

CANADA / JUDGMENT

Husky Bobcat Ltd. v. McBride

2002 BCSC 70

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Husky Bobcat Ltd. v McBride et al
Date:20020117
2002 BCSC 70

Docket: 8532
Registry: Port Alberni
IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: HUSKY BOBCAT LTD. DBA husky contracting
plaintiff

AND: david mCbride, shawn flynn AND greenmax resources, a partnership,
Island-roots forestry services ltd., highlead forest management ltd.
defendants

REASONS FOR JUDGMENT

OF THE

HONOURABLE mr. JUSTICE shabbits

Counsel for the plaintiff:

J. Andersen

Counsel for the defendants:

M. Barnard

Date and Place of trial:

August 7, 8, 9, 10 and

September 6, 2001

Port Alberni & Nanaimo, BC

- [1] The plaintiff is a logging contractor. In 1997, it entered into contracts with Greenmax Resources to build roads and to log a portion of a wood lot near Port Alberni. In early 1997, Greenmax Resources was a registered partnership of the personal defendants David McBride and Shawn Flynn. Following the incorporation of the two corporate defendants, the two corporate defendants carried on the former business of Greenmax Resources in partnership under the name of Greenmax Resources. The defendants agree that they have been properly joined as parties to this action. There were two contracts made between the plaintiff and Greenmax Resources. They were dated June 12, 1997 and July 24, 1997. This suit involved claims by the plaintiff against the partnerships and its members for damages arising from the contracts.
- [2] The principal of the plaintiff company is Mr. Leo Cyr. The plaintiff company has operated as a road building logging contractor since the mid 1980s. In about April of 1997, Mr. Cyr spoke with Mr. McBride about logging parts of wood lot 1479, those parts being known as Blocks 1, 2, 5 and 6. Mr. Cyr was provided with diagrams and maps. He was told that Greenmax Resources was entitled to use gravel which was on the wood lot for the building of roads, and that Greenmax Resources wished to use that gravel, since its use would save it the cost of obtaining gravel from elsewhere.
- [3] The two agreements related to road building, tree falling, yarding, loading and hauling logs. The contracts were referred to in the evidence as being "stump to dump" agreements.
- [4] The second contract was made after the first contract was completed. It was terminated by the defendants with a notice of termination given October 1, 1997.
- [5] The plaintiff's claims include claims for monies for work done under the contracts and yet unpaid, claims for extras to the contract, and claims for damages in breach of contract.

The Claim relating to the Length of Roads Built

- [6] The contract made June 12th, 1997 ("the first contract") included these provisions:

6. Roads

The contractor shall build the roads as specified in Schedule A attached. The Contractor shall maintain and repair, as necessary, all roads used the Contractor.

11. Payment

The Owner agrees to pay the Contractor for:

A. ROADS

\$19.73 per lineal metre of road constructed as per schedule A. Estimated at 1,130m. Payment to be based on final road constructed.

This is inclusive of:

- Rehabilitation of 420m of existing road
- Installation of culverts provided by the Owner
- All loading, hauling and spreading of gravel

[7] The agreement made the 24th day of July 1997 ("the second contract") included these provisions:

6. ROADS

The contractor shall build the roads as specified in Schedule A attached. The Contractor shall maintain and repair, as necessary, all roads used the Contractor.

11. PAYMENT

The Owner agrees to pay the Contractor for:

A.ROADS

Not to exceed 22 per metre (agree to final price upon completion) per lineal metre of road constructed as per schedule A. Estimated at 817m. Payment to be based on final road constructed.

This is inclusive of:

- Installation of gate at Coleman Rd.
- Installation of (3) culverts provided by the Owner
- Construction of "T" turnouts at approx. 150m. intervals
- All loading, hauling and spreading of gravel

[8] The plaintiff built all roads required to be built under the two contracts, that being the roads and spurs needed to do the logging. The plaintiff alleges that it built 140 meters less road under the first contract than was estimated as being required, and 25 meters of road less road under the second contract than was estimated as being required.

[9] The defendant submitted that one reason that the length of roads built were less than estimated, was that certain spur roads were shorter than estimated, their length depending in part on the method of yarding used, with tower yarding requiring shorter spur roads than yarding with wheeled yarders.

[10] Although the plaintiff's measurement of the roads it built differed somewhat from the defendants' measurement, the defendants did pay the plaintiffs an amount which reasonably corresponded to the length of road actually built.

- [11] In advancing this claim, the plaintiff submitted that its fuel costs to build the roads was \$.75 per meter, and its labour costs to build the roads was \$5.45 per meter, and that the difference between \$6.20 and \$19.73, or \$13.53 per meter, was its loss of profit under the first contract for roads that it did not build, and the difference between \$6.20 and \$22.00 under the second contract, or \$15.80 per meter, was its loss of profit under the second contract for roads that it did not build.
- [12] I am of the opinion that the plaintiff's claim to be paid for roads it did not build cannot succeed.
- [13] Both contracts included the provision "Payment to be based on final road constructed", and both contracts provided that the lengths of the roads to be built were "estimates". What was to be built under the first contract was identified to the plaintiff in the documentation given the plaintiff before it settled on its bid price. The plaintiff knew before it entered into the second contract that the roads that it had been required to build under the first contract were shorter than estimated. There was no guarantee given by the defendants to the plaintiff under either contract as to the length of roads to be built. It was as open to the plaintiff as it was to the defendants, to measure, and estimate, what was required.
- [14] The plaintiff bid on and was paid on a per meter of road constructed basis. There is no reason to consider that it ought to be paid for roads it did not build.
- [15] The plaintiff's profits in the building of roads under the contracts remain a matter of some speculation. The plaintiff's claim has only taken into account the cost of fuel and labour. I do not accept that its road building costs under the contracts were only \$6.20 per meter. I do infer that one reason why the contract price for the building of roads was increased under the second contract, was because of the plaintiff's concerns that the per meter contract price under the first contract was too low. I am of the opinion that it is improbable that the price would have been increased had the plaintiff received three times its costs while building roads under the first contract.

Quality of Gravel

- [16] The plaintiff has advanced a claim for compensation relating to the requirement that it use the gravel which the defendants had available to them when building roads. The plaintiff's claim rests on its allegation that the coarseness of the available material was too fine and less suitable for road building than the kind of material usually used.
- [17] The plaintiff was experienced in road building. It submitted its bid for road building on the basis that it would use the gravel available to the defendants.

- [18] Mr. Cyr acknowledged that there were no representations made to the plaintiff as to the quality or suitability of the gravel. The plaintiff inspected the gravel before bidding on the first contract, and had already built roads using the gravel before entering into the second contract. I see no basis for the plaintiff's claim that it is entitled to compensation on the basis that the unsuitability of this building material caused it additional expense.
- [19] In its claim for damages based on the roads built not being as long as estimated, the plaintiff claimed that it had enjoyed substantial profits in the building of these roads. Although, in my opinion, the plaintiff did not establish that it had the profits it claimed, its evidence that it handsomely profited by the road building derogates from its position that the quality of the gravel caused it additional costs for which it is entitled to compensation.

The Repair of Roads in Blocks 1 and 2

- [20] In the first contract, the plaintiff agreed to rehabilitate existing road totaling 420 meters in length. The plaintiff claims that it spent ten additional hours in doing repair work over and beyond the rehabilitation included in the contract.
- [21] The plaintiff's evidence is that the rehabilitation work included within the contract was done in six hours, but that ten additional hours of recapping work was done at the request of the defendants.
- [22] This claim was advanced by the plaintiff by way of amendment long after the proceedings were commenced. Notwithstanding the adverse inference to be drawn from that, I am satisfied that the plaintiff has established that it did work over and beyond what was included in the first contract, and I accept that 10 hours is a reasonable estimate of that extra work.
- [23] I am of the opinion that the use of fabric in building up and strengthening the road surface was not "rehabilitation", but something more akin to construction. The procedure entailed installing something that was not there before. It could not have been something that the parties had in mind when entering into the contract. Furthermore, the defendants supplied some of the fabric to the plaintiff at no charge. In my opinion, that reflects an acknowledgement by the defendants that what was being done was over and beyond what was required of the plaintiff under the contract.
- [24] I am of the opinion that the plaintiff has established its right to recover \$3,800.00 for these extra repair costs.

Loss of Profit on Trucking

- [25] The first and the second contracts both required the plaintiff to deliver all logs to Union Bay Sort for scaling by a licensed government scaler. The first contract initially provided that the plaintiff would be paid \$12.00 per cubic meter for the loading and hauling of merchantable logs. This was later changed by agreement to \$12.25. The second contract provided that the plaintiff would be paid \$12.25.
- [26] The defendants decided to sell some of the logs other than through the Union Bay Sort. It was more profitable for them to sell better quality logs for the building of log homes, and they did so. The result of that was that some of the logs were not hauled to the Union Bay Sort. In addition, the defendants made other arrangements for the hauling of some of the logs. The position of the defendants at trial was that these changes were made with the agreement of the plaintiff. I am satisfied that that was not so, even though the plaintiff did, from time to time, acquiesce in the new arrangements for the hauling of logs being made by the defendants.
- [27] During August of 1997, Mr. McBride and Mr. Flynn went on vacation. They instructed the plaintiff not to load or haul any logs from the logging site while they were away. The evidence of the defendants was that the plaintiff agreed with them that all concerned would take a vacation, in part because of fire season shutdowns. I am satisfied that that was simply not so. It was the defendants who unilaterally dictated to the plaintiff that no work would be done while they were away on vacation. I am of the opinion that the reason they did so was that they wished to supervise the plaintiff's activities, notwithstanding that the plaintiff, under the written contracts, was entitled to carry out the operations which it had contracted to do, without cessation for holidays.
- [28] For those reasons, I am of the opinion that the plaintiff has established that the defendants breached the written contracts in respect of hauling.
- [29] However, the plaintiff has not established that it suffered any losses or damages by reason of those breaches. The plaintiff had always expected that it would hire or subcontract others to do the hauling work at the contract prices. The hauling was not an activity that would have profited the plaintiff. For that reason, the plaintiff's claim for damages in respect of hauling must fail, notwithstanding that the defendants sometimes acted in disregard of the contract.

Termination

- [30] On October 1, 1997, the defendants terminated the second contract. The reasons for termination which they advanced are that the faller who was working on the site failed to follow bucking specifications, and that the plaintiff started work on the last of the blocks to be logged, that being block 6, without giving advance notice to the defendants.

- [31] The second contract provided that the contract could be terminated upon the plaintiff's "failure to respond to directions by the Owner". It was the defendants' position that they were entitled to be given advance notice of the commencement of work on Block 6. They wished to supervise the work of the plaintiff and its employees and subcontractors.
- [32] The agreements which had been entered into between the plaintiff and the defendants were not contracts of employment. The plaintiff was an independent contractor. The plaintiff was required to do that which it had contracted to do, in accordance with the contracts, but it was entitled to do that required of it independently. From the outset, the defendants involved themselves in "supervising" the work that was being done. The contracts did not entitle them to do that. Not surprisingly, their actions caused conflict, and their involvement in "supervision" affected the efficiency of the plaintiff's activities.
- [33] I am satisfied that the reason that the contract was terminated was because the plaintiff started work on block 6 without the defendants being advised in advance that that would occur. Since they were not entitled to supervise, it follows that the failure of the plaintiff to advise them work was commencing in order to permit them to supervise could not justify the defendants' termination of the contract.
- [34] It was, in my opinion, the defendants who did not follow the provisions of the contract. It was the defendants who made changes in the manner in which logs were to be sorted, and changes as to where and how they were to be delivered. It was they who decided that work would be suspended for a vacation. It was the defendants who involved themselves on an ongoing basis in directing the plaintiff in its contract activities. The defendants did not act in strict accordance with the agreement, and, in my opinion, cannot now claim that the plaintiff committed a fundamental breach of the agreement in failing to give them notice as to when work would be started on block 6.
- [35] I am also of the opinion that the defendants have not established that the wood that was felled on Block 6 was not bucked according to specifications. The defendants abandoned their counterclaim for damages based on that allegation. The evidence which they offered at trial that bucking specifications were not being followed was unconvincing and not documented. In any event, I am of the opinion that it was the lack of notice, and not a failure to follow bucking specifications, that led to the termination of the contract.
- [36] The plaintiff claims a loss of profit of about \$5,000 arising from the defendant's failure to permit it to complete the contract of the logging of block 6.
- [37] There are two difficulties in quantifying the extent of the plaintiff's loss.
- [38] The first is that the exact amount of wood logged from block 6 was not measured. It was the defendants who had control of the wood following termination. The plaintiff cannot be faulted for not having an exact measurement of what was taken.

[39] The defendants estimate that 698.7 cubic meters of wood were taken from block 6. They have record of the volume of the total of all of the wood taken from the four blocks, and record of the total number of loads of wood taken. In arriving at their estimate, they have used the number of loads taken from Block 6 and applied a per load average of volume. The plaintiff estimated that 464 cubic meters of wood were taken from Block 6. In arriving at its estimate, the plaintiff took the same proportion of the total volume of wood logged, as the area of Block 6 which was logged bore to the area of all the lands logged. I am of the opinion that it is more likely than not that about 561 cubic meters of wood were taken from Block 6. That is the volume of wood that was estimated to be there in the pre-contract cruise of the wood lot. That, in my opinion, is the best estimate of the volume of wood, which was logged from Block 6.

[40] The second difficulty is in determining the plaintiff's per cubic meter profit. The second contract included this provision:

B. LOGGING

Falling and yarding to roadside by hand falling and yarding with Urus skyline yarder. Not to exceed \$17/m3 (Agree to final price upon completion,

per cubic meter this is inclusive of

- Machine setup and dismantling
- All functions necessary to move logs to roadside of designated roads in Schedule A.

[41] The plaintiff submitted that its costs included only falling costs and fuel costs. The plaintiff had other costs. The plaintiff's estimate of loss of profit is based on incomplete data.

[42] I can see no reason why the plaintiff ought not to have been paid \$17 per cubic meter under the second contract. In my opinion, the defendants have not shown any reason why the \$17 amount, that being the only amount referred to in the contract, should not be used, even though the contract refers to that as being the maximum price. The defendants abandoned their claim for losses arising from unsatisfactory work, and they ought not to be allowed to reduce what would otherwise be due of them by alleging that the work was unsatisfactory, without establishing an evidentiary basis for a reduction.

[43] I assess the plaintiff's damages for the unlawful termination of the contract at \$1621.29, that being 20% of what it would have been paid had it logged Block 6.

The Plaintiff's Claim for Monies due it for the Falling and Yarding of Blocks, 1, 2, and 5.

[44] The plaintiff claims that it has not been fully paid for logging Blocks 1, 2, and 5.

[45] The plaintiff claims it is entitled to be paid for residue and waste wood and for firewood. There was 95.7 cubic meters of residue and waste wood, and 80 cubic meters of firewood, left on site, or given away to others as free firewood. Under the contracts, the plaintiff was to

be paid for logging, which included falling and yarding to roadside, and all functions necessary to move "logs" to roadside. I am of the opinion that those payment provisions do not relate to residue or waste wood or firewood, and that the contract did not provide that the plaintiff was to be paid for that wood.

- [46] In my opinion, the evidence establishes that the total volume of wood logged was 4,046 cubic meters, not including the residue and waste wood. I do not accept the defendants' submission that the sum of 4,046 cubic meters includes the 95.7 cubic meters of residue and waste wood. The information from the Ministry of Forests dated April 3, 1998 that 4,046 cubic meters of wood of identified species was taken from the wood lot, predates the April 15, 1998 notification from the Ministry of Forests that there would be a residue billing for residue and waste wood based on an average stumpage rate. The dates of these documents, and the identification in the April 3, 1998 document of 4,046 cubic meters of wood by species, demonstrate that residue and waste wood was not included in the 4,046 volume.
- [47] The plaintiff was entitled to payment for 3,147.26 cubic meters of wood taken from Blocks 1 and 2 at the rate of \$14 per cubic meter. That totals \$44,061.64. It was entitled to payment of 337.74 cubic meters of wood taken from Block 5 at \$17 per cubic meter. That totals \$5,741.58. (4,046 was the volume of all of the wood. Excluding the 561 cubic meters related to Block 6, and 3,147.26 cubic meters related to Blocks 1 and 2, leaves 337.74 cubic meters in Block 5.) The plaintiff has been paid \$45,544.40. It is entitled to recover \$4,259.24.
- [48] I would allow the plaintiff its costs on Scale 3, although the parties have leave to speak to costs by application by telephone should they consider there is reason for costs to be addressed with submissions. Court Order Interest shall be at the Registrars' rates, with interest to be calculated from December 1, 1997.

"S.J. Shabbits, J."

The Honourable Mr. Justice S.J. Shabbits

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