (now C.J.C.) in *Osorio v. Cardona* (1984), 15 D.L.R. (4th) 619 that, "The test for intention to create legal relations is objective." It is stated in S.M. Waddams, The Law of Contracts, 4th ed. (Toronto: Canada Law Book Inc., 1999), at 106 that "it is not what the signer inwardly intends but what he appears to a reasonable promisee to do that is relevant. (at paras 18-19)

McEachern C.J.B.C. also stated at para. 37 that there must be certainty with respect to the terms of the contract:

> This analysis is carried out according to the standard rules of contract construction: give the words their plain and ordinary meaning where that meaning does not conflict with the context of the communications as a whole. Where there is ambiguity, extrinsic evidence may be considered.

[17] In the case at bar, the plaintiff states that the February 25, 1998 Letter of Understanding and Commitment is a legally binding contract between the plaintiff and the Defendants for a loan of $420,000.00, more or less, and that the meaning of the terms is fully contained within the four corners of the document itself. The plaintiff argues that extrinsic evidence, or parol evidence, is not to be used, as definition can be given to the document without resort to such evidence. Despite this assertion, counsel for the plaintiff led the court through a great deal of extrinsic evidence leading to the execution of the February 25, 1998 Letter of Understanding and Commitment.

[18] The Defendants take the position that the February 25, 1998 Letter of Understanding and Commitment is not a legally binding contract in the terms pleaded. They state that the February 25, 1998 Letter of Understanding and Commitment was a direction to secure a loan (acting as a mortgage broker) and, if not, at most was a contract to enter into a contract, which was never finalized. They point out numerous ambiguities in the document.

[19] At first glance, the document might appear to have all the hallmarks of a binding contract. Once it is examined closely, the Defendants assert, it becomes apparent that

there are many difficulties in determining what the intentions of the parties were within the four corners of the document itself.

[20] In examining the February 25, 1998 Letter of Understanding and Commitment, I agree with the Defendants on the issue of ambiguities. There are some ambiguities within the letter that cannot be resolved using only the language of the letter itself. For example:

1. The preamble states: “We are prepared to offer a loan…”. “We” is not defined in the body of the document. The confusion is compounded by the fact that it later refers to “the lender” and “the interim lender” in paragraphs 3 and 4, respectively. This use of terminology presents confusion as to who exactly is providing the loan. There is clearly uncertainty about who the parties to the contract were as well as uncertainty about the intention of the Defendants to lend the money. Whether it means, “we are prepared to offer a loan” is uncertain. Also, this possibly means, “we are prepared to offer this loan opportunity to lenders.”

2. The interest rate in paragraph 5 creates a contingency depending on the source of funding. This creates an ambiguity as to who was supposed to be providing the funds. Again, this is evidence of an uncertainty as to the intentions of the Defendants in executing this document.

3. References to the “borrower will be” or “the borrower may” carry an inference of a future decision as to parties to be obligated.

[21] The language used in the formation of this document is unfortunate. The document was drafted stating that “We are prepared to offer a loan… ” and “We will make the initial advance of $400,000 to the borrower’s counsel in trust on March 16, 1998…”. When taken in concert with the ambiguities noted above, it only compounds the uncertainty as to who the parties to the contract are, and what they are promising to do.

[22] It must be remembered that the Defendants did not draft the February 25, 1998 Letter of Understanding and Commitment. It was drafted by counsel for the plaintiff. The doctrine of *contra proferentem* applies. Any ambiguities will therefore be resolved against the plaintiff’s interest.

[23] The plaintiff argued that the court should not be able to consider parol evidence in this matter. They cited the case of *Shields v. Landreth*, [1919] 1 W.W.R. 763 (Sask K.B.) at p. 764, which states:

> Where the contracting parties have committed the terms of the contract to writing, especially a writing under seal, an averment by either of the parities as to what was said or understood previously to, or contemporaneous with, the written contract, is excluded.

[24] However, this is only the case when the language in the contract is clear and unambiguous. As Fridman, in *The Law of Contracts*, 4th Ed. states:

> Where the contract as written is ambiguous, extrinsic evidence can be admitted to resolve such ambiguity. (at p. 482)

[25] I find the document of February 25, 1998 lacks clarity and definition, which lack and the ambiguities presented justify a look at the surrounding circumstances. The

surrounding circumstances, however, in themselves, are unclear with respect to the parties intentions when viewed objectively:

1. The various names of Associated Mortgage Funds, Associated Mortgage Funds Inc., Association Mortgage Funds (1996) Inc. and Associated Business Group, are used in conjunction with Mr. Burgess' name, making it unclear, or at least undecided, as to who the party was that is being contracted with.

2. The position of YHC is reasonably clear in the Letter of Intent, but what is said about it by both parties, the plaintiff and the Defendants, is confusing and, perhaps, unsupported by the Letter of Intent or any other document emanating from YHC.

3. The February 25, 1998 Letter of Understanding and Commitment appears to originate with the Defendants. However, it was, in fact, drafted by the plaintiff's solicitor. Why does plaintiff's solicitor prepare the document and construct the defendant's letterhead for that purpose?

4. Both parties use the term "lender" frequently, as though there was a third party involved.

5. There is evidence that indicates that on many occasions AMF or ABG conducted themselves as mortgage brokers to the knowledge of the plaintiff.

6. The plaintiff paid broker fees to the defendant AMF.

7. Mr. Burgess' affidavit indicated that at all times he was acting as a middleman or broker.

8. The February 19, 1998 letter from Burgess states: "I acknowledge receipt of your suggested draft of a letter that you would find suitable for your purposes." What meaning can be put to that?

[26] Perhaps the most significant variable to the February 25, 1998 Letter of Intention and Commitment is the letter from Mr. Burgess to Mr. Byblow (Exhibit F of Burgess No. 1 affidavit), which is, in fact, a fax cover sheet. This document accompanied Exhibit V of the Byblow affidavit which had been requested by Mr. Byblow. Therefore, the fax cover sheet in question was sent by Mr. Burgess and received by Mr. Byblow on February 25. It states as follows:

> Message: HELLO MR. BYBLOW:
>
> In response to your fax, I will take this opportunity to confirm our mutual understanding on the interest rate.
>
> As indicated, we may *not* get conventional financing in the short space of time by mid March.
>
> The strategy therefore would be to buy back the property and have control in your name.
>
> This will then provide sufficient time to attract favourable financing to the project with good interest rates. The process will commence three (3) months after close of the bridge-financing loan which will be paid out upon refinancing.
>
> I have also enclosed a corporate and personal profile along with a reference letter from a recent client.
>
> Have not got the luxury of time to update our corporate brochures (which are a few years old). Will certainly forward when completed within the next few months.

> In the interim, I trust that the profiles will suffice.
>
> Thank you and I look forward to working with you!
>
> WITH KINDEST REGARDS
>
> (Signed “HUGH”)

[27] This letter, Exhibit V of Byblow Affidavit No. 1, received by Mr. Byblow on February 25, 1998, was not exhibited in Mr. Byblow’s affidavit with the promotional materials it accompanied. It was also apparently not shown to Mr. Snow who was proceeding on the basis that the letter of February 25, which he drafted, was the only document in existence regarding the obligation allegedly created by the Letter of Understanding and Commitment.

[28] It can be seen that this cover sheet expresses a great deal of anticipated delay before monies will find their way to the plaintiff. This letter may provide some explanation as to what was meant by “that you would find suitable for your purposes” as contained in the letter of February 19, 1998. This letter acknowledged the response to the letter of February 17, 1998. Mr. Burgess appeared to be setting out his view of the letters being drafted at that time. He stated:

> We acknowledge receipt of your suggested draft of a letter that you would find suitable for your purposes.

I take from this statement that he is saying that the letters are being drafted for certain specific purposes of 16098.

[29] On April 14, 1998, and in other correspondence, ABG stated:

> Our February 24th Letter of Understanding and Commitment was issued under you and your lawyer's instructions in order to enable you to buy additional time to allow you to:
>
> - a) finalize your joint-venture agreement with the YHC
> - b) get an extension on the Tower Acceptance foreclosure proceedings.

(This appears in the Affidavit of Byblow No. 1, Exhibit QQ.)

[30] It is the Defendants' position that the Letter of Understanding and Commitment of February 25, 1998 was obtained by Mr. Byblow for the principal purpose of procuring a document to show the mortgagee (Tower) evidence of progress in raising funds to pay off the Tower mortgage and thereby secure an extension of the March 16, 1998 deadline.

[31] This submission, I find, has considerable merit considering all of the evidence.

[32] Subsequent correspondence indicates that the plaintiff was prepared to continue with the negotiations. In these negotiations the plaintiff was continually made aware of the position of the Defendants that the funds were to come from a lender to be located by the Defendants and not from the Defendants themselves.

[33] The position of the plaintiff is spelled out in the Affidavit of Byblow No. 1 from paragraph 22 to paragraph 35. Likewise, the position is also spelled out in Mr. Burgess' affidavit No. 1 in paragraphs 8 to 38.

[34] The correspondence leading up to February 25, 1998 describes a relationship of client and broker in documents presented by the plaintiff and Defendants. These include the "Mandate and Directive" (Affidavit of Byblow No. 1, Exhibit I), which, although poorly

worded, set out the relationship and is supported by the bank draft. (Exhibit K to the Affidavit of Byblow No. 1)

[35] On February 24, 1998, Mr. Byblow wrote to Mr. Burgess and stated, *inter alia*:

> You advised me that you needed the rate to source the funds…
>
> …
>
> Could you provide us with a corporate resume, brochure or profile to assist us in removing the foreclosure, etc.
>
> (My emphasis.)

[36] These pieces of evidence give some indication that the plaintiff knew the Defendants were acting as brokers, and secondly, that the purpose of the letters of February 24 and 25, 1998, were to provide an instrument to secure an extension of time in the foreclosure matter.

[37] Mr. Byblow was cross-examined on his affidavit. This appears from the transcript at pages 67 and 68:

> Q Now, did you, at that point when you sent that fax to Mr. Burgess, believe that Mr. Burgess was going to lend the funds to you? (Referring to Exhibit F of the Affidavit of Burgess No. 1)
>
> A Well, it's not entirely clear how the funds would flow. That was never very clear. It could be a third party sourcing, but up to this stage of negotiation, it was clearly my understanding that it would flow through A.B.G., because that's where we got to.
>
> MR. SHIER: Madam Reporter, can you please read my question out to the witness?
>
> …

THE COURT REPORTER (By Reading):

"Q Now, did you, at that point when you sent that fax to Mr. Burgess, believe that Mr. Burgess was going to lend the funds to you?"

Q MR. SHIER: What's your answer?

A At that point, it was my understanding that Mr. Burgess was not personally going to be lending the money.

…

Q Now, at that point, did you believe that Associated Business Group was going to be lending the money to you?

…

A Okay, at this point now, it is my understanding, given where we got to in achieving this negotiated letter of commitment, it was my understanding that the money is now going to flow through one of his companies. He was clearly going out to source it somewhere. There had to be third party involvement, but he was going to get it, flow it through, and we'd be paying the bill back to A.B.G. That was my understanding.

MR. SHIER: Can you read the question, please, again.

THE COURT REPORTER (By reading):

"Q Now, at that point, did you believe that Associated Business Group was going to be lending the money to you?"

A The short answer is "Yes".

The passage above, referring to the understanding between the parties as at February 24, 1998, does not support the plaintiff's position.

[38] Mr. Burgess, in his Affidavit No. 1, Exhibit G, discloses three letters written to prospective lenders in support of the Defendants' position, as to the Defendants' intentions at this time. These letters were written February 23, 1998.

[39] Exhibit I to Affidavit No. 1 of Burgess, is evidence of an interested lender. A copy of the letter of interest was intended to be sent to Mr. Byblow via Mr. Ogden.

[40] Exhibit K to Affidavit No. 1 of Mr. Burgess is a reply letter to this proposed lender. There is reference by Mr. Burgess to "my client", referring to 16098.

[41] The evidence of the relationship between these parties in a business sense is very difficult to understand. After much consideration and reconsideration I am unable to find that the plaintiff has made out its case against the defendants ABG and AMF (1996). Specifically, it has not been proven on the evidence that AMF (1996) was even a participant in ABG.

[42] With respect to ABG, the evidence, it seems to me, viewed objectively, is ambivalent as to the intentions of the party and the legal relationships that may have been created. I am concluding that Exhibit W to the Affidavit of Byblow No. 1 contained ambiguities that, in order to interpret it, enabled me to view the surrounding circumstances leading up to its execution and thereafter. The document in question was drafted by the plaintiff's solicitors in circumstances where it is apparent that the plaintiff did not fully inform its solicitors.

[43] Not only before, but also after February 25, 1998, the evidence, as I see it, shows the Defendants to be brokers and not lenders. Therefore, looking at all the evidence,

and having regard to the burden of proof upon the plaintiff, I am not satisfied and do not find that the liability of the defendant ABG, or indeed any of the Defendants, has been established on the evidence.

[44] With respect to the defendant Mr. Burgess, it is abundantly clear in that the evidence of Mr. Byblow on the cross-examination of his affidavit contains an admission that Mr. Burgess did not personally undertake to advance any funds or loan any funds.

[45] Therefore, this application and the action are dismissed as against all Defendants with costs to the Defendants.

Hudson J.

Glen R. Thompson	For the Plaintiff
Daniel S. Shier	For the Defendants