CITATION: Valley Water Supply Inc. v. Caledon Carriers Inc., 2023 ONSC 7000
BARRIE COURT FILE NO.: CV-17-547-SR
DATE: 20231212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
VALLEY WATER SUPPLY INC. Plaintiff/Defendant by Counterclaim	Julian Binavince, for the Plaintiff/Defendant by Counterclaim
– and –	
CALEDON CARRIERS INC. and MICHAEL JAMES SCHILD Defendants/Plaintiffs by Counterclaim	Andrew Wood, for the Defendants/Plaintiffs by Counterclaim
	HEARD: December 6 and 7, 2023

HEALEY, J.:

OVERVIEW

[1] Valley Water Supply Inc. ("Valley Water") was subcontracted by Caledon Carriers Inc. ("Caledon") to provide trucking services for several construction projects throughout 2014. Caledon is also a trucking contractor.

[2] Dwight Ward is the principal of Valley Water. Michael Schild is the principal of Caledon.

[3] Valley Water began this action for payment of its outstanding invoices. The parties agree that after payment credits are applied, Caledon is indebted to Valley Water in the amount of $33,900. All other issues raised by the Statement of Claim have been resolved.

[4] The triable issue arose from Caledon's counterclaim. At the outset of trial, Caledon's counsel advised the court that Caledon was limiting its counterclaim to the amount of $33,900. This amount is alleged to be owed by Valley Water to Caledon because of an agreement reached by the parties on October 24, 2016. Caledon seeks to set off this amount against its debt to Valley Water.

[5] Whether such an agreement was made is in dispute.

[6] The alleged agreement is about soil. Caledon was retained by Coco Paving Inc. in 2014 to provide trucking services for the widening of the Adjala-Tosorontio Townline Road. This was one of the projects for which Valley Water was hired by Caledon (the "Coco Paving project'). During the Coco Paving project, Schild and Ward decided that some of the excavated soil should be transported to Ward's nearby farm, to be stored until sold. The parties refer to this soil as "peat" or "material" or "soil inventory" in their evidence.

[7] At the time of their initial discussions, both parties anticipated that the soil would be rich and fertile, a potentially profitable commodity. It is not disputed that Ward and Schild reached a common understanding that they would split any profits from its sale, although the percentage of the split does not appear to have been discussed at the time.

[8] The evidence also suggests that both parties contemplated that the soil may have to be screened to remove debris and possibly have other components added to it to create "triple mix" before it was saleable. However, these steps, including how they would be carried out and how associated costs would be paid or allocated, were also not discussed at the time.

[9] The parties refer to this initial agreement as the joint venture.

[10] Caledon or its subcontractors, including Valley Water, hauled the soil to Ward's property. Ward did not keep track of the number of truckloads that were brought onto to his property. It is alleged in Caledon's Statement of Defence and Counterclaim that approximately 250 triaxle dump truck loads were transported from the Coco Paving project to Ward's farm. In Valley Water's Reply and Defence to Counterclaim, it admits that approximately 200 loads were dumped on Ward's property. An excavator owned by Caledon was used on the farm to stockpile the soil. When they were finished, the loads created a single pile of soil inventory. There is some conflict in the evidence as to whether this stockpiling was completed in 2014 or 2015, but it is not important to this ruling to decide which is more likely correct.

[11] There is no dispute in the evidence that in October 2016, Ward decided to screen the soil inventory to make it more saleable. He concedes that he did not tell Schild that he was doing so, nor did he involve him in the process.

[12] Schild learned that this was happening and went to the farm to speak to Ward. It is alleged that this occurred on October 24, 2016. Schild alleges that a conversation occurred between the two men that day, whereby a "resolution agreement" was reached. Caledon's pleading refers to this as an "amended agreement", but the terms are synonymous.

[13] Caledon's Statement of Defence and Counterclaim, at paragraph 35(b), claims "payment in the amount of $33,900 owing by the Defendants by Counterclaim to Caledon Carriers pursuant to the Amended Agreement". The pleading alleges that the terms of the amended agreement were that Caledon was to be paid $33,900, which was to be offset against the debt owed to Valley Water. The $33,900 was broken down as follows:

Sale of 100 loads of peat moss ($275/per load)	$27,500
½ monthly excavator rental fee ($5,000/month)	$ 2,500
H.S.T. (13%)	$ 3,900
Total	$33,900

[14] Caledon delivered an invoice for that amount to Valley Water in January 2017, along with a cheque for $8,055.22. This amount is the difference between Valley Water's unpaid invoices and the amount allegedly owed to Caledon under the resolution agreement.

[15] It is Caledon's position that no debt is owed by either party by virtue of the resolution agreement.

[16] It is Valley Water's position that the resolution agreement is fictitious, and that Caledon continues to owe it $33,900 for trucking services.

ISSUE

[17] The only issue to be determined by this court is whether the parties reached the resolution agreement alleged by Caledon.

EVIDENCE

[18] Schild's evidence is that Caledon delivered approximately 247 truckloads of soil to the Ward farm in 2014. Thereafter, he did nothing to try to sell the soil, nor did he offer to remove it.

[19] Ward's admission that 200 loads were dumped is reflected in his evidence. This is an assumption because neither he nor anyone else at Valley Water kept count during the process.

[20] The first attempt to sell the soil arises in Ward's evidence. He stated that a neighbour named Bob Murphy approached him about taking the entire pile in its original form, and offered to pay $100 per load.

[21] Ward says that he communicated this to Schild, that Schild agreed to the price of $100 per load, and that he and Schild agreed that they could move the pile for Murphy over the weekend. Ward, like Schild, stated that most of their communication was done through text messaging. Ward could not remember when this communication occurred but knew that it was before he took any steps to screen the soil. These text messages are not in evidence; Ward's evidence is that he was unable to find them. Schild has not denied this exchange in any way.

[22] The sale to Murphy fell through, as Murphy obtained fill from another source at no cost.

[23] Ward says that he decided to screen the pile after the failed transaction with Murphy. He began to screen the pile on October 17, 2016, with the help of his father and brother.

[24] There were costs associated with the screening. In his affidavit sworn as his evidence in chief, Ward deposed that he incurred costs of approximately $19,000 for the rental of a screener, excavator and skid steer. Over 180 hours were spent on this project, and over $2,000 in fuel costs were incurred. Under cross-examination he altered that evidence to say that only one-quarter of those costs could be attributed to the soil project, as he was creating a driveway at the farm at the same time. The pile of soil was situated in the area where he wanted to build the driveway.

[25] Ward acknowledges that he did not tell Schild that he was going to screen the soil. He has provided differing answers to explain himself: at discovery there was "no good reason", in his evidence in chief he stated that he did not want to have an argument with Schild about whether it was a good idea; on cross examination he said that he wanted to do it his way, it was on his property, and he did not want Schild involved.

[26] Schild says that he learned from another individual that Ward had been screening and hauling the material from the farm without notifying him. This caused him to drive there to, in his words, confront Ward. On arriving at the farm, he saw that there were two Valley Water dump trucks that were leaving the farm with soil, and a loader and excavator were set up near a screening plant close to the pile. He noticed that the pile was half of its original size, which led him to believe that at least half of the soil had been sold and removed from the farm.

[27] His evidence is that when he confronted Ward, Ward said that he had sold all the material but refused to provide any information about the sale, such as the buyer, price per load, or why he did not consult with Schild regarding the deal.

[28] Schild goes on to say that this was the day that the resolution agreement was reached. Schild told Ward that Caledon wanted $30,000 for their half of the soil, which included $2,500 for the use of Caledon's excavator used in creating the pile at the Ward farm. He estimated that the market value of one load of the soil was $275. At that time Ward brought up the fact that Caledon was indebted to Valley Water and told Schild to take the money for the soil from what Caledon owed.

[29] Ward completely denies ever discussing such terms with Schild or reaching any such understanding, then or ever.

[30] Ward acknowledges that Schild attended his property on October 24, 2016. Ward saw him entering onto the property and sent him a text message that states, "were in office". The office was approximately 200 feet away from the pile of soil. Schild did not come to the office but sent a responding text that reads: "I'll come see you later". Ward says that Schild never spoke to him that day in person, nor did he return later to speak with him.

[31] Schild's evidence is that Ward called him two to three days later and told him that he had sold all of the soil to an individual named Bob Murphy, and that Murphy might possibly be paying cash. Ward was going to speak to Murphy and get back to him.

[32] Ward's evidence is that they never spoke on the phone after October 24, 2016.

[33] The text message chain filed in evidence shows that after the text exchange on October 24, the next exchange occurred on November 3, 2016. It started at 10:47 a.m., when Schild sent a message to Ward that reads: "Hey Dwight, did u get the numbers figured out on our peat moss? Ewart is $23/yd picked up at his yard…triple mix is selling for 30-40 a yard…don't give it away, that pile is worth some good money".

[34] Ward responded seven minutes later. His return message reads: "Nothing yet Bob isn't taking much someone is bringing soil to dump he's using it so it's still here". One minute later, Ward sent another message that reads: "Sell it!!".

[35] Schild's evidence was that he did not know what Ward was referring to by the words "sell it", but he never sought any clarification.

[36] Schild says that they had a number of conversations by phone or through text message after the alleged resolution discussion of October 24 and continuing on after the November 3 text message exchange, but was unable to say how many times those communications took place.

[37] Schild referred to there being "a couple" of telephone discussions after October 24. Their phone conversations were about what was happening with the soil. They talked about whether Murphy would be taking more. Ward told him that people other than Murphy were going to take some of it, but Schild could not recall how many individuals were discussed or the details of the transactions. They talked about whether Ward was getting money for the soil. Schild conceded that he cannot provide details of what was discussed because the communications took place eight years ago.

[38] Schild also said that during these communications, Ward also said that not much was happening with the soil and that Murphy was not taking much and he started to "make excuses".

[39] The next text exchange occurred on November 21, 2016. Exhibit C to Ward's affidavit sworn November 9, 2023 contains these messages. I note that there was a message sent by Ward on that date at 9:57 a.m., but the body of the text has not been produced for reasons not covered in the evidence. So there is no context to the response from Schild at 3:45 that same day, which reads: "Yes hopefully soon, we will have to get together and figure out a price on our peat moss and we can straighten up". Ward's response is "OK".

[40] Ward's evidence at trial was that he did not really understand what Schild meant by "straighten up" but he never questioned it. He also testified that at that time either of them could be getting money, or Schild could take the soil.

[41] The next communication in the chain occurred on December 22, 2016. Ward asked “any check in sight?”. Schild responded “Yes will get everything sorted out over the holidays and write you a cheque next week”. Ward responded “great thanks”.

[42] On January 24, 2017, the next email in the chain is from Ward, who wrote “any word on a check?”. Schild responded “You got money coming this week”. Ward responded with thanks.

[43] Shortly thereafter, Ward received mail from Caledon containing an invoice dated January 31, 2017 for $33,900 and the cheque for $8,055.22.

[44] Ward sent a response by letter from Valley Water dated February 6, 2017. It contains a slightly altered explanation of the joint venture, as it mentions nothing about their now mutual understanding that the soil would be eventually sold. Ward asserts in the letter that the understanding was that the soil would be deposited on his property temporarily, and that Schild would later “remove it and dump the topsoil to a dump site”. He also wrote that he was left with a mess on his property, and disputed that Schild could now expect to “charge me for your mess”.

[45] It is Ward’s evidence that he sold 35 loads of the screened soil, and that the rest remains on his farm in three piles – two piles of the screened soil, and another containing the sorted debris including garbage and rocks, to which he added the other half of the unscreened soil. It is his evidence that when the pile was exposed to the weather, rocks and debris began to emerge as soil was washed down. When he began to screen the soil, he discovered that it contained more stones and debris than expected, including garbage and old tires. He sold the soil to Murphy and two other individuals, Gibson and Parks, for $150 per load. His revenue amounted to $5,250, which was more than offset by the costs associated with screening.

[46] There is a conflict in the evidence about the quality of the soil. Schild has maintained that the soil was excavated by Coco Paving from a farm field, rather than from a ditch beside the road. Under cross-examination he admitted that the excavation occurred on the edge of a farmer’s field, and that he did not really know if it was excavated from the field. He did not know where the lot line was, or whether any of the farmer’s property had been expropriated.

[47] Ward’s evidence, as indicated, was that about 40% of the pile was unusable.

[48] There is a conflict in the evidence about how much soil remains on Ward’s farm. Ward says all of it remains, other than what has washed away over the years, less the 35 loads that he sold. Schild asserts that only approximately 24 loads remain on the farm.

[49] Schild agreed that he was asked at his examination for discovery in March 2019 whether he wanted the remaining soil. His evidence was that he did not want to go back on the farm property, and that only a few loads were remaining. However, the only evidence in the record of investigations taken by Schild to determine the remaining amount comes from

photographs taken by him in 2020 and the results of "GPS technology" undertaken in November 2022.

[50] An order was made in this proceeding by Associate Judge Brott on September 23, 2019. The order provided the following:

> The defendant or a knowledgeable representative of the defendant shall attend at the plaintiff's premises to (illegible) the quality, quantity and estimated value of the peat moss on the plaintiff's property. The parties shall then attempt to resolve the action through counsel and if unable to do so shall reattend for a further pretrial on a date to be agreed to by counsel and the trial office. I shall remain seized.

[51] The evidence offered by Schild from this investigation is inadmissible. He stated that on November 23, 2022, he went to the Ward farm with Jason Vasey to assess the material. His affidavit states:

> Vasey and I determined, using GPS technology to measure the volume, that at that time there was approximately 375 cubic meters of Material remaining…This is a big difference between the approximately 4,900 cubic yards of Material that was delivered in 2014 and means that only approximately 24 loads of the Material remain on the Ward Farm. The assessment from the site and GPS quantity reports are attached hereto as Exhibit "F".

[52] The evidence from the use of the GPS technology is hearsay. It comes entirely from Jason Vasey, as Schild admitted on cross-examination that he does not know how GPS technology works. Vasey was not called to testify. His credentials are unknown. The process undertaken, and its reliability, are unknown. The information cannot be used by the court for any purpose.

ANALYSIS

[53] The events that took place in the fall of 2016 happened seven years before this trial. Understandably, the details relating to timing and the content of communications, where text messages have not been retrieved, have grown more faint for both men over time. Additionally, neither one of them presented as talkative individuals. As the hazy nature of their original joint venture reveals, neither is particularly detail oriented. It seems that the friendly nature of their relationship at that time led them to believe that outlining their understanding or expectations in detail was not required.

[54] Since then, both individuals have developed their own interpretation of what transpired. And each has some problems with credibility, and with the reliability of their evidence.

[55] Ward has been inconsistent on several matters. He testified that he has not asked for reimbursement for the screening costs because it was something that Valley Water

undertook on its own initiative, but in his evidence in chief he asks that the payment of $8,055.22 be allocated to those costs instead of the outstanding invoices, despite acknowledging in his letter of February 6, 2017 that that payment has been applied to Caledon's account.

[56] As mentioned, Ward gave differing answers about why he did not tell Schild about his decision to screen.

[57] He said during discovery that 40% of the unscreened pile was debris, and at trial confirmed this was based on his visual observation after the pile was rained on. Later in his cross-examination he said that he did not determine that 40% was debris until they dug into it at the time of screening.

[58] He restated his sworn evidence about the costs associated with the screening, acknowledging that only 25% of it can be attributed to the portion that he sold.

[59] Ward also kept no records of the sales to the three individuals, nor were they called as witnesses.

[60] Schild indicated that there were only a "few" loads left on the property as of 2019, but offered no evidence from that era to substantiate that assertion. The photographs that he took in 2020 from a distance suggest that far more than a few loads are on the Ward farm, as do the photographs provided by Ward.

[61] Although Schild's affidavit asserts that he has inspected the remaining material, he references only photographing the piles from a distance and using the GPS technology. Despite the order from Associate Justice Brott, he never actually went on the property to inspect the soil at close range. Schild says that he never saw any debris when stockpiling the soil, but also admits that he never went back to look at it during that year and a half.

[62] Schild's evidence was that he did not prepare the accounting that is contained in his affidavit as part of Exhibit D until January 20, 2017, and that it reflects the resolution agreement reached months before. However, there are no contemporaneous documents from October 24, 2016, and the only text message from that day indicates that Schild declined to go into the office to speak with Ward when invited.

[63] I have already referred to the change in his assertion that the soil came from the farmer's field, even though his evidence in chief refers to Coco Paving excavating a farm field, and Schild asserts that he knew that it was comprised of valuable rich peat loam. Yet Schild did nothing to process that soil for approximately a year and three quarters before learning that Ward had started to screen it.

[64] At paragraph 23 of his affidavit, Schild outlines the terms of the resolution agreement. Although his evidence is that he made several demands, his evidence falls short of saying that Ward agreed to those demands. And although he states that the market value of the material was $275 for one load at that time, he offered no evidence to support that value. His affidavit also states that he drafted a response to Valley Water's February

correspondence, and attached a letter dated March 1, 2017, which "confirmed the terms of the Resolution Agreement". However, under cross-examination he clarified that the letter was never sent.

[65] Due to the shortcomings inherent in the evidence of the parties' principals, I consider the most reliable evidence to be the documentary evidence arising from their communications in the fall of 2016.

[66] What is first apparent from the exchanges that occurred in 2016 is that these men were not behaving as though they were at odds with one another, or as though there had been a "confrontation" on October 24. They appear to still be having some sort of collaborative relationship. Schild's comment on November 3 "don't give it away" is an acknowledgement that he is aware that Ward is selling or intending to sell the soil. I find that Ward's comment to Schild to "sell it" on November 3 is an invitation to Schild to deal with the soil that remained there as of that date.

[67] Ward's invitation to Schild to sell it is inconsistent with the alleged resolution agreement, which was premised on Ward selling or retaining all the soil (or at least 200 truckloads) and giving Schild one-half of the profits or value. Further, Schild's discussion of the prices being charged by "Ewart" is unnecessary if Ward and Schild had already reached a decision about the value of the soil on October 24. Further, Schild's reference on November 21 of having to get together to "figure out a price for our peat moss" is inconsistent with the idea that a resolution had been reached on October 24. This entire course of conduct is inconsistent with the creation of an oral agreement on October 24, or any time thereafter.

[68] Schild has provided no evidence to support his belief that the soil was worth $275 per load, or that Ward had some basis for agreeing to such a price. Given that the only evidence of sale price comes from Ward, which is that he sold screened soil for $125 less than that per load, it seems improbable that he would concede to Schild's price demand.

[69] There is no evidence of a conversation or other communication on October 24 apart from the brief text messages. The text exchange suggests that Schild did not remain to speak with Ward, and intended to speak with Ward sometime later. Schild's evidence is inconsistent with the text message, as he provides no evidence of returning a second time on October 24, but maintains that the resolution agreement was struck while standing on Ward's driveway.

[70] I find that the evidence does not lead me to conclude that Ward sold 200 or more truckloads of the screened topsoil, which was one of the premises of the alleged resolution agreement. I infer that there had been a conversation about a potential sale to Murphy before the text exchange on November 3, because there was no introduction to this topic into Ward's message of November 3, which would be expected if it was the first time the idea was being mentioned. I find that a discussion did occur as Ward described it, when he informed Schild that Murphy might be interested in buying the entire inventory, and that this is the conversation recalled by Schild. Schild does not deny Ward's contention that the discussion included moving the pile over a weekend, which could not have occurred while the

screening was going on, especially since Ward was only screening one-half of the pile. This leads me to conclude that the parties' discussion about Murphy occurred before Ward beginning to screen the topsoil on October 17. It also makes sense that that failed sale led Ward to take further steps to make the soil saleable.

[71] Even if Schild was unaware that the bulk sale to Murphy fell through, as he may well have been, he knew it by November 3 at the latest, when Ward informed him that Murphy "wasn't taking much". And despite having detailed information about the amounts that Ward sold to Murphy and two others, and the price, he did not call any of those witnesses to provide contrary evidence. And as indicated, Schild has not provided reliable evidence of the amount of soil now remaining on the property or its quality, to support his contention that Ward sold most of it, or that Ward has retained the benefit of a valuable commodity. Again, one or both concepts were the basis for Schild saying that a resolution agreement had been reached, and that Ward agreed to pay him for 100 loads.

[72] Schild and Caledon had the legal onus to prove entitlement to a set-off, and to do so must prove the existence of the resolution agreement. They have not met that burden.

[73] Accordingly, this court orders that the claim is granted and the counterclaim is dismissed.

[74] This court orders that Valley Water shall have judgment against Caledon and Schild in the amount of $33,900 plus prejudgment interest.

[75] If the parties are unable to agree upon costs of this action, they may provide the court with written submissions not exceeding 3 double-spaced pages, plus any offers to settle and Bill of Costs. The plaintiff's are due by January 5, 2024, the defendants' by January 12, 2024 and reply, if any by January 17, 2024. To be served and filed with proof of service at the filing office, with a copy to my judicial assistant (BarrieJudSec@ontario.ca).

Madam Justice S.E. Healey

Released: December 12, 2023