Court of King's Bench of Alberta

Citation: Forestburg (Village) v Austin Carroll Pool Construction Ltd, 2024 ABKB 587

Date: 20241003
Docket: 2212 00215
Registry: Wetaskiwin

Between:

Village of Forestburg

Plaintiff/Applicant

- and -

Austin Carroll Pool Construction Ltd.

Defendant/Respondent

Corrected judgment: A corrigendum was issued on October 3, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Justice A. Loparco

I. Introduction

[1] The Applicant, Village of Forestburg (Village, Plaintiff, or Applicant) appeals the Order of Applications Judge M. Park dated November 22, 2023 (the Park Order), which held that certain undertakings were not relevant or material to the matters in issue and need not be responded to.

II. Brief Conclusion

[2] For the reasons that follow, the Appeal is allowed in part in respect of Undertakings #32 and 33.

III. Background

[3] In or around October 9, 2019, the Village issued a request for proposal (the RFP) for the "Forestburg Swimming Pool Membrane Liner Replacement" project (the Project).

[4] In response to the RFP, Austin Carroll Pool Construction Ltd. (Austin Carroll, Defendant or Respondent) provided the Village with a proposal for the replacement of the existing membrane, which included the cost of materials and labour for the installation of a new membrane.

[5] The Project was awarded to Austin Carroll. The Contract, dated November 12, 2019, provided in part:

- the Village would pay a lump sum of $150,714.29 plus GST (the Contract Amount);
- the Contract Amount included all materials associated with the scope of work including delivery of the materials.

[6] The Contract stated that the Village would pay 30% of the Contract price to Austin Carroll prior to mobilization and the remaining 70% upon completion of the Project.

[7] On February 10, 2020, the Village paid 30% of the Contract price to Austin Carroll pursuant to the Contract.

[8] Austin Carroll delivered materials to the Project site on June 30, 2020. On July 14, 2020, Austin Carroll began the process of removing the existing pool liner. Upon removal of the existing liner, the structural integrity of the Pool was called into question and the Village issued a stop work order.

[9] Discussions ensued between the parties on the nature of the required structural repairs; it was agreed that the Village would complete the necessary structural repairs before Austin Carroll returned in May of 2021 to complete the installation (the Installation Window).

[10] Austin Carroll indicated they could no longer complete the Project.

[11] On August 5, 2020, Austin Carroll invoiced the Village the sum of $93,975.00, reflected in Invoice 7176. In support of Invoice 7176, Austin Carroll provided the Village with an invoice from Priority SS Inc., a related company (Priority SS), totaling $73,636.36 for the cost of the pool liner replacement materials.

[12] Austin Carroll sent a letter and invoice dated September 21, 2020, again requesting payment of Invoice 7176. The Village believed they had to pay this invoice to ensure that Austin Carroll would complete the Project, but they took the position that the latter was in breach of the Contract terms.

[13] The parties disagree about the amount claimed in Invoice 7176. Austin Carroll states that Invoice 7176 represents the balance owing under the Contract minus labour costs of $16,800, while the Village disputes that the $73,636.36 portion represents the true cost of the materials.

[14] On March 8, 2023, during Questioning, Ms. Hulan, Austin Carroll's corporate representative, indicated that Priority SS was a related corporation. She was unable to explain why materials were purchased from Priority SS instead of the manufacturer, Natare Corporation.

[15] The following undertakings relating to the cost of the materials were refused and are the subject of this appeal:

> **#6.** Request and produce from the relevant suppliers, including Natare Corporation, what their pricing would have been for the relevant materials at the time they were ordered.
>
> **#32.** Review records and identify the cost of purchasing subject products from the manufacturer and if any mark-up was done by Priority SS in selling said products to Austin Carroll.
>
> **#33.** Provide invoices from manufacturer relating to subject products and identification of the materials that were provided to the Village of Forestburg that are listed on the subject invoice.
>
> **#42.** Review records and provide the cost that Austin Carroll incurred in shipping products to the Village of Forestburg relating to AOR 41.
>
> (Undertakings)

[16] On June 1, 2023, Ms. Hulan refused to answer the undertakings on the basis that the Project was a lump sum project, and that supplier material and internal costing were irrelevant.

[17] Later, Ms. Hulan advised that the invoice was incorrect, as Austin Carroll actually purchased the materials from the Natare Corporation and not Priority SS.

[18] The Village has received a copy of the Natare Corporation's price list from the relevant time period and determined that the cost of materials based on the Natare Corporation's price list was approximately half of the amount invoiced by Austin Carroll to the Village.

IV. Issue

[19] Are the Undertakings relevant and material to the within action as described in *Rule* 5.2 of the *Alberta Rules of Court,* Alta Reg 124/2010 [*Rules*]?

V. Standard of Review

[20] The standard of review of an appeal from an Application Judge's decision is correctness and the review itself takes the form of a *de novo* application: ***Bahcheli v Yorkton Securities Inc.***, 2012 ABCA 166 at para 3; ***Steer v Chicago Title Insurance Company***, 2019 ABQB 318 at para 9; ***Western Energy v Savanna Energy***, 2022 ABQB 259 at para 22; and see also, ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333.

[21] New evidence may be adduced, and new arguments made: ***Charuk v Terravest Industries Limited Partnership***, 2019 ABQB 747 at para 7.

VI. Law

[22] *Rule* 5.2 states:

When something is relevant and material

5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected

(a) to significantly help determine one or more of the issues raised in the pleadings, or

(b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

[23] Relevance is primarily determined by the pleadings as the allegations within the pleadings determine the issues within the action. Whether something is relevant will depend on the issues identified/raised. All pleadings must be considered when assessing relevance: ***Geophysical Service Incorporated v Edison SPA***, 2024 ABKB 27 [***Geophysical Service***] at para 9; ***Dow Chemical Canada Inc. v Nova Chemicals Corp.***, 2014 ABCA 244 [***Dow Chemical***] at para 17.

[24] Materiality is assessed by whether the information in question can significantly help to prove a fact in issue either directly or indirectly. Judgment must be exercised when assessing whether information sought is material: ***Geophysical Service*** at para 10; ***Dow Chemical*** at para 19.

[25] Courts should not be overly strict in assessing relevance and materiality:

> In deciding whether a particular document is material, one must take a very pragmatic view, viewing the situation from the perspective of the party who must prove the fact in question. At an interlocutory stage of proceedings, the Court should not measure counsels' proposed line of argument too finely; if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient. Again, it must be remembered that the purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry: ***McDiarmaid Estate v Alberta***, 2022 ABCA 247 at para 29 [***McDiarmaid***], citing ***Weatherill Estate v Weatherill***, 2003 ABQB 69 at para 16 [***Weatherill***]. See also ***Geophysical Service*** at paras 12 and 14; ***Dow Chemical*** at para 21; ***Goold v Allen***, 2023 ABKB 66 at para 16.

[26] In ***Geophysical Service***, Justice Horner summarized the burden that the party seeking disclosure must meet:

> 13. A party that seeks to compel disclosure must therefore show some reason why the fact at issue could reasonably be expected to help determine one or more issues. This burden has been described in several ways:
>
> - " . . .the [party] need only show a plausible line of argument.": ***Kaddoura*** at para 14.
> - "…some underlying foundation on which [the party] is basing its allegations…": ***Tirecraft Group Inc (Receiver of) v High Park Holdings ULC***, 2010 ABQB 653 at para 26

- "Some evidence is required…There must be some underlying factual foundation . . . ": ***Burns*** at para 28.
- " . . . if counsel can disclose a rational strategy in which the disputed document plays a material part, that should be sufficient": ***Weatherill*** at para 18.

14 The burden is not intended to be onerous. At the production stage of litigation, the court should not measure the parties' proposed line of argument "too finely": ***Dow*** at para 21 citing ***Weatherill*** at para 16. The rules are intended to prevent abusive and/or excessive discovery processes, not to cut off legitimate lines of inquiry: ***Weatherill*** at para 16. The party seeking disclosure does not need to prove conclusively that the information will be of any assistance to them: ***Kaddoura*** at para 14.

VII. The Pleadings

1. The Village's Position

[27] The Village's pleadings state that Austin Carroll: (a) breached the Contract; (b) was negligent in failing to complete the pool liner replacement; or (c) in the alternative, was unjustly enriched by the Village's payment of Invoice 7176.

[28] The Village submits that the Undertakings are relevant and material and should be answered pursuant to *Rule* 5.2. They state that the value of the building materials provided by Austin Carroll to the Village is key to determining damages flowing from a breach of Contract, negligence, and/or unjust enrichment claims.

[29] The Village disputes the amount of Invoice 7176. They state that the identification of the materials is required to determine whether Austin Carroll was negligent by failing to supply sufficient materials to complete the Project.

[30] Additionally, they argue that the cost of the materials for the pool liner is relevant to determining damages for breach of the Contract in the case where the Contract was partially performed. Further, the Village states the value of the materials is relevant to respond to Austin Carroll's defence, which disputes the damages claimed by the Village for completing the installation of the pool liner.

[31] Finally, with respect to the unjust enrichment claim, the Village argues that it is independent of the Contract breach claim. In other words, if Austin Carroll was not entitled to the $93,975 under the Contract, then they will be relying on the alternate argument that Austin Carroll was unjustly enriched by the Village's payment to $93,975.

[32] The Village submits that supplier and internal costing are relevant to the unjust enrichment claim so that the Village can determine whether Austin Carroll has a juristic reason for retaining any or all of the $93,975.

2. Austin Carroll's Position

[33] In defence, Austin Carroll states that: (a) the Contract was voidable; (b) Invoice 7176 was for the balance of the work, less the labour costs associated with installation; (c) Amounts invoiced under Invoice 7176 were for amounts for work performed in mobilizing, membrane

removal, and delivery of materials; and (d) that the damages claimed by the Village are excessive or exaggerated, or the Village failed to mitigate its losses.

[34] Austin Carroll argues that there is no reference in the Original Statement of Claim and Amended Statement of Claim regarding the cost of materials, mark up, overcharges, shipping costs, or anything related to internal costing. Further, they state that their Statement of Defence merely provides a factual basis for why the Contract became voidable and denies that any act or omission on their part resulted in a breach of contract, negligence, or unjust enrichment.

[35] They therefore state that the Undertakings are irrelevant as the Village has not put in issue in any pleading that a term of the Contract included a specified cost of materials, or a specified mark-up on materials. The only issue in question relates to the allegation that Austin Carroll did not complete the Project and/or that it did not provide enough materials. They maintain that the issue pleaded by the Village relates to a lack of quantity of materials and not an issue with the cost of materials.

[36] With respect to the unjust enrichment claim, they argue that the blanket claim pled does not put in issue material costing, mark up, or shipping costs. They state that the juristic reason to be determined is the presence (or absence) of a Contract term entitling Austin Carroll to charge for materials. They state that the juristic reason does include whether the price of materials contracted for was fair. There appears to be no dispute between the parties that the Contract provided for a lump sum payment.

[37] Austin Carroll submits that the Undertaking requests fall within the category of a "remote and unlikely line of analysis," that is "unrealistic, speculative, and without an air of reality."

[38] They further note that all materials required under the Contract were delivered to site and were ultimately incorporated into the Project by the Village.

VIII. Analysis

[39] As the Village's action is for breach of contract, negligence, or unjust enrichment, it is necessary to examine the component parts of the damage calculation for each of these allegations to determine whether the Undertakings are relevant and material.

1. Damages Assessment for Breach of Contract and Negligence

[40] Nielsen J (as he then was) set out the basic principles and damages for breach of contract in ***Vermilion & District Housing Foundation v Binder Construction Limited***, 2017 ABQB 365 [***Vermilion***] at para 179-180:

> The primary rule in breach of contract cases is that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant: ***Michaels v Red Deer College (1975)***, 1975 CanLII 15 (SCC), [1976] 2 SCR 324 at 330, [1975] SCJ No 81.

[41] Nielsen J held:

> Further, the majority in ***BG Checo International Ltd*** stated that in situations of concurrent liability in tort and contract it would seem anomalous to award a different level of damages for what is essentially the same wrong on the sole basis of the form of action chosen, though particular circumstances or policy may

> dictate such a course. See also ***Plas-Tex Canada Ltd v Dow Chemical of Canada Ltd***, 2004 ABCA 309 at paras 60-62, 245 DLR (4th) 650 (CA).

[42] The Village argues that identification of the materials is required to determine whether Austin Carroll was negligent, namely, that the supplies provided were inadequate. They also point to the fact that Austin Carroll disputes the damages claimed by the Village, which they say is relevant if a finding that the Contract was partially performed is made.

[43] In ***Nguyen v Dang***, 2018 BCSC 382 [***Nguyen***], the Court assessed damages for breach of a fixed term construction contract. The Court summarized the damages calculation at paras 35 and 47:

> The evidence before me supports the plaintiffs' assertions that the defendants breached their contractual obligation by not completing the construction project. Further, the plaintiffs took reasonable steps to mitigate their loss by hiring another contractor to finish the job after the defendants abandoned the job site. The plaintiffs are, therefore, entitled to all damages flowing from the defendants' breach: ***Mackenzie v Dougherty***, 2017 BCSC 931 at para 38, citing ***Michaels v Red Deer College***, 1975 CanLII 15 (SCC), [1976] 2 S.C.R. 324 at 330-31.
>
> ...
>
> I find that in paying PGD a total of $135,000 to complete the construction project, the plaintiffs paid $73,400 more than they would have in fact paid had the defendants not breached the Contract. In summary, on the evidence before me, I accept the plaintiffs' submission that the Contract price of $630,200 included tax, and I also accept that due to the defendants' breach of the Contract, the plaintiffs were required to pay an additional sum of $73,400 to complete the work under the Contract. [Emphasis added]

[44] Austin Carroll argues that if the Village's action has any merit, the only issue for the trial judge to determine is what the Village paid to complete the Project over and above what they would have paid Austin Carroll pursuant to the Contract. Thus, the internal cost of materials supplied is irrelevant.

[45] I agree. Even if Austin Carroll failed to provide sufficient materials, the Village merely has to prove that their increased material costs were proper; the value of the materials supplied by Austin Carroll is irrelevant.

[46] Similarly, as it relates to the claim for part performance, Austin Carroll provided a credit for the installation costs. The Village is free to question on whether this amount is sufficient. This relates to the labour, not the material costs and thus, does not open the door for the Village to obtain a detailed break down of internal material costs.

[47] Permitting them to seek information about the costs they were billed is not required to prove their contractual or negligence claims on a fixed term contract.

[48] It is also important to note that in this interim application, the Court is not deciding contested issues of fact or law on an application for undertakings: ***Canuck v Yangarra***, 2022 ABQB 145 at para 45 [***Canuck***]. It is open to the parties to argue before the trial judge the *quantum* and calculation of damages. All of the damages claimed flowing from the Defendant's breach or negligence relate to the Plaintiff's additional cost to complete the Project.

2. Damages Assessment for Unjust Enrichment

[49] The Supreme Court of Canada confirmed the elements of unjust enrichment in ***Garland v Consumers' Gas Co.***, 2004 SCC 25 at para 30:

> (a) an enrichment of the defendant,
>
> (b) a corresponding deprivation of the plaintiff, and
>
> (c) an absence of juristic reason for the enrichment.

[50] At this stage of the proceedings, whether Austin Carroll was entitled to be paid the balance of the lump sum contract minus the labour costs credited in Invoice 7176 is not for me to determine: see ***Canuck*** at para 45. Rather, I am focused on whether the information sought in the Undertaking requests will help determine the issue of unjust enrichment, namely, whether the breakdown of the specific material costs will help determine whether Austin Carroll has juristic reason to be paid all or part of $93,975.

[51] If Austin Carroll has spent money acquiring supplies for the Village's Project, then that could justify why it received the $93,975. Thus, the source documentation is relevant. The letter attached to Invoice 7176 indicates that Austin Carroll used its internal material costing as a justification for demanding payment.

[52] Whether the Contract is voidable or unenforceable as a result of a breach is a triable issue; in either case, a court may be in the position of needing to rule on the unjust enrichment claim. If the Contract no longer stands, it will be necessary to prove damages or the lack thereof via the existence or absence of a juristic reason for the enrichment by breaking down the different components of the invoice costs.

[53] The material costing is relevant to the claim of unjust enrichment as the Village will be required to prove that there was no juristic reason for all or part of the balance of the material costs to be paid to Austin Carroll in Invoice 7176 (after the labour costs are ascertained and deducted). Solely providing information about the quantity of material, which Austin Carroll has done, does not answer this question.

[54] Ultimately, I agree with the Village that the unjust enrichment claim is independent of the Contract claim. The Village has pled that the amount paid pursuant to this invoice was not part of the Contract since the balance was only due on completion, which did not occur.

[55] With respect to the unjust enrichment claim, I take a pragmatic view from the perspective of the Village, which must prove the fact in question. I conclude that they have disclosed a rational strategy in which the disputed information plays a material part – that the value of the materials is relevant to whether Austin Carroll had any juristic reason for the payment received.

[56] The purpose of the Rule was to avoid abusive, excessive, and unnecessarily expensive discovery, not to cut off legitimate lines of inquiry: see ***MacDiarmaid*** at para 29 and ***Weatherhill*** at para 16.

Conclusion on Undertakings Requested

Undertaking #6 states:

Request and produce from the relevant suppliers, including Natare Corporation, what their pricing would have been for the relevant materials at the time they were ordered.

[57] I agree with Austin Carroll that Undertaking 6 seeks to have them obtain information from a third party, which is outside their control. There is no obligation on a party to litigation to obtain/disclose a record that is not within their control or possession. I disagree with the Village that it is impractical to require them to compel it from a third party. The *Rules* require this process be followed when the record is not in the possession and control of a party to ensure that the third party is put on notice of the request and has an opportunity to respond and protect any interests at stake.

[58] Moreover, the Village was able to obtain this information independently and thus, the Undertaking need not be answered.

Undertaking #32 states:

Review records and identify the cost of purchasing subject products from the manufacturer and if any mark-up was done by Priority SS in selling said products to Austin Carroll.

[59] As Ms. Hulan has since identified that the materials were not purchased from Priority SS but rather from Natare Corporation, I see no reason why the Village should have to set up another round of questioning to have this question answered; it is clear that they seek the costs of the subject products and any mark-up from the manufacturer, which is now known to be Natare Corporation. In relation to the unjust enrichment claim, this is relevant in order to establish whether there was a juristic reason for the payment (i.e., that Austin Carroll paid for products that the Village benefited from). The detailed breakdown of the costs, including any mark-up, is needed to assess whether the costs represent the market value of the goods.

[60] For the reasons stated above, I order that this Undertaking be produced.

Undertaking #33 states:

Provide invoices from manufacturer relating to subject products and identification of the materials that were provided to the Village of Forestburg that are listed on the subject invoice.

[61] In a September 21, 2020 letter to the Village, Ms. Hulan advised that the cost of materials incurred by Austin Carroll was $73,636.36.19. A 10% markup was then applied by Austin Carroll to show a material cost of $81,000 on Invoice 7176.

[62] On May 5, 2021, the Village obtained a cost estimate of the relevant materials directly from Natare Corporation. Based on the 2021 Distributor Price List provided by Natare Corporation, the cost of materials shipped to the Village would have cost a total of $41,895.45.21

[63] The discrepancy in the amount Ms. Hulan states Austin Carroll incurred and the amounts quoted by Natare Corporation raises a concern about the actual costs of materials provided for the Project. In assessing if the Village's claim for unjust enrichment, the value of the materials provided at the relevant time is needed.

[64] The Village also requires the pricing information for the specific materials ordered by Austin Carroll (and not just an estimate) to determine to what extent Austin Carroll has a juristic reason for the material costs portion of the invoice paid by the Village. Austin Carroll is in the best position to provide this information as it has knowledge of what was ordered for the Project and when.

Undertaking #42 states:

Review records and provide the cost that Austin Carroll incurred in shipping products to the Village of Forestburg relating to AOR 41.

[65] The Village notes that the reference in the Undertaking to "AOR 41" is incorrect and should be a reference to "AOR 36".

[66] While the cost of shipping products is relevant to the unjust enrichment claim as it represents the costs that Austin Carroll incurred in relation to the Project, Ms. Hulan would need to agree to an undertaking that references the correct document from the Affidavit of Records in order to fairly answer the question.

[67] This undertaking response does not need to be answered at this time.

IX. Conclusion

[68] Undertakings #32 and 33 are relevant and material to the Village's claim against Austin Carroll and I order Ms. Hulan to answer these Undertakings.

[69] The parties may speak to costs if they are unable to agree.

Heard on the 22nd day of August, 2024.
Dated at the City of Wetaskiwin, Alberta this 3rd day of October, 2024.

A. Loparco
J.C.K.B.A.

Appearances:

Kathleen Elhatton-Lake
Shores Jardin LLP
for the Plaintiff/Applicant

Sean Manery
HMC Lawyers LLP
for the Defendant/Respondent

Corrigendum of the Memorandum of Decision
of
The Honourable Justice A. Loparco

Amendments were made to paragraphs 10 and 48.