

CANADA / JUDGMENT

Cobra Logging v. Lucas Lake Logging

2006 BCSC 260

COURT

Supreme Court of British Columbia

DECIDED

15 February 2006

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2006 BCSC 260 Cobra Logging v. Lucas Lake Logging

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cobra Logging v. Lucas Lake Logging,

2006 BCSC 260

Date: 20060215

Docket: S13961

Registry: Smithers

Between:

Cobra Logging & Excavating Ltd.

Plaintiff

And

Lucas Lake Logging Ltd.

Defendant

Before: Master Baker

Reasons for Judgment

In Chambers

Counsel for the plaintiff:

D. Giddings

Counsel for the defendant:

J. Perry

Date and Place of Hearing:

Video Conference December 15, 2005

Prince George, B.C.

January 26, 2006

Smithers, B.C.

ISSUE

- [1] The defendant, Lucas Lake Logging Ltd. ("Lucas"), applies to have \$90,068.00 paid out of court. Lucas has filed two motions requesting this, both, in part, citing the Court Order Enforcement Act [1] ("the Act"). Whether the Act applies in this circumstance is very much in issue. The funds were paid into court on October 5, 2005 in circumstances described below in paragraph 5.

BACKGROUND

- [2] Lucas is a logging contractor. Cobra Logging and Excavating Ltd. ("Cobra") is a sub-contractor. From the evidence it seems to be a one-man company, with Mr. Wayne Kindrat being that man. Cobra operates a feller-buncher, which is, typically, a tracked logging machine equipped with shears or some other form of cutting device. Feller-bunchers are capable, in the right conditions, of shearing/felling and bunching for removal an impressive amount of timber.
- [3] The parties agree that in July of 2004 Cobra was contracted by Lucas to log in the Ootsa Lake region of central British Columbia and that Cobra worked for Lucas for 585.5 hours[2]; 462.0 hours before November 22nd and 123.5 after that date (that date is important for reasons discussed below). Lucas paid Cobra \$80,292.80. That is about all the parties agree on. In addition to this sum Mr. Vandenberg, a principal of Lucas, paid Cobra \$1,430.00, he says, from his personal company. The terms of that contract between Cobra and Lucas (verbal, of course) are very much in dispute. Cobra says that it was to be paid by the volume of timber cut, but Lucas says Cobra was to be paid on a time basis (i.e. for total hours worked).
- [4] Cobra's claim is for \$164,220.00 plus GST, less payments made by Lucas, for a net claim of \$95,422.60 (\$89,180.00 + GST of \$6,242.60).
- [5] On October 3, 2005 Cobra obtained a garnishing order before judgment for \$89,180.00 plus \$888.00 costs and served it on West Fraser Mills Ltd., the garnishee. While there is no evidence per se on the point, counsel advised that representatives of the garnishee then contacted Lucas and indicated their displeasure with the garnishment. The contents of that discussion are not important, but what is significant is that Lucas then paid, from its own resources, \$90,068.00 into court. I emphasize that Lucas, not West Fraser Mills Ltd., paid the

funds into court. It is those funds that Lucas now wants returned.

- [6] It is important to know the basis for any obligation between Lucas and Cobra, as the nature of that obligation will help decide if it is one that may support garnishment before judgment.

PARTIES' POSITIONS

- [7] Lucas. Mr. Perry for Lucas advanced little argument, and no authorities, on whether or not the Act applies to the funds in court. His submission was, basically, that whether the garnishee or the defendant paid the funds in, the Act still

applied as, in his words, "... it's all the mechanics of the Act". On that basis, he argued that the funds in court should be paid out to Lucas for any or all of three reasons -

- 1) the debt is not a liquidated sum;
- 2) Cobra has not given all due and just discounts in the calculation of the garnished sum;
- 3) Cobra's claim is weak on its merits.

Before dealing specifically with these arguments I will describe Lucas' versions of the facts and its agreement with Cobra.

- [8] Lucas says that at first it agreed to pay Cobra \$4.00 per cubic metre of wood logged, but that the first logging area assigned to Cobra was difficult. The timber was small, and "... it was tough going and there was a lot of blow down" [3]. Before any payments were made, therefore, Lucas moved Cobra to another area Lucas was logging, and assigned an area where two of its own feller-bunchers were working. There was no attempt to segregate the logs cut by Cobra from those cut by Lucas' two machines. By late August, says Lucas, "... it was agreed ... that Wayne would be paid \$125.00 per hour." In other words, payment was changed from a volumetric basis to a time-based one.
- [9] This rate was revisited, Mr. Vandenberg says, around November 22nd; by that date Cobra had worked for Lucas for 462 hours. This discussion occurred when Mr. Kindrat complained about the \$125.00 rate. The parties then agreed to increase the rate from \$125.00 to \$140.00 per hour. After November 22nd Cobra worked 123.5 more hours, all at the rate of \$140.00. In Lucas' view, therefore, Cobra was due $(462 \times \$125.00) + (123.5 \times \$140.00) = \$75,040.00$ plus GST. This sum, it says, has been paid, so that nothing is due Cobra. The hours worked (585.5) come from a record kept, says Mr. Vandenberg, by Mr. Kindrat. It is Exhibit A to Vandenberg affidavit #1.
- [10] Addressing the garnishment, Lucas argues that the claim is not liquidated because assuming that a volumetric rate was agreed at one point (\$4.00), and a total time worked (585.5 hours) may also be agreed (and ignoring for argument Lucas' position of a new agreement that was time-based) there is no agreement as to Cobra's actual production rate, or that there is such an average rate. In fact, Mr. Vandenberg estimates that Cobra more likely produced 30 cubic

metres per hour rather than the 70 cubic metres per hour posited in the statement of claim (para. 11, below).

- [11] Even on its best day, argues Lucas, Cobra has not given all due and just discounts. This argument turns on Mr. Kindrat's acknowledgment under oath (para. 15 below) that, for whatever reason, he agreed on or about November 22nd to accept \$140.00 per hour for his production, rather than \$4.00 per cubic metre. Relying on that admission, says Lucas, and accepting for the purposes of argument that until

November 22nd Cobra worked on a volumetric basis and logged at the rate alleged (i.e. 70 cubic metres per hour), Cobra is due $(462 \text{ hrs} \times 70 \text{ cubic metres/hr} \times \$4.00/\text{cubic metre}) + (123.5 \text{ hrs} \times \$140.00/\text{hr}) = \$146,650.00$. To repeat, that sum relies on Mr. Kindrat's admission of an agreement to the \$140.00 hourly rate after November 22nd. The statement of claim, however, claims \$164,220.00 (figures net of GST). The plaintiff should have acknowledged a reduction of the difference (\$17,570.00), argues Mr. Perry.

- [12] Cobra. Cobra says that Lucas agreed to pay it on a volume basis. Specifically, Lucas agreed to pay \$4.00 per cubic metre of logs and Cobra produced 70 cubic metres per hour of logging[4] over the 586.5 hours it worked for Lucas. Cobra says that the sum due to it is easily calculated as: $586.5 \text{ hours} \times 70 \text{ cubic metres/hour} \times \$4.00/\text{cubic metre} = \$164,220.00$. Nowhere, either in its affidavit or in its pleadings, does Cobra allege that the parties actually agreed to an assumed rate of production. Paragraphs 32 and 33 of Mr. Kindrat's affidavit and paragraph 5 of the statement of claim allege 70 cubic metres per hour to be a typical rate of production. But neither Mr. Kindrat nor Cobra allege that Lucas or its representatives agreed at any time to that rate of production for Cobra.

- [13] In its statement of claim, at para. 3, Cobra says that Cobra agreed to pay \$4.00 per cubic metre of wood cut. Paragraph 11 of the claim says:

On or about November 9, 2004, the Defendant wrongfully and in breach of contract attempted to unilaterally alter the terms and conditions of the contract from \$4.00 per cubic meter of wood cut, plus GST, fuel and camp costs, to \$125.00 per hour worked, plus GST, fuel and camp costs. The Plaintiff immediately advised the Defendant that the contract was for \$4.00 per cubic meter of wood cut, plus GST, fuel and camp costs, not \$125.00 per hour worked plus GST, fuel, and camp costs, and returned to work.

In his affidavit #2, Mr. Kindrat at para. 4, said "The facts in the Statement of Claim are true".

- [14] At para. 17 of that affidavit Mr. Kindrat describes a discussion that took place the week before November 9th. In that discussion, he says, Mr. Vandenberg told him that Lucas was going to pay him \$125.00 per hour of work. Discussion on this point ensued over the next week; Mr. Kindrat returned a cheque calculated on the hourly rate but then cashed it on Mr. Vandenberg's encouragement that "... we would work something out". Shortly after that Mr. Vandenberg and his partner, says Mr. Kindrat, told him that "... if I wanted to continue working for them I would have to accept \$140.00 per hour"[5].

- [15] Mr. Kindrat's affidavit makes further reference to this event. At para. 22 he says " . . . I was forced to accept \$140.00 per hour . . ." and at para. 24 says "Only after I was forced to accept the hourly rate of \$140.00 per hour " and finally at para. 25 "Up until I was forced to accept the \$140.00 per hour rate . . . ". The point is that, under whatever terms, Mr. Kindrat acknowledges under oath that he agreed to the change to an hourly rate. This happened on or about November 22nd, but there is no mention of it in the statement of claim.
- [16] Mr. Giddings, counsel for Cobra, argues that the change to \$140.00 per hour, agreed to by Mr. Kindrat, is of no force or effect whatever, as it was forced upon Mr. Kindrat. During submissions, however, he acknowledged that no claim of duress or other vitiating cause has yet been pleaded.
- [17] Respecting the defendant's application, Cobra argues -
- 1) The application cannot be brought under the Act, that the only relief would be under Rule 58 (Funds in Court), and that the defendant would have to show hardship to have its funds returned. The defendant has provided no evidence of such hardship.
 - 2) In any event, and if the Act applies, the sum is a liquidated one and all due and just discounts have been made.
- [18] More specifically, Mr. Giddings argues that since the funds were not paid into court by the garnishee, but rather by the defendant, the fact that it did so as an eventual consequence of Cobra's garnishing order is irrelevant. The funds were paid into court by the defendant, essentially, voluntarily, and it cannot now rely on the Act, or cases decided under it, for payment out.
- [19] In the alternative, if the Act does apply, Mr. Giddings submits that its requirements have been strictly adhered to and that the sum is liquidated being one, he argues, that is easily calculated by a simple formula (para. 11 above). He also submits that Cobra's case is strong on its merits, and that Lucas cannot claim hardship, as it has presented no evidence of financial or other difficulty flowing from the garnishment. Finally, during submissions, Mr. Giddings asked that, if the funds were not paid into court by proper garnishment, that they be secured now by a charging order.

ANALYSIS

- [20] Applicability of the Act. The first question is: Can Lucas use the Act and the cases decided under it to have the funds paid out? I think not. In *Gryphon Graphics Inc. v. ChromaColor Press (c.o.b. ChromaColor)*[6] Melnick J. considered a similar situation, when a pre-judgment garnishee order had been served on the defendant's bank. At para. 2, Melnick J. described what then happened:

When the garnishing order was served on the Bank, ChromaColor did not have any funds on deposit. However, it had a line of credit. At the suggestion of one of the personnel of the Bank, ChromaColor drew sufficient funds on its line of credit to pay into court the full amount claimed in the garnishing order. Essentially, the Bank wanted the matter looked after so ChromaColor complied with its suggestion.

While the funds were still in court, the plaintiff was given judgment under Rule 18A. The defendant then applied for payment out. The court refused, concluding at para 5:

In this case, effectively it was ChromaColor, not the Bank, that caused the funds to be paid into court. Thus, they were not paid in by the Bank pursuant to the garnishing order, but rather by ChromaColor to satisfy Gryphon's claim. ChromaColor may not have received the best advice from its banker, but it cannot now say that it is entitled to have the money back (except to the extent that the funds in court exceed the judgment obtained by Gryphon). It was a voluntary payment by ChromaColor. Thus, the cases involving void or voidable garnishing orders are of no assistance to it. Nor, I might add, are they of assistance to any secured creditor of ChromaColor which might seek to exercise a security interest. The money is gone, paid voluntarily by ChromaColor.

[Emphasis added]

- [21] When the garnishee mill was served with this garnishment, it contacted representatives of Lucas, who agreed to deal with it. When they paid their own funds into court they were acting the same as ChromaColor, above. It would seem to me that, as in Gryphon, Lucas cannot use "... the cases involving void or voidable garnishing orders ..." to have the funds repaid. The big difference, however, is that no judgment has been awarded Cobra, so that implicitly the funds should be returned to Lucas, much like ChromaColor was entitled to the return of "... funds in court (that) exceed the judgment obtained by Gryphon."
- [22] Obviously, this result invites abuse. A canny defendant could, for example, voluntarily pay a garnishment sum into court and thereby purport to relieve the garnishee of the obligation (although nothing in the Act releases the garnishee in such a case). The payment could easily lull a plaintiff while arrangements or tactics by a defendant make other pre-judgment security difficult. Then, relying on the logic of Gryphon, it could request repayment of the funds. The reason that possibility does not arise in this case is that when Lucas came to the court registry and tendered its own cheque in compliance with the order staff immediately telephoned counsel for Cobra before accepting the cheque and advised that it was the defendant's cheque, not the garnishee's, that was being tendered. On the instructions of counsel they accepted and deposited the cheque. Counsel then wrote a letter to the garnishee, and "released" the garnishee from any obligation of payment.
- [23] Such a letter, of course, could not relieve the garnishee of its obligations. It was required by the terms of a court order to make payment (assuming it was financially obliged to Lucas), or to dispute its liability to Lucas. Its options and obligations are clearly set out in ss. 11, 16, and 17 of the Act. The options do not include ignoring the garnishment order as the result of

counsel's letter. Nevertheless the Registry telephone call put counsel on notice, and he elected to proceed as he did. The funds, then, not having been paid into court by order, cannot continue to be held in court under the terms of the Act or cases decided under it.

- [24] What is the nature of either Lucas' or Cobra's interest in the funds? An answer is found in the majority decision in *Stewart v. Hoch* [7], a decision of the Ontario Court (General Division). The case considered competing claims by the defendant's creditors to funds paid into court, by order, from the sale of some of the defendant's real property. The reasoning of the court[8], with respect, is applicable to the funds paid in by Lucas:

In my respectful view although the debtor temporarily gave up control of the funds she remained the owner of them. The plaintiff in the action had no ownership interest. He had no judgment. The court was a stakeholder, not an owner. The debtor remained entitled to her funds unless a judge at the conclusion of the action ordered otherwise.

The respondent has produced no authority for the proposition that depositing funds in court to await the outcome of an action automatically divests the depositor of all ownership interest in those funds. Here the order of Master Peterson did not so direct, nor is there any evidence that the parties intended such a result.

- [25] The funds must therefore be returned to Lucas. In the event I am wrong, however, and if the Act does apply, I will consider the arguments brought by Lucas under the Act.

- [26] Liquidated debt. I agree with Mr. Perry's submission that the sum claimed is not a liquidated debt. Cobra argues that it is, as an easily calculated sum. The debt is the result of a simple calculation:

(hours worked) x (70 cubic metres/hour) x (\$4.00/cubic metre).

While it is true that the parties have agreed to the total hours worked by Cobra, and that, at one point, they had agreed to \$4.00/cubic metre, at no time did they ever agree that Cobra could, and would, log 70 cubic metres per hour. That is only an assertion found first in Cobra's statement of claim, and then in Mr. Kindrat's affidavit # 2. It is not alleged, nor is there any evidence, that the parties ever agreed to that production rate.

- [27] *Schultz, C.C.J.*, at p. 497, in *Standard Oil Company of British Columbia Limited v. Wood*[9], and cited with approval in *Pitney Bowes Leasing*, a division of *Pitney Bowes of Canada Ltd. V. Aqua-Lung Canada Ltd.*[10], said:

If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes 'damages'.

It cannot be said that the calculation suggested by Cobra is a "mere calculation", or that it does not require further investigation. In fact, doubt is created by Cobra's own evidence. Mr. Kindrat, in his affidavit, says his machine produces an average of 70 cubic metres per hour. Mr. McComber, however, a logging contractor who has hired Cobra in the past, said, at para. 4, that:

Wayne Kindrat averaged 900 cubic metres per shift and he worked between 10 and 12 hours a shift.

In other words, while working for Mr. McComber, Cobra averaged between 75 and 90 cubic metres' production per hour. Finally, Mr. Vandenberg states in his affidavit #1, at para. 32, that:

On the one block that Wayne did cut where some measure of this cubic metres per hour could be obtained, he cut 37 cubic metres per hour.

There is no doubt in my mind, therefore, that if the court were to agree (as Cobra alleges) that payment was to be made on a volumetric basis, and since there is no suggestion or evidence of Cobra's cut volume having actually been measured or tallied (through, for example, weigh scales), further enquiry and, doubtless, evidence, will have to proceed before the court can settle on a reasonable rate of production. That inevitability means that any sum owed Cobra by Lucas, on the facts so far shown, is not a liquidated sum.

[28] Just discounts. Mr. Perry has argued that Cobra has not, in the calculation of any sums due, made all just discounts. That argument proceeds from Mr. Kindrat's acknowledgement of an agreement, late in the parties' relationship, by which Cobra agreed to accept \$140.00 per hour in place of the initial payment by volume (para. 15 above). I conclude that Mr. Kindrat did agree to the \$140.00 hourly rate; he even invoiced Lucas on that basis[11]. That acknowledged change, Mr. Perry argues, means that the maximum Lucas could owe Cobra is $\$146,650.00 + \$10,265.50 \text{ GST} = \$156,915.50$ (para. 11, above); credited with the payment of \$80,292.80 (as agreed by the parties, para. 3, above), the net owing to Cobra could not exceed \$76,622.70. The statement of claim alleges that this net amount is \$95,422.60 ($\$89,180.00 + 6,242.60 \text{ GST}$); Cobra, therefore, has not made a just discount of \$18,799.90.

[29] With respect, I do not think that this reduction should be considered as a just discount. Rather, it is the result of the plaintiff contradicting itself and alleging, in various places and under oath, that both net sums (\$76,622.70 and \$95,422.60) are due. The first sum is computed, by necessary implication and simple calculation, when Mr. Kindrat acknowledged that he accepted the rate of \$140.00 per hour in November. The second number is affirmed under oath when Mr. Kindrat swore to the truth of the statement of claim. It is trite law that garnishment before judgment is an extraordinary remedy, requiring strict adherence to due process. That due process must preclude the garnishor proceeding on conflicting or contradictory evidence on a significant point (such as the net sum due). In such a case the garnishment cannot stand.

- [30] Merits of the case. The merits of the garnishor's case may be considered in an application such as this; in *Min-En Laboratories v. Westley Mines Ltd. and Ventures West Minerals Ltd.* [12] Seaton J.A. commented:

I think that the merits of the plaintiff's claim, in the broad sense that I have suggested, are factors, among the many, many factors in a case such as this, that the chambers judge is permitted to consider.

Nevertheless, I would expect that on an interlocutory application such as this the master or judge should be very careful about placing too much emphasis on merits which are, obviously, a trial issue. Implicit support for this is found in Seaton J.A.'s reference to " many, many factors ".

- [31] *Min-En* suggests further, also at p. 260, that an applicant such as Lucas need not demonstrate that the entire claim of the garnishor lacks merit; it is enough to show that, while some parts of the claim may proceed, there are serious doubts respecting the balance of the claim. I take that to apply in this case as: even if it is evident that Cobra has a claim against Lucas, it is doubtful that the claim is as stated i.e. for \$95,422.60, will stand and that, on its own evidence, the maximum claim would be for \$76,622.70. A significant portion of Cobra's claim, therefore, lacks merit.

- [32] Hardship. Mr. Giddings is correct. There is no evidence presented by Lucas that suggests this garnishment has created such hardship for Lucas that it should be set aside. Indeed, there is the possibility of inference to the contrary; as admitted by Lucas, it was not the garnishee that paid the sum into court, but Lucas. That payment was made very quickly after the garnishment order was served, and Lucas presents no evidence that it has created undue difficulties or financial problems for it to have made the payment.

- [33] Rule 58. Mr. Giddings argued that Rule 58 (Funds in Court) applies to these funds and to any request that they be paid out. With respect, I disagree. Rule 58 directs the manner in which funds deposited with the court will be managed and invested, and has very little to do with payment out. The only references to payment out are in ss. (5), (11), (14.1), and (16), and direct the technical, not legal, means and bases for payment out.

- [34] Charging order. At the close of submissions Mr. Giddings requested, in the event his arguments did not support the garnishment, that the court grant a charging order against the funds in court. No formal motion or application, other than this request, was made, nor was authority offered for the order. The defendant is entitled to proper notice of such significant relief. The request is therefore denied, without prejudice to Cobra's right to apply further and formally, if it wishes.

SUMMARY

- [35] As the funds were not paid into court by court order under the Act, they must now be paid out to the defendant Lucas Lake Logging Ltd. In the event the Act does apply to these funds, the garnishment is set aside for the reasons given above. Costs will be in the cause.

"Master D. Baker"

- [1] R.S.B.C. 1996 Ch. 78
 - [2] Actually, in its pleadings and affidavit materials Lucas totals the time to 586.5 hours, but Exhibit A to Vandenberg affidavit #1 is a note prepared by Mr. Kindrat totaling the time to 585.5 hours.
 - [3] Vandenberg affidavit #1, para. 5
 - [4] statement of claim, para. 5
 - [5] Kindrat affidavit #2, para. 21
 - [6] 2004 BCSC 975; (2004) B.C.J. No. 1554
 - [7] (1999) 43 O.R. (3d) 286; (1999) O.J. No. 687
 - [8] p. 4, Quicklaw
 - [9] (1964) 47 WWR 494
 - [10] (1996) B.C.J. No. 728) at para. 16
 - [11] Exhibit D to Vandenberg affidavit #1
 - [12] (1985) 57 B.C.L.R. 259 at 260
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