SUPREME COURT OF YUKON

Citation: *Norcope Enterprises Ltd. v. Government of Yukon*, 2012 YKSC 25

Date: 20120411
S.C. No. 11-A0020
Registry: Whitehorse

Between:

NORCOPE ENTERPRISES LTD.

Plaintiff

And

GOVERNMENT OF YUKON

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Karen Martin and Owen J. James	Counsel for the Plaintiff
Charles W. Bois and Sarah D. Hansen	Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Norcope Enterprises Ltd. (“Norcope”) applies for a summary trial, pursuant to Rule 19(1) of the *Rules of Court*, on the threshold issue of whether the Government of Yukon (“Yukon”) breached its contract with Norcope by awarding additional excavation and hauling work (the “disputed work”) to another contractor. The contract terms are not in dispute. Yukon opposes the summary trial and applies for an order under Rule 19(9)(b),(i) and (ii), saying that the issue raised is not suitable for disposition by summary trial and will not assist the efficient resolution of the proceeding.

[2] I have ordered that a summary trial proceed on the threshold issue of whether the additional excavation and hauling work is effectively a change order within the scope of the contract or whether it is new work that Yukon is not required to give to Norcope under the contract. These are my reasons.

BACKGROUND

[3] This court action began with an application by Norcope for an injunction to prevent the award of the disputed work, valued at approximately $2.1 million, to another contractor. That application was abandoned, and Norcope now seeks a declaration that it was entitled to do the disputed work and a judgment for damages.

[4] As early as 2006, Yukon and the City of Whitehorse (“Whitehorse”) began planning a multi-phase residential subdivision project called the Whistle Bend Project (the “Project”). Yukon is the owner of the lands and manages the Project while the planning and public consultation was completed by Whitehorse. In the spring of 2008, Yukon and Whitehorse entered into a Subdivision Planning Agreement based upon a Land Development Protocol for land development in Whitehorse. The Project is in response to an acute housing shortage in Whitehorse. Stages one and two of the Project are designed to accommodate 194 single family lots, 48 townhouse lots, 34 duplex lots and 17 multiple family lots to be made available in the fall of 2012 and 2013. The design includes a school site, one community use lot, and three parks, all of which will accommodate approximately 8,000 residents in nearly 3,900 housing units.

[5] In January 2011, Yukon issued a Request for Tenders for the Deep and Shallow Underground Utilities work for the Project (the “Tender”). The Tender is a complex and voluminous set of documents that forms part of the contract and includes:

(a) Instructions to Bidders “A”;

(b) Supplementary General Conditions “B”;

(c) General Conditions “C”;

(d) Conditions “D”, “E”, “F”, “G” and “H” which do not appear to be relevant to this application;

(e) Plans and Specifications “I”;

(f) List of drawings of Issued for Tender Drawings (the “IFT Drawings”), as well as “other documents”, Tender Forms and Addendums.

[6] Plans and Specifications “I” includes a Scope of Work clause that says:

> The Contractor shall furnish all labour, supervision, equipment and materials necessary to complete the Project in accordance with the plans and specifications, namely:
>
> …
>
> (n) Common excavation to embankment or to disposal as required.

[7] The General Terms and Conditions in ‘C’ are enumerated as a series of ‘GC’ numbers. GC 24 provides Yukon the right to add to, remove from or amend the work being done by Norcope.

[8] GC 32 provides the conditions that permit Yukon to take the work out of the contractor’s hands.

[9] GC 44 provides for the determination of cost when negotiations fail.

[10] On March 1, 2011, Norcope tendered the lowest compliant bid at $15.939 million and was awarded the construction contract in a document entitled Articles of Agreement dated March 28, 2011 (the “Contract”). The Contract includes specific dates for total and substantial performance of various stages of work.

The Contract Dispute

[11] The following is not a finding of fact but a brief explanation of the contract dispute. There are no doubt credibility issues that will arise in resolving this dispute, and I do not purport to determine them here. I note that Norcope also pled that Yukon is in breach of its obligation to negotiate in good faith, however, it abandoned this claim as part of its application for summary trial.

[12] Norcope says that on March 30, 2011, it was advised by the Project Engineer retained by Yukon that there was a change to the drainage plan for the Project which would be reflected in the "Issued for Construction" drawings (the "IFC drawings"). Because the change raised lot elevations on the site, additional excavation and hauling became necessary, and it is this work that is in dispute. Norcope assumed that it would do the disputed work as an amendment to the Contract and believed that the fill required for the raised lot elevations was to come from excess soil that it would haul to the stockpile area. There are a number of e-mails between Mr. Lasker, Norcope's Project Manager, and Mr. Ritchie, Yukon's Project Manager, discussing the disputed work "and its impact on Norcope's contract and pricing." Ultimately, Yukon did not accept Norcope's pricing and awarded the disputed work to another contractor; in fact one who had submitted an unsuccessful bid on the original tender. In May 2011, Norcope says that Yukon, through Mr. Molloy, its Director of Infrastructure Development, presented Change Order No. 1 which in effect removed significant excavation work from Norcope's scope of work under the Contract.

[13] Yukon acknowledges that the IFC drawings issued on April 11, 2011 contained significant design changes, one of which was a change in the direction of the drainage

slope from a north-south orientation to a south-north orientation which required new excavation work. While Yukon says that most of this work was outside of the Contract, it acknowledges that the changes also created some variation in the scope of Norcope's work under the Contract. Yukon says that, because of this, the Design Team produced a new unit price table and revised estimated quantities for work and asked Norcope to respond with revised numbers, both for work under the Contract and with respect to estimated costs for the new work. To be clear, Yukon says the excavation work resulting from the change in the direction of the drainage slope was "new work" and that there was no provision in the Contract requiring Yukon to award it to Norcope. Yukon says it had the discretionary right to add, remove or change the work under the Contract, and that the actual change to the work contemplated by the Contract was insignificant. Yukon takes issue with Norcope's view of the disputed work and the pricing but agrees that it was not prepared to let Norcope commence the new work.

[14] In essence, Norcope claims that it was entitled to perform the disputed work under the Contract, and that it should be awarded damages to reflect investments it made in equipment in anticipation of performing additional excavation work and also to reflect harm to its business and censure of Yukon's conduct. Yukon's Statement of Defence and Counterclaim denies that the Contract required that the disputed work be given to Norcope and denies that Norcope has suffered any damage. Yukon has counterclaimed that Norcope interfered with the contractor it awarded the disputed work to and breached the Contract, thereby causing damage to Yukon.

[15] Although it is not part of the summary trial application, the damages claimed by Norcope include equipment leases for six dump trucks, two compactors and one

caterpillar dozer, all allegedly signed to complete the disputed work. Yukon denies that the equipment leases had any connection to the disputed work. In any event, the application for summary trial relates to the interpretation of the Contract only, and the damages and counterclaim would be resolved subsequently.

[16] The evidence filed by both parties consists of a lengthy affidavit of Mr. Gonder, the owner of Norcope, a lengthy affidavit by Mr. Molloy, a further affidavit of Mr. Gonder and an affidavit of Mr. Ritchie. Norcope's counsel proposes that cross-examinations can take place prior to the summary trial and expert evidence can be filed to deal with the industry practice issue.

Summary Trial Law

[17] The Yukon *Rules of Court* state that the object of the *Rules* is as follows:

> **Object of rules**
>
> 1(6) The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding, and the expenses incurred by the parties in resolving the proceeding, are proportionate to the court's assessment of
>
> (a) the dollar amount involved in the proceeding,
>
> (b) the importance of the issues in dispute to the jurisprudence of Yukon and to the public interest, and
>
> (c) the complexity of the proceeding.

[18] Rule 19(1), the summary trial rule, provides that a party may apply for judgment "either on an issue or generally".

[19] Pursuant to Rule 19(4), the court may hear evidence by way of affidavit, interrogatories, evidence taken on examination for discovery and written expert opinion.

[20] Rule 19(9) provides for a preliminary direction that the application under Rule 19(1) be dismissed on the grounds that the issues are not suitable for disposition by summary trial or will not assist the efficient resolution of the proceeding. Rule 19(9) also allows the court to direct that a deponent or an expert attend for cross-examination and permits the court to set time limits for further evidence and briefs.

[21] Rule 19 essentially adopted the former summary trial rule from British Columbia. B.C.'s Rule 18A was added to the British Columbia *Rules of Court* in 1983 and was intended to provide for the early resolution of cases. A great deal of litigation has stemmed from the question of just how far a judge can proceed where there is conflicting evidence on the facts of a case. The resulting case law focusses to some extent on the powers of a judge on the hearing of the summary trial application.

[22] Rule 19(12) provides:

> 19(12) On the hearing of an application under subrule (1), the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
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> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, as it thinks just, and
>
> (c) award costs.

[23] As a result, even if an issue is ordered to proceed to summary trial, the court may decline to grant judgment if it is unable to find the facts necessary to decide the issues or concludes it would be unjust to do so.

[24] The generally-accepted leading authority on summary trial practice is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989) 36 B.C.L.R. (2d) 202 (C.A.), ("*Inspiration Management*"). In that case the personal plaintiff, who was the sole shareholder of the corporate plaintiff, had borrowed money from the defendant brokerage house and placed it in a corporate investment account. When he subsequently withdrew funds, the account fell into a debit position and the defendant began to sell shares to recoup the debt. The issue was whether some of the shares had been wrongly sold, and the affidavit evidence conflicted on which shares had been pledged as security. The chambers judge dismissed an application for a summary trial on the ground that one was only available where a normal trial could not possibly make any difference to the outcome. The British Columbia Court of Appeal granted leave to the plaintiffs to file a new Rule 18A application on the ground that this was the wrong test.

[25] The five-member panel in *Inspiration Management* focussed on the role of the judge on a Rule 18A application as well as the circumstances to be considered when determining whether a summary trial is appropriate. This decision is directly relevant to Rule 19 of the Yukon *Rules of Court*.

[26] I adopt counsel for Norcope's summary of the principles from *Inspiration Management*:

(a) judges should be careful but not limited in using Rule 18A (para. 47);

(b) in deciding whether it would be unjust to give judgment, the court may consider the amount of money involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other relevant matters that arise (para. 48);

(c) in determining whether an issue in the action should be determined by summary trial, the court should consider whether deciding that critical issue will assist the parties to reach an accommodation on other questions (para. 50);

(d) if the court can find the facts, then it must give judgment, unless for any proper judicial reason it would be unjust to do so (para. 52);

(e) conflicts in the affidavit evidence can be resolved by considering other admissible evidence (para. 56); and

(f) the right to summary judgment plays an increasingly important role in the efficient disposition of litigation and its use is not limited to simple or straight forward cases (para. 57).

[27] *Western Delta Lands Partnership v. 3557537 Canada Inc.*, 2000 BCSC 54, ("*Western Delta"*) is a more recent consideration of the former Rule 18A. It refines, and to some extent restates, the *Inspiration Management* principles.

[28] In *Western Delta,* Allan J. found that there is a heavy onus on the party seeking to dismiss a summary judgment application to demonstrate that the issues should not

be decided summarily (para. 21). He found that this onus would rarely be met unless one of the following circumstances existed (para. 24):

> (a) the litigation is extensive and the summary trial hearing itself will take considerable time;
>
> (b) the unsuitability of a summary determination of the issues is relatively obvious, e.g., where credibility is a crucial issue;
>
> (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
>
> (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.

[29] Allan J. permitted the case before her to go to summary trial, even though the initial application had 17 binders of affidavit and documentary evidence. I read the *Western Delta* judgment as supportive of the *Inspiration Management* position that conflicts in affidavit evidence can be resolved by considering other admissible evidence, especially in cases where, as here, there is a written contract and helpful background documentation. In other words, credibility issues and conflicts in evidence are the very essence of most court cases and should not prevent the frequent and judicious use of summary trials.

[30] In *McCully Contracting Ltd. v. Osborne and 13183 Yukon Inc.*, 2001 YKSC 535, I concluded that the matter was not suitable for summary trial because of “a high degree of factual dispute, which requires oral testimony to determine credibility” (para. 20). In that case, verbal discussions about a land purchase had taken place in 1996 and 1997. McCully asserted an agreement was reached for him to purchase the lot from Osborne while Osborne denied that this was the case. In 1997, McCully discovered that Osborne

was building a shop on the lot. He filed a *lis pendens* and statement of claim in August 1999, and Osborne filed an application for summary trial in July 2001. There was a flurry of affidavits filed with the court, each contradicting the previous one, and a shortage of evidence that was independent from the recollection of the parties. I set the matter down for a conventional trial on October 22 – 24, 2001 after completion of discoveries. The primary reason for denying a summary trial on affidavits was the contradictory evidence about the conversations between McCully and Osborne that had taken place in 1996 and 1997, as well as the lack of any written contract.

ANALYSIS

[31] Per *Inspiration Management,* I have considered the following factors in concluding that a summary trial is appropriate in this matter:

1. the complexity of the matter;
2. the urgency of the matter;
3. any prejudice by reason of delay;
4. the cost of taking the matter to a conventional trial;
5. deciding the liability issue will assist the parties to reach accommodation on other matters.

[32] However, in my view, the above factors are largely subsumed in the *Western Delta* consideration that an application to dismiss a summary trial application is likely to fail unless one or more of the following circumstances exist:

a. the litigation is extensive and the summary trial hearing itself will take considerable time;

b. the unsuitability of a summary determination of the issues is relatively obvious, e.g., where credibility is a crucial issue;

c. it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or

d. the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.

[33] As such, my analysis is framed slightly differently than what was set out by McEachern C.J.B.C. in *Inspiration Management.*

Complexity of the Summary Trial

[34] Counsel for Yukon submits that a summary trial is not appropriate as there are complex factual and legal issues to resolve. Her written submission sets out nine factual issues and six legal issues to be determined as follows:

Disputed Facts

(i) What work was the Plaintiff to perform on the Project and when?

(ii) What was said to the Plaintiff when the Defendant requested that it provide the Defendant with its proposed pricing and scheduling offer for the New Work?

(iii) How did the redesign of the Project come about and what was communicated to the Plaintiff?

(iv) Can the mere issuance of the issued for construction documents be said to constitute instruction or authorization to the Plaintiff to perform the New Work, either expressly, implicitly, or otherwise?

(v) What was said by the Defendant to the Plaintiff at the time of the issued for construction documents concerning the New Work?

(vi) What the Plaintiff said to the Defendant further to any request for authorization or instructions from the Plaintiff and the Defendant's response.

(vii) What is the scope of the Contract between the Plaintiff and Defendant as bid by the Defendant?

(viii) Whether the Defendant in fact requested the Plaintiff to do the New Work?

(ix) Whether the Plaintiff in fact admitted that the New Work was not part of the Contract?

Legal Issues

(i) the issue of hierarchy of provisions when there is a conflict in and between the Specific Instructions, and General Instructions of the General Requirement and other parts of the Contract including General Conditions, Supplementary General Conditions;

(ii) the ability of the parties to amend the Contract, whether expressly or implicitly;

(iii) the scope of work under the Contract (mixed fact and law);

(iv) is the New Work outside the scope of work identified under the Contract?

(v) Expert evidence regarding the process for changing the scope of work and, specifically, the allocation of New Work to a contractor:

(vi) Alternatively, expert evidence on the interpretation of the contractual terms "delete or change" the work under section GC 24 of the Contract?

[35] While I have no doubt that there may be some complexity in the matter, I find that when, as here, there is a comprehensive written contract, the complexity is more in the

context of interpretation than a factual inquiry to determine the terms of the relationship between the parties. The existence of an extensive written contract supports the application for a summary trial.

[36] This case is readily distinguishable from *McCully Contracting* where the issue of whether a contract even existed was in dispute. In the case at bar, the terms of the Contract are clear, and the issue can quite simply be stated as whether the disputed work was within the scope of the Contract or whether it was new work that Yukon was not obligated to give to Norcope.

Credibility

[37] Counsel for both parties acknowledge that there are credibility issues inherent in any determination of whether there has been a breach of contract. The issue at this stage is the extent of the credibility issues and whether they can be resolved in a summary trial through discovery transcripts and cross-examination on the filed affidavits.

[38] In my view, the credibility issues raised by counsel for Yukon can be explored in cross-examination on the affidavits. In addition, there are numerous e-mails back and forth which will assist the trier of fact in making determinations about the parties' credibility. The credibility issues here do not go to the root of whether a contract exists, as was the case in *McCully Contracting,* but rather to what was said by the parties in their discussions about the contract and the disputed work. It is also important that there is extrinsic evidence in the form of written correspondence to support any conclusions made.

The Time and Expense Involved

[39] Clearly, when a summary trial is going to involve extensive affidavits, numerous witnesses and voluminous documents, consideration must be given to whether it will be efficacious. In this case, counsel indicate two to three days will be required, provided that cross-examinations take place in advance. Counsel for Yukon also wishes to call an expert on industry practice and have that expert testify orally in addition to providing the written report required by the *Rules of Court*.

[40] I do not find that three days is in any way out of the ordinary for a summary trial, and I note that this estimate does not exceed the length of some interlocutory applications. Undoubtedly, a conventional trial would be considerably longer and it would require looking well into the future to find a trial date suitable to the parties.

[41] A consideration of time and expense also favours a summary trial, as it will be both time-consuming and expensive to do the extensive discoveries required to fully resolve the damages issue. A preliminary determination of whether or not there has been a breach of the Contract would be useful to the parties and may ultimately shorten the litigation.

Issues Determinative of Litigation

[42] Counsel for Yukon submitted that a summary trial on the breach of contract issue could be a waste of time and effort because that issue is inextricably interwoven with other liability issues, including the counterclaim of Yukon. In my view, a summary determination of the contract interpretation issue could take the main liability issue off the table. If Norcope does not succeed, their strongest argument will have failed and the likelihood of proceeding to trial on other liability issues and damages is lessened. If

Norcope does succeed, the damages claim may be resolved or could proceed to resolution with Yukon's counterclaim issues, which I note are not unrelated to the damages claim of Norcope. I cannot say that a ruling on the interpretation of the Contract as it applies to the disputed work will bring the entire litigation to an end. However, I do find it will be helpful in allowing the parties to move forward in the litigation, and it may well facilitate the resolution of the other outstanding issues.

DECISION

[43] I conclude that it is appropriate in these circumstances to proceed to summary trial on the issue of whether the disputed work was within the scope of the Contract and effectively a change order, or whether it was new work that Yukon was not obligated to give to Norcope. Although there are credibility issues that arise, I do not find them to be insurmountable, particularly if cross-examination on the affidavits is permitted prior to the summary trial.

[44] Having made this determination to dismiss Yukon's application under Rule 19(9), I made the following case management order after discussion with counsel:

1. the summary trial will be held on March 7, 8 and 9, 2012;
2. the discovery of Mr. Gonder and Mr. Malloy will be one day each. I order that discovery can be broader than cross-examination on affidavits, as this will be more useful should the case proceed to trial on further issues or damages;
3. Counsel for Yukon may examine or discover Malik Lasker, Norcope's Project Manager, for one half-day and counsel for Norcope may examine for discovery Brian Ritchie, Yukon's Project Manager, for one half-day.

4. In the examinations for discovery, all questions that are in dispute for relevancy shall be answered, subject to objection at the summary trial;
5. Yukon and Norcope are each permitted to present one expert on industry practice or other issues, and this person can be present in person or by video conference at the summary trial so long as the *Rules of Court* are followed by filing written reports;
6. Discoveries must be completed by the end of January 2012;
7. Examination for discovery may include questions on correspondence and communications both before and after the specific contractual issues arose;
8. Yukon's expert reports must be filed by February 17, 2012, and Norcope's, if any, by February 28, 2012; and
9. a further case management will be held on Monday, January 23, 2012 at 9:30 a.m.

VEALE J.