SUPREME COURT OF YUKON

Citation: *Kareway Homes Ltd.* v. *37889 Yukon Inc.*, 2011 YKSC 37

Date: 20110411
Docket S.C. No.: 09-A0095
Registry: Whitehorse

BETWEEN:

KAREWAY HOMES LTD.

Plaintiff

AND:

37889 YUKON INC.

Defendant

Before: Mr. Justice E.W. Stach

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

RULING ON SUMMARY TRIAL APPLICATION DELIVERED FROM THE BENCH

[1] STACH J. (Oral): In 2007, the parties elected to collaborate with one another in the development of certain lands, and the construction on those lands of two multiple-unit residential condominium buildings. This was a major undertaking that ultimately gave rise to an expenditure of several millions of dollars.

[2] The collaboration between the parties sought to take advantage of the plaintiff's skills in the construction of residential buildings and the defendant's ownership of still undeveloped properties which it held. Differences in the execution of their proposed

collaboration resulted in these legal proceedings between the parties. Pleadings have long since been exchanged, examinations for discovery have also been completed.

[3] The current difference of opinion between the parties, and the engine that now brings this aspect of the matter before the Court for decision, is whether the lawsuit is capable of disposition by a summary trial based on affidavit evidence, or whether a full trial with oral testimony is required. The defendant owner says the matter is suitable for disposition by summary trial. The plaintiff builder says it is not.

[4] In 2007, the parties signed a Development Agreement. The Development Agreement cannot, in my opinion, be put forward as a model of draftsmanship. In addition to providing design conceptualization and the supply of labour and materials, the builder obliged itself, in paragraph 1 of the Development Agreement, to do such other things necessary to do the construction work required for the project described in Schedule A. The Development Agreement states that the description of the scope of the project listed in Schedule A will include the things necessary for the full execution and completion of the project. It is to be noted that Schedule A in the signed Development Agreement is a blank page.

[5] Paragraph 1.0 of the Development Agreement similarly provides that both parties will contribute to and reach consensus on development and approval of the project pre-budget and project working budget; development and approval of the project description; scope plans, et cetera; development of a time schedule for the project. That language in paragraph 1.0 suggests an ongoing process in respect of material aspects of the project on which consensus had not yet been reached by the parties. This view of

the matter is reinforced by paragraph 1.4 of the Development Agreement, which states that:

> Notwithstanding anything contained in this Agreement, the Owner and the Builder shall attempt to resolve any and all differences of opinion with respect to the Project, as to the terms and conditions of this Agreement, or with respect to the interpretation of this Agreement ...

[6] Notwithstanding the "Entire agreement" provision set out in paragraph 27 of the Development Agreement, it appears clear that numerous open-ended features remained a part of the "entire agreement" of the parties. Those open-ended features required an ongoing process between the parties to define more precisely what their expectations were. There are numerous glaring factual disparities between the affidavits filed on behalf of the builder and the owner. There are live issues of fact: whether, as between the builder and the owner, a formal budget was ever agreed upon; who bore responsibility for tracking or controlling costs; the extent of agreement, if any, over extending the completion date; whether all proposed changes or extras respecting the condominium buildings were discussed or agreed upon; whether the builder adopted and used a purchase order system in respect of this project.

[7] In their affidavits, both parties give widely disparate accounts of meetings, conversations, and the results of those meetings and conversations and their implications for the project. I think it quite impossible for a trial judge to make a fair and just determination of the several factual matters that remain an issue between the parties without hearing oral testimony and the much enhanced opportunity it provides to make findings of credibility.

[8] In *Dahl* v. *Royal Bank* (2005), 46 B.C.L.R. (4th) 342, the British Columbia Court of Appeal sets out various factors to consider in determining whether a proceeding is suitable for disposition by way of summary trial. Veale J. in *McCully Contracting Ltd.* v. *Osborne,* [2001] Y.J. No. 108, provides a similar canvassing of such factors. These decisions provided a useful template for me in reaching my decision on the matter now before the Court.

[9] This is a complex matter that requires a full trial in the usual course, and I so order.

[10] Those are my reasons, counsel. Is there any submission that counsel wishes to make in respect of costs?

[11] MR. TATCHELL: Well, I'll make the -- I'll leave it to my friend whether he wants to go first, but I submit that in these circumstances costs should be in the cause.

[12] THE COURT: Okay. Mr. Tucker?

[13] MR. TUCKER: Your Honour, I would ask for costs on a normal scale, on the normal scale, simply given the --

[14] THE COURT: What is the normal scale? Is it Schedule B?

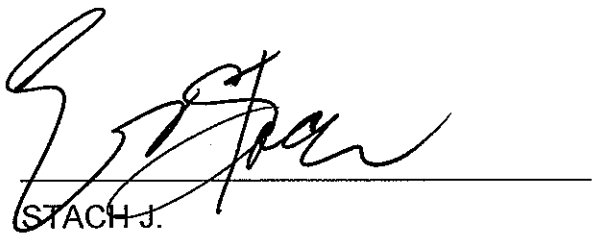
[15] MR. TUCKER: Yeah, I have it in my computer, my *Rules*, yes, and I'm not sure offhand, it used to be A, B, C; I think they changed it, but for a matter of -- that's not -- I mean, in terms of this application being not complex of the normal

difficulty, I can find it if you'll give me a moment.

[16] THE COURT: Will it be understood by counsel and anyone else who needs understanding if I order costs in the usual scale?

[17] MR. TATCHELL: That'll be fine for us. Are you ordering costs in any event or costs in the cause?

[18] THE COURT: I am of the view that costs should normally follow the result, and I see no reason that they should be made costs in the cause. So I decline to take up your suggestion, Mr. Tatchell.



STACH J.