

CANADA / JUDGMENT

P.S. Sidhu Trucking Ltd. v. Elima Enterprises Ltd.

2020 BCSC 1062

COURT

Supreme Court of British Columbia

DECIDED

17 July 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.S. Sidhu Trucking Ltd. v. Elima Enterprises Ltd.,

2020 BCSC 1062

Date: 20200717

Docket: S172864

Registry: Vancouver

Between:

P.S. Sidhu Trucking Ltd.

Plaintiff

And

Elima Enterprises Ltd., 364832 B.C. Ltd.,

Soucie Construction Ltd. and Stewart Bulk Terminals Ltd.

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

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Elima Enterprises Ltd. and 364832 B.C. Ltd.:

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D. Shouldice

Place and Dates of Trial:

Vancouver, B.C.

February 24-28, 2020

March 2-3, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 17, 2020

Introduction

- [1] The plaintiff, P.S. Sidhu Trucking Ltd. (Sidhu Trucking) asserts ownership and seeks possession of two pieces of equipment located in Stewart, British Columbia. They are:
- a) a hydraulic side tilt dumper (tipping table) located in a storage building owned by Stewart Bulk Terminals Limited (SBT); and
 - b) a 20 metric ton capacity twin-hoist trailer reload system (crane) located on property owned by Elima Enterprises Ltd. and 364832 B.C. Ltd. (the Elima defendants).
- [2] Sidhu Trucking says that it purchased these pieces of equipment through the receivership process involving Maple Leaf Loading Ltd. (Maple Leaf) in August 2014, along with other Maple Leaf assets.
- [3] SBT and the Elima defendants assert that Sidhu Trucking does not own the equipment and that each piece of equipment is a fixture on their respective properties and are now part of their realty.
- [4] For clarification, Sidhu Trucking is not pursuing any claim against Soucie Construction Ltd.

The Parties

- [5] Sidhu Trucking was incorporated as a truck hauling and construction company in 2002. Paramjit Sidhu is the President of Sidhu Trucking and manages the business. Before that, Mr. Sidhu operated this business as a sole proprietorship.
- [6] In addition to truck hauling, Sidhu Trucking performs a variety of construction services, focused on road building and water and sewer construction. It owns and operates numerous vehicles and construction equipment for these purposes.
- [7] SBT owns and operates three buildings at the port terminal in Stewart. Its principals are Daniel and Roland Soucie, who operate it as a team. SBT's customers are nearby mines. SBT contracts with a mine for its services of warehouse storage to store and transfer ore and concentrate from the mine. The mine will have the use of one of its buildings. If no building is available at the time, the mine will construct a building at the terminal, and SBT will pay back the mine for the same through reduced handling rates.
- [8] The Elima defendants are separate companies, each owned and operated by Moira Hyslop and Erin Grey. Their purchase of the property was part of a joint venture between the Elima defendants. Aside from this joint venture, the Elima defendants operate as residential landlords and hotel operators in Stewart.

Background

Maple Leaf's Hauling Contract with Yukon Zinc Corporation

- [9] In 2010, Maple Leaf operated as a transport and logistics company, primarily in the business of commercial truck hauling for mines, from the mine sites to points of dispatch. Its major customer at that time was Yukon Zinc Corporation (YZC), which owned and operated the Wolverine mine near Watson Lake, Yukon. In 2010, Maple Leaf entered into a hauling contract with YZC to haul bulk copper and zinc concentrate from the Wolverine Mine to Stewart, for transport overseas. The distance from the Wolverine Mine to Stewart was about 700 or 750 kilometers, a 16-hour drive.
- [10] The nature of the truck hauling business is that the truck hauling company contracts with the mine to haul its ore and concentrate to a storage facility. The truck hauling company picks up the ore and concentrate at the mine, transports it by truck to the storage facility and unloads it there. The mine contracts directly with the storage facility to store the ore and/or concentrate, until it is ready for shipment from the port.
- [11] Don Watt was the chief operating officer of Maple Leaf at the time. In his evidence, Mr. Watt described Maple Leaf's decision to acquire custom-built, specialized trucks, trailers and related equipment to perform the hauling services. Maple Leaf commissioned Tycrop Manufacturing Ltd. (Tycrop) to design and manufacture 15 of the trucks and trailers, the tipping table and two cranes.

- [12] The advantage of the custom trucks and trailers was that they had a higher gross payload capacity than was legal at the time. The trucks had a tridem-drive tractor with three sets of axles and the trailers had five sets of axles. They could carry approximately 49 metric tons of payload; about 10 tons more than any other trucks and trailers on the market at the time. They cost approximately 5-15% more to operate than regular truck and trailers.
- [13] In order to lighten the weight of the trucks and reduce costs related to maintenance and wear, they did not have hydraulic lift capacity. Because of this, the trucks could not dump their payload themselves. They had to be driven onto and dumped by the tipping table that was specifically designed for that purpose. The Maple Leaf driver would exit the truck and attach safety chains to it. The driver would then open gates on the truck and trailer to allow the payload to be emptied. The driver would then go to a platform at the side of the tipping table and open it, using the hydraulic lifts and operate the tipping table to empty the payload.
- [14] Mr. Watt said that Maple Leaf designed the tipping table to be "modularized" so it could be moved and used anywhere that is it could be plugged in and secured to the ground. If Maple Leaf no longer hauled concentrate to Stewart, he said, it would have moved the tipping table and the crane to wherever it hauled concentrate.
- [15] The tipping table was purchased for approximately \$369,885, plus tax.
- [16] Maple Leaf also decided to design the cranes, which were necessary for use by the custom trucks. Once emptied, the Maple Leaf trucks and trailers were over length and unsafe to operate in their normal formation. The crane located on the Maple Leaf property in Stewart was specifically designed to lift the trailers up and attach them onto the trucks in a "piggyback" fashion so they could be driven on the highway back to the mine. The crane could be operated by one person, using two hoists that were designed to be situated for certain connection points on the custom trailers.
- [17] The second crane was sold to YZC and installed at the Wolverine mine, for the same purpose.
- [18] The crane that was located in Stewart was purchased for approximately \$63,663, plus tax.
- [19] Maple Leaf's purchase of the tipping table and the crane was financed by a secured loan from GE Canada Equipment Financing G.P. (GE Canada) and registered a general security agreement in the Personal Property Registry (PPR) against Maple Leaf's assets, which included a specific registration against the following collateral:

Type

Serial #

Year

Make/Model

MV

00043722

2010

Hydraulic Side Dumper

MV

10441168

2010

Hydramach Lifting System

MV

H301981A

2010

Hydramach Lifting System

MV

H301981B

2010

Hydramach Lifting System

Installation

The Tipping Table

- [20] SBT owns and operates three buildings at the port terminal in Stewart. There was one building there when SBT bought the operation in 1994. Now there are two other similar buildings at the terminal: a building built in 1997 that is currently being used to store and load concentrate from the Silvertip mine (Huckleberry building) and a building built in 2014 that is currently being used to store and load concentrate from the Red Chris mine (Red Chris building).
- [21] The original building came to be known as the YZC building, because that was the storage and offloading facility where Maple Leaf hauled and offloaded the bulk copper and zinc concentrate from the Wolverine mine.
- [22] In 2010, Maple Leaf obtained SBT's consent to install the tipping table at the YZC building so it could perform the YZC hauling contract with the Maple Leaf trucks. There was no contract between Maple Leaf and SBT at any time. Both Maple Leaf and SBT contracted directly with YZC.

- [23] Mr. Watt said that when he spoke with the Soucies in 2010 about the installation of the tipping table, he told them that Maple Leaf would be taking the tipping table when the YZC hauling contract ended. Mr. Watt could not recall which of the Soucies who he spoke to at SBT specifically, or SBT's response, if any. He said that there was never any discussion about SBT owning the tipping table or the tipping table remaining at the YZC building at the conclusion of the hauling contract.
- [24] Daniel Soucie testified that the practice of SBT is to allow a truck hauling company to install whatever equipment it wished, but at the end of the truck hauling contract with the mine, the equipment would remain at the warehouse and become the property of SBT. He agreed that to his direct knowledge, Maple Leaf never agreed that it would leave the tipping table at SBT once it finished hauling for YZC.
- [25] In order to purchase these custom assets, Maple Leaf obtained a secured loan from GE Canada, which provided almost all of the financing for these assets.
- [26] Before the tipping table was installed, GE Canada required that SBT sign a waiver and SBT agreed. The waiver was signed on behalf of SBT on March 31, 2010. In the waiver, SBT agreed that "so long as GE Canada holds a Claim in or to the [tipping table] and/or its proceeds", SBT would release and waive any claim it might have in the tipping table in favour of any claim GE Canada might have, and not to assert any claim in the tipping table that ranked in priority ahead of any claim of GE Canada's. SBT agreed that "the [tipping table] shall at all times be considered to be personal property and shall not constitute a fixture or become part of the [YZC building]".
- [27] GE Canada agreed that if it removed the tipping table from the YZC building, it would either repair any damage caused by the removal or reimburse SBT for the cost.
- [28] The tipping table was installed in the YZC building in June 2010. Maple Leaf paid approximately \$100,000 for the installation. Maple Leaf supervised the work. The installation required the removal of an existing concrete ramp and a steel deck and the pouring of a new concrete foundation. The tipping table was secured to the concrete with bolts. It rests on four cement slabs in the space excavated from part of the concrete ramp. Roland Soucie described it as "sitting" on the cement.
- [29] The electrical power for the hydraulic system on the tipping table was hardwired into the YZC building and SBT's electrical system.
- [30] Maple Leaf continued to use the tipping table until it went into receivership in June 2014.
- [31] Mr. Watt said that he told the Soucies about the receivership in June 2014. The Soucies were aware of the receivership when it happened, and were aware that the receiver was marketing and selling Maple Leaf's assets in Stewart. SBT was not a creditor of Maple Leaf and was not involved in the receivership process.

The Crane

- [32] Maple Leaf installed the crane (other than the one that it sold to YZC) on its property in Stewart where it maintained a workshop and an office.
- [33] The crane has four posts, each of which is bolted to a concrete foundation with four one-inch bolts. It is connected, by underground cable, to the electrical system in the shop located on the property.
- [34] The crane remains on the property that is now owned by the Elima defendants.

Maple Leaf Receivership

- [35] Ernst & Young Inc. (Receiver) was appointed by the court as the receiver of all of the assets, undertakings and properties of Maple Leaf on June 27, 2014, at which time Maple Leaf ceased its operations. In the course of the receivership, the Receiver marketed and sold all of the assets of Maple Leaf.
- [36] The Receiver had access to an appraisal of Maple Leaf's assets prepared in February 2014 by the Sterling Group (Sterling appraisal). The tipping table and the crane were specifically linked as a single item and the crane is described as being a key component of the tipping table.
- [37] The Receiver arranged for its own appraisal to verify the assets in the possession of the debtor (Receiver appraisal). It described the tipping table and the crane as two pieces of equipment as:

276

2011-TY-CROP HYDRAULIC TRUCK TIP DECK 10 FT 6 IN

277

TYCROP 20 TON ELECTRIC 20 FT X 50 FT GANTRY CRANE

- [38] Based on the Sterling appraisal, the Receiver understood that these two pieces of equipment were an unloading/lifting system.
- [39] In the bid process for Maple Leaf's assets in Stewart, the Receiver distributed an asset list, which included the following in the second line item:

Year

Make

Serial Number

Physical Location

NBV

2010

Tycrop

Stewart

\$453,558

[40] NBV refers to net book value.

[41] Kevin Brennan of Ernst & Young Inc. was involved in the receivership of Maple Leaf. His role included oversight of the disposition of assets. He deposed that the unloading/lifting system was comprised of two separate pieces of equipment and that it was not sold to any other party other than YZC, as I discuss below. The Receiver understood those pieces of equipment to be the items identified as number 276 and 277 in the Receiver appraisal. Every witness at trial who was shown the Receiver appraisal, including the representatives of SBT and the Elima defendants, confirmed that the pictures of those items in the appraisal depicted the tipping table and the crane, respectively.

YZC Sale Agreement

[42] The Receiver and YZC entered into an asset purchase and settlement agreement dated July 25, 2014 (YZC Sale Agreement). YZC purchased certain trucks, trailers and equipment as listed in the YZC Sale Agreement, for a purchase price of \$2,453,289, excluding GST. The price reflected 70% of the NBV of the assets.

[43] The YZC Sale Agreement was approved by court order on July 31, 2014 (Vesting Order) and the sale closed on August 1, 2014.

[44] The YZC Sale Agreement was attached as Appendix B to the Receiver's second report dated July 28, 2014. According to the second report, which also set out the details of the proposed sale, the assets to be purchased by YZC included "one unloading/lifting system".

[45] The YZC Sale Agreement was attached as Schedule B to the Vesting Order. The second line item at Schedule 1 - List of Assets to the YZC Sale Agreement reads as follows:

Year

Make

Unit #

Model

Type

Serial Number

NBV

2010

Tycrop (weighscale)

N/A

MHM5564M/I

20 Ton listing system/unloading

1044-1168

453,558

[46] Mr. Brennan testified that the NBV of the second line item came from Maple Leaf's accounting records, which set out that value as including both the tipping table and the crane. He testified that the wording "20 Ton listing/unloading system" was an error and should be "20 ton lifting/unloading system".

[47] Mr. Watt said that the descriptions of items 276 and 277 in the Receiver appraisal could not have referred to any other assets owned by Maple Leaf in Stewart. Maple Leaf did not own any other assets that could have comprised a NBV of \$453,558.

Sidhu Trucking's Hauling Contract with YZC

[48] In July 2014, Sidhu Trucking negotiated a contract with YZC to take over the hauling services that had been provided by Maple Leaf under the YZC Hauling Contract. On July 22, 2014, YZC sent a Letter of Intent (LOI) to Sidhu Trucking setting out the terms of that agreement. Under that agreement, YZC agreed to sell all of the YZC assets purchased from the Receiver to Sidhu Trucking for the same price it had paid the Receiver for them.

[49] Sidhu Trucking began hauling concentrate from the Wolverine mine with its existing equipment starting on July 31, 2014.

Sale of the YZC Assets to Sidhu Trucking

[50] In order to purchase the YZC assets, Sidhu Trucking entered into a conditional sales contract with Inland Kenworth Ltd. Inland Kenworth Ltd. provided most of the purchase price for the YZC assets, and Sidhu Trucking took title to the assets while paying Inland Kenworth Ltd. back over time. Sidhu Trucking acquired the YZC assets on August 6, 2014. The value allocated to the tipping table and crane was \$323,994.52.

[51] Sidhu Trucking purchased all of the assets that the Receiver sold to YZC as set out in the Vesting Order. No assets were added to this sale that were not included in the sale between YZC and the Receiver, and no assets that were included in the sale between YZC and the Receiver were removed.

- [52] Once it acquired the Maple Leaf trucks in early August 2014, Sidhu Trucking began hauling with them and was able to "ramp up" the volume of concentrate it was hauling because of the greater capacity of the Maple Leaf trucks.
- [53] Sidhu Trucking also used the crane that was located on Maple Leaf's property in Stewart. When that property was sold to the Elima defendants by the Receiver on August 31, 2014, Sidhu Trucking entered into a lease with them to use the property to perform maintenance and storage of its vehicles and to use the crane.
- [54] Sidhu Trucking hauled ore and concentrate from the Wolverine mine until July 2015, when YZC experienced financial trouble. At that time Sidhu Trucking terminated its lease on the Elima defendants' property and removed all of its assets, with the exception of the crane.
- [55] Since then, the Maple Leaf trucks have sat idle on property that Sidhu Trucking owns in Stewart.

Sidhu Trucking Asserts Ownership of the Tipping Table and Crane

- [56] As the YZC hauling contract was coming to an end, Mr. Sidhu contacted SBT and the Elima defendants about the tipping table and the crane.
- [57] The evidence about the conversations by telephone, in person and by email over the course of 2014-2016 is vague, but suffice it to say that Mr. Sidhu contacted the principals of both SBT and the Elima defendants, asserting his ownership of the tipping table and the crane. He provided the documents from his purchase of them to each.
- [58] SBT and the Elima defendants were not satisfied that the documents that Mr. Sidhu sent to them accurately described the tipping table or the crane and they each denied that Sidhu Trucking owned them. Further, they each took the position that the tipping table and the crane were fixtures on their respective properties and were being put to use consistently since Sidhu Trucking ceased hauling to Stewart in 2015.
- [59] The parties each consulted their lawyers and this litigation ensued.

Recent Hauling Opportunities

- [60] In December 2019, Sidhu Trucking contracted with Arrow Transportation Systems Inc. (Arrow) to provide hauling services from the Red Chris mine to Stewart at the price of \$70 per metric ton. Because it could not use Maple Leaf trucks for the hauling, as it did not have the use of the crane to piggyback the trailers of the Maple Leaf trucks for the return trip, it used its older tandem trucks. Sidhu Trucking hauled 4,783 metric tons of concentrate in 125 trips between December 12, 2019 and January 20, 2020 for an average of just over 38 metric tons per trip and a gross revenue of \$334,810.

- [61] Mr. Sidhu testified that there were no limits on how much it could haul under this contract. The mine had a lot of concentrate remaining when Sidhu Trucking had to stop hauling on January 20, 2020. Mr. Sidhu had to move his older tandem trucks for another contract in the Northwest Territories. Mr. Sidhu said that Sidhu Trucking could have hauled at least 6,000 metric tons of concentrate over the same period.
- [62] Mr. Sidhu said that if Sidhu Trucking had the use of the crane, it would have been able to use the Maple Leaf trucks for the Arrow contract. It could have hauled 11 tons per trip more than it could with its regular trucks in December 2019 and January 2020 and it would have been able to continue to perform the Arrow contract after January 20, 2020. In the same amount of trips (125), Sidhu Trucking would have been able to haul approximately 6,125 metric tons of concentrate from the Red Chris mine with the Maple Leaf trucks, meaning an increased revenue of \$93,940.
- [63] Mr. Sidhu testified that the direct costs of these trips include labour and fuel costs. The labour costs for the Arrow contract are the same for the regular trucks or the Maple Leaf trucks (\$570 per trip). The fuel costs are approximately 10% higher for the Maple Leaf trucks. The fuel costs for the Arrow contract were about \$650-\$670, meaning they would have been \$715-\$737 using the Maple Leaf trucks.
- [64] Mr. Sidhu estimates that if the fuel costs would be approximately \$737 per trip, the increased direct costs of the Arrow contract with the Maple Leaf trucks would have been \$8,375. After deducting that amount from the increased revenue of \$93,940, he said that the loss of profit to Sidhu Trucking caused by the deprivation of the crane is \$85,565.
- [65] Mr. Sidhu said that in addition to its hauling approximately 6,125 metric tons with the Maple Leaf trucks, it also could have hauled the 4,783 metric tons it did in 26 fewer trips with those trucks. The direct costs of those additional trips are approximately \$25,087, after factoring in a discount for a 10% increase in fuel costs for the Maple Leaf trucks.

Issues

- [66] The issues are:
- Did Sidhu Trucking purchase the tipping table and the crane?
 - If so, are the tipping table and the crane fixtures or chattels?
 - If they are chattels, what is the appropriate remedy: return of the goods or compensatory damages?
 - Is Sidhu Trucking entitled to damages from the Elima defendants for loss of profit and opportunity in respect of its deprivation of the crane?

Did Sidhu Trucking Purchase the tipping table and the crane?

Legal Framework

[67] The parties agree on the principles of contractual interpretation as set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47 [Sattva]:

To [determine the parties' intention and the scope of their understanding], a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning

Positions of the Parties

[68] As noted in the facts above, the dispute between Sidhu Trucking and SBT and the Elima defendants is that none of the sale documents between the Receiver, YZC, Inland Kenworth Ltd. and Sidhu Trucking clearly refer to the conveyance of the tipping table or the crane.

[69] In the YZC Sales Agreement, attached as Schedule B to the Vesting Order, reference is made to a "weighscale" and a "20 Ton listing system/unloading system" with a model number of MHM5564M/I and a serial number of 1044-1168 with a NBV of \$453,558. SBT says that the tipping table is not a weigh scale nor a listing/unloading system and does not bear the serial number listed. The Elima defendants say that the crane is not included in the description. SBT and the Elima defendants assert that the NBV bears no reference to either the tipping table or the crane.

[70] Sidhu Trucking says that both the tipping table and the crane were manufactured by Tycrop in 2010. The tipping table is not actually a weigh scale but it looks like one. The tipping table does not have a serial number. The model number of the crane is MHM5564M/I. The crane is a 20 metric ton capacity piece of machinery meant to "lift". The tipping table is a piece of machinery meant to "unload". It is unclear what the serial number of the crane may be but the number "1044-1168" was associated with the crane in both the packing slip from Tycrop for the crane and the PPR search for the crane. Sidhu Trucking says that the undisputed evidence is that the crane and the tipping table had a combined NBV of exactly \$453,558.

Discussion

[71] As Sattva points out, the role of the court is to determine the objective intention of the parties to the contract. The intention of the parties is clear: the Receiver agreed to sell and YZC agreed to buy the assets of Maple Leaf, including the tipping table and the crane.

[72] YZC intended to sell and Sidhu Trucking intended to buy those same assets, including the tipping table and the crane, for the price that was paid by Sidhu Trucking in August 2014.

- [73] Sidhu Trucking purchased all of the assets that the Receiver sold to YZC as set out in the Vesting Order. No assets were added to this sale that were not included in the sale between YZC and the Receiver, and no assets that were included in the sale between YZC and the Receiver were removed.
- [74] I appreciate that the description of the tipping table and the crane in the YZC Sale Agreement attached as Schedule B to the Vesting Order is not the picture of clarity. It is the reason that both SBT and the Elima defendants did not agree with the assertions of Mr. Sidhu from 2014 to 2016 that he had purchased these assets from YZC in August 2014. However, the Elima defendants' view of the documents does not change the intention of the parties to the sale.
- [75] The evidence relied upon by Sidhu Trucking demonstrates clearly that it purchased from YZC the tipping table and the crane, along with the other former assets of Maple Leaf, most notably the Tycrop designed trucks. That evidence is:
- a) the Receiver sold all of the assets of Maple Leaf and did not sell the lifting/unloading equipment to any other party but YZC;
 - b) the Receiver was selling the assets owned by Maple Leaf in Stewart that it was using for the YZC hauling contract as a package and the Maple Leaf trucks cannot operate without the lifting/unloading equipment;
 - c) YZC (and Sidhu Trucking) intended to buy the assets used by Maple Leaf for the YZC hauling contract because they both wanted ore from the Wolverine mine to be hauled to Stewart as done by Maple Leaf under that contract;
 - d) the assets sold in the YZC Sales Agreement were the assets used by Maple Leaf in the YZC hauling contract;
 - e) aside from tipping table and the crane (as well as the wheel loader, the first line item), all of the other assets in the YZC Sale Agreement are easily identifiable as vehicles with serial numbers;
 - f) in every single asset list or contract in evidence at trial, the lifting/unloading equipment is listed as the second line item;
 - g) Maple Leaf did not own a weigh scale, or any other assets that could have been described by the second line item;
 - h) the tipping table looks like a weigh scale, and at the time, there was only one tipping table at SBT;
 - i) the Receiver, who was marketing Maple Leaf's assets, understood that the tipping table and the crane were part of the same "lifting/unloading system", based on the Sterling appraisal;

- j) in the second report, the Receiver states that the assets being sold to YZC include "one unloading/lifting system"; and
 - k) there are no other assets that fit that description.
- [76] The tipping table and the crane were included in the YZC Sales Agreement. Sidhu Trucking purchased those assets from YZC.
- [77] Sidhu Trucking is the owner of the tipping table and the crane.

Are the Tipping Table and the Crane Fixtures or Chattels?

Legal Framework

- [78] Fixtures are chattels that become attached to real property and pass with the transfer of title to real property.
- [79] The test for distinguishing between fixtures and chattels was set out in *Stack v. T. Eaton Co.* (1902), 4 OLR 335 at 338 (Div. Ct.), adopted by the B.C. Court of Appeal in *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549 at 554 and *Zellstoff Celgar Ltd. v. British Columbia*, 2014 BCCA 279 at para. 9 [Zellstoff CA], aff'ng 2013 BCSC 1108 [Zellstoff SC]:
- (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
 - (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
 - (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation which are patent to all to see.
 - (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.
 - (5) That, even in the case of tenants' fixtures, put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.
- [80] In Zellstoff SC, the Court stated at para. 21:

These principles presume that an item affixed to the land in any manner is a fixture unless the degree and purpose of its annexation objectively demonstrate otherwise. The subjective intention of the party affixing the items, or of the parties to the transaction, are not determinative. In *Melluish (Inspector of Taxes) v. B.M.I. (No. 3) Ltd.* (1995), [1996] A.C. 454 (U.K. H.L.), the House of Lords held as follows (at 473):

... the intention of the parties as to the ownership of the chattel fixed to the land is only material so far as such intention can be presumed from the degree and object of the annexation. The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil.

[81] A chattel may be attached both for the purpose of the better use of the land and the better use of the chattel. If so, the court must discern the dominant or true object of the annexation: *Zellstoff SC* (at para. 75).

[82] In *Zellstoff CA* the Court instructed (at para. 40):

In my opinion, the question of whether the items were annexed for the better use of the chattels or the better use of the lands should not be asked in isolation. It should be informed by all of the relevant circumstances, including the objective intention with respect to the duration of the annexation and the use of the lands.

[83] The objective intention to affix chattel permanently indicates that the chattel has become a fixture. In *Zellstoff CA*, the Court addressed this at paras. 41-42:

41 In *Haggert v. Brampton (Town)* [(1897) 28 S.C.R. 174], the Supreme Court of Canada stated that the use of the premises are to be taken into account, and it made the distinction between "occasional" or "temporary" affixing and "permanent" affixing. In holding that the safe was a fixture, the Court had regard to the fact that "it was put there not for a temporary purpose but to be permanently there" and it considered the purpose to which the building was applied.

42 This distinction between "occasional" and "permanent" affixing was also utilized by this Court in *La Salle Recreations*, [(1969) 4 D.L.R. (3d) 549] where McFarlane J.A. interpreted the word "permanent" as indicating the object of having the item in question remain where it is so long as it serves its purpose. Thus, in that case, where the carpeting was affixed with the intention of remaining in place for so long as it served its purpose, McFarlane J.A. concluded that the object of annexation was the better use of the building as a hotel and not the better use of the carpeting as a chattel even though the degree of annexation was not great.

Positions of the Parties

[84] There is no dispute that the tipping table is affixed to the YZC building at SBT's facility in Stewart. Similarly, there is no dispute that the crane is affixed to the Elima defendants' property in Stewart. The presumption is therefore that they are both fixtures.

- [85] The dispute between the parties is whether that presumption is rebutted.
- [86] SBT asserts the tipping table is a fixture and forms part of the realty owned by SBT. The purpose of the annexation was for the better use of the YZC building to receive, store and transfer ore and concentrate. The degree of annexation of the tipping table is significant: it is securely anchored to the concrete floor of the YZC building by several bolts. The installation of the tipping table involved the removal of the existing concrete and steel ramp and the pouring of new concrete to establish a solid foundation in order to secure the tipping table.
- [87] SBT argues that its interest in the tipping table was not extinguished by the Vesting Order because SBT did not receive any notice of the hearing.
- [88] The Elima defendants assert that the crane improves their property as an industrial rental property shop for tenants in logging, mining and road construction industries. The crane is affixed to a large concrete pad situated on the property and each of the crane's posts is bolted in with four anchor bolts. The electrical cables run from the crane underground to the main shop and are connected to the electrical source in the shop.
- [89] The Elima defendants argue that all of the chattels on the property were removed and sold to an unrelated company before the land was transferred to the Elima defendants. The crane was not and, they argue, is therefore not a chattel.
- [90] The Elima defendants also assert that the Vesting Order did not extinguish its interest in the crane.
- [91] Representatives of all of the defendants gave evidence of the difficulty in removing the tipping table and the crane and the extent of the remediation required.
- [92] Sidhu Trucking argues that the presumption that the tipping table and the crane are fixtures is rebutted.
- [93] Sidhu Trucking says that the tipping table was designed to be modular to allow it to be moved to other locations. It is affixed for the purpose of its better use as a chattel, not to improve the YZC building. The purpose of attaching the tipping table was for its better use as machinery to empty the custom-built Maple Leaf trucks. The tipping table could only provide a stable tipping surface for trucks if it was securely attached to the ground. However, the degree of annexation of the tipping table is not substantial relative to its size. While the tipping table is large, it is a single piece of equipment that is intended to be removed as either a single piece or in several pieces and installed at other locations.

- [94] Sidhu Trucking submits that Mr. Watt's evidence about Maple Leaf's intention is critical to the consideration of whether the tipping table is a fixture or a chattel. Maple Leaf had no contractual relationship with SBT and had no guaranteed term for the YZC hauling contract. It did not intend to improve the YZC building by installing the tipping table, one of its most valuable assets. Maple Leaf secured the tipping table at that location because its hauling contract required its trucks to offload there at that time.
- [95] Sidhu Trucking says that the GE Canada waiver demonstrates that the objective intention was not to permanently affix the tipping table to the YZC building. This is supported by SBT's express acknowledgement in the GE Canada waiver that the tipping table was Maple Leaf's personal property and not a fixture, and the necessary implication that it was Maple Leaf's personal property.
- [96] With respect to the crane, Sidhu Trucking submits it was affixed for its better use as a chattel (as with all cranes). The crane was installed for the purpose of readying the Maple Leafs trucks for their return trip to the Wolverine mine during the course of the YZC hauling contract. As such, the crane was to be kept at that location until the contract ended and relocated to wherever the trucks unloaded their payload.
- [97] Mr. Sidhu says that both the tipping table and the crane can be removed with relative ease, by unbolting them from the concrete to which they are attached, disassembling them (at least in part), unhooking the tipping table from the power supply of the YZC building and the crane from the power supply of the shop on the Elima defendants' property, and transporting them to a new location.

Discussion

- [98] The tipping table and the crane are not attached to the property of SBT and the Elima defendants by their own weight but by several posts, each affixed with bolts. As such, they are presumed to be fixtures and Sidhu Trucking must demonstrate that this presumption is rebutted.
- [99] In determining whether this presumption is rebutted, I consider the following questions:
- a) What was the degree and purpose of their annexation, in particular were the tipping table and the crane affixed for their better use as chattels or for the better use of the land?;
 - b) What was the objective intention of the parties, based upon the relevant circumstances, including the objective intention having regard to the duration of the annexation and the use of the lands?

Tipping Table

- [100] Mr. Watt's evidence about the design and function of the tipping table is relevant for determining the object of its annexation. Maple Leaf purchased modularized equipment, including the trucks and the tipping table, to conduct its hauling contract with YZC. When that contract was over, Maple Leaf intended to move all of its equipment, including the tipping table, to wherever it was required. The tipping table's modular design aids its relocation.
- [101] Mr. Watt's evidence on the design and function of the tipping table is consistent with his testimony on his communication with the Soucies. Mr. Watt said that when Maple Leaf installed the tipping table in the YZC building, he informed the Soucies that Maple Leaf intended to remove the tipping table at the end of the YZC hauling contract. He was vague on the specifics of the discussion, including whether he had it with Daniel or Roland Soucie or their father. Daniel Soucie said that the Soucies understood that the tipping table would remain part of the YZC building as their practice was that any upgrades to the building performed by others would become a fixture.
- [102] Based on Mr. Watt's evidence, I find the object of the annexation of the tipping table was to unload the Maple Leaf trucks during the course of the YZC hauling contract, not to better the YZC building for the benefit of other hauling companies that might be offloading at the YZC building in furtherance of a truck hauling contract with a mine.
- [103] The parties disagree on the degree of annexation. Mr. Sidhu says that it is slight: the bolts can be unbolted from the concrete and easily removed; SBT says that annexation is significant. I find that while the tipping table is securely anchored in the YZC building, it had to be, in order to perform the task for which it was installed, to empty the Maple Leaf trucks.
- [104] The duration of the annexation, relative to the SBT's ownership of the YZC building, was not lengthy. The Soucies acquired the property including the YZC building in 1994. The tipping table was installed in 2010. Sidhu Trucking purchased the tipping table in 2014 and has been asserting ownership and seeking possession of the tipping table since then. The period between 2015 and 2020 cannot be considered in the duration calculation. Essentially, the tipping table was installed for 4 years of the 20 years that SBT owned the YZC building before Sidhu Trucking purchased the table.
- [105] I find that the tipping table is securely anchored in the YZC building; the bolts can be unbolted, but some concrete on which it sits must also be removed before the tipping table can be moved. The evidence about returning the YZC building to its original form is vague. I will refer to that later in these reasons when discussing damages.
- [106] In any event, while the table is securely anchored, I find it had to be in order to perform the task for which it was installed, to empty the Maple Leaf trucks.

[107] Both Sidhu Trucking and SBT rely on the GE Canada waiver. Sidhu Trucking says that it demonstrates that SBT expressly acknowledged that it was not a fixture; SBT says that it agreed that it was not a fixture in the context of the waiver only, otherwise it was a fixture. Ultimately, I find that the waiver is unhelpful as an interpretative tool.

[108] It is useful to examine the facts of the Zellstoff case and compare them to the facts of this case. Before doing so, I refer to Madam Justice Fisher's remarks about the applicable authorities (Zellstoff SC at para. 48): "The common law principles reviewed above are easy to describe but difficult to apply. As cases over the years have demonstrated, the application of the principles has resulted in conflicting results."

[109] For that reason, I decline to review the many cases to which the parties referred.

[110] In Zellstoff, the "machinery" included all of the machinery and equipment contained within a kraft pulp mill. Fisher J. addressed the purpose of the annexation (Zellstoff SC at paras. 46 and 47):

46 The engineering evidence establishes that each piece of machinery is affixed in order to ensure its proper functioning, enable its safe operation, maintain alignment with other components and interconnecting piping and wiring, and resist vibrations, and many of the buildings or structures are constructed to support, protect or provide access to the machinery.

47 In addition, because no piece of machinery, while affixed, performs a function apart from its role in the pulp manufacturing process and each operates in conjunction with the whole operation, I find that the machinery as a whole is affixed in order to facilitate for the proper operation of the pulp manufacturing process.

[111] Fisher J. addressed the size of the machinery (Zellstoff SC at para. 68):

In contrast, the machinery at the Celgar mill is vast. There are several thousand pieces; the list spans some 40 pages in an insurance appraisal report. Most items of machinery are affixed in some way, either to the premises or to other items, along with complex piping, power and control cabling systems.

[112] The machinery was there for a very long time, some of it from the 1960's and some from the 1990's. The case was decided in 2013.

[113] Ultimately, Fisher J. found (Zellstoff SC at para. 75):

that no piece of machinery, while affixed, performs a function apart from its role in the pulp manufacturing process is significant. In my view, all of the machinery was intended to be part of the pulp mill facility and the land, to improve its usefulness.

[114] On that basis, Fisher J. determined that: "the true object of the annexation of the machinery is for the better use of the land for the purpose of its use as a pulp mill." (Zellstoff SC at para. 76). The machinery and equipment were found to be fixtures (Zellstoff SC at para. 77).

- [115] In this case, the tipping table is a single piece of equipment that is modularized in order to make it easier to move it to a different location. It was installed for the purpose of unloading the unique Maple Leaf trucks and used as such throughout the period that Maple Leaf and Sidhu Trucking were hauling for YZC. The duration of the annexation in this case was also much shorter than that in Zellstoff.
- [116] The relevant circumstances, including the use of the YZC building and SBT's operations there, also lead me to conclude the tipping table is a chattel. SBT has had the advantage of being able to offer truck hauling companies the use of the tipping table, and because of it, SBT has contracted with a new truck hauling company to store ore and concentrate. However, this does not show the tipping table was affixed to improve the usefulness of the YZC building. The true advantage goes to the truck hauling company with whom a mine contracts. It does not need to install its own tipping table. It is unlikely that it was Maple Leaf's objective intention to benefit every subsequent truck hauler that did not purchase the tipping table, as Sidhu Trucking did.
- [117] Further, it is not an integral part of SBT's use for the YZC building, which is the storage of a mine's product, not the loading or unloading of it.
- [118] I find that the tipping table has only one function: to unload the unique Maple Leaf trucks and was installed by Maple Leaf for that explicit purpose. It is not integral to SBT's use of the YZC building as a storage facility. It does not perform any function that is part of SBT's business at the YZC building. It was not installed to improve the usefulness of the YZC building; it was installed to unload the Maple Leaf trucks. It was not installed for the better use of the YZC building, which is a storage facility for a mine.
- [119] In respect of the argument that SBT did not receive notice of the hearing where the Vesting Order was made, this relies on SBT's "right" to the tipping table. It only has such a right if the tipping table is a fixture, and I have found that it is not. SBT had no right to the tipping table: it was a Maple Leaf asset and sold through the receivership process.
- [120] Sidhu Trucking has rebutted the presumption that the tipping table is a fixture. I find that the tipping table is a chattel.

The Crane

- [121] In respect of the crane, the objective intention in affixing the crane is equally clear: Maple Leaf installed the crane on its property in Stewart for the purpose of piggybacking the empty Maple Leaf trailers on the back of the trucks for their return trip to the Wolverine mine.
- [122] Mr. Watt said the crane was part of the entire system that could be moved to other locations to accommodate Maple Leaf's future hauling opportunities. The inclusion of the crane within this portable system demonstrates an objective intention to treat the crane as a chattel.

- [123] As for the degree of annexation, the crane is securely anchored, like the tipping table. The crane is attached to a large concrete pad and each of its posts is bolted with four anchor bolts. It is in an open field on the Elima defendants' property. However, it is not attached to any other building, except that the electrical cables run underground from the crane to an electrical source in the shop located on the property. As well, I find that the bolts can be unbolted and the concrete pad can be removed. The electrical cables can be detached and removed from the crane.
- [124] Once again, the evidence about remediation is vague and I will address it further.
- [125] In respect of the position of the Elima defendants that the crane passed with the land conveyance as a fixture after all of the chattels had been removed, that argument ignores the fact that Sidhu Trucking owned the crane when the property was transferred. Sidhu Trucking had no reason to move the crane; it leased the property from the Elima defendants, until its hauling contract with YZC ended.
- [126] The Elima defendants did not ask about the crane and whether it was included in the land sale. The evidence shows that the crane did not factor into their purchase.
- [127] For the reasons that I have found, the tipping table is not a fixture due to the object and degree of its annexation, neither is the crane.
- [128] Sidhu Trucking has rebutted the presumption that the crane is a fixture. I find that the crane is a chattel.

What is the Appropriate Remedy?

Legal Framework

- [129] The parties agree that the proper cause of action, based upon what I have found so far, is detinue, since Sidhu Trucking seeks the return of the tipping table and crane, not merely their value.
- [130] Detinue was discussed in *Neill v. Vancouver Police Department*, 2005 BCSC 277 at para. 29:
- A final order for the return of specific property must be framed in detinue in this province. Any improper retention of goods is actionable in detinue. The elements of detinue are: the property is specific personal property, the plaintiff has a possessory interest in the property, and the defendant has refused to return the property (Lewis and Klar, *Remedies in Tort*, (Toronto: Carswell) 1987 at para. 46).
- [131] The court has discretion to order either return of the property or damages in lieu of return as a remedy for detinue. Where the property consists of ordinary items of commerce, damages are the appropriate remedy: *Mayne v. Kidd*, [1951] 2 D.L.R. 652 at 654 (Sask. C.A.).

- [132] Where recovery is not appropriate, the measure of damages is the value of the chattel at the end of trial, plus any damages for the actual detention: *Baud Corp., N.V. v. Brook*, [1979] 1 SCR 633 at para. 35.

Positions of the Parties

- [133] SBT and the Elima defendants assert that damages are the appropriate measure in the circumstances.
- [134] SBT refers to the evidence of Daniel and Roland Soucie that the removal of the tipping table from the YZC building would be devastating and cause significant disruption to the operation of their operation, well beyond mere inconvenience.
- [135] SBT also argues that the removal of the tipping table would result in the YZC building no longer being available for the current party who has contracted for its use. The removal of the tipping table could result in SBT being unable to honour its contractual obligations to that party under their terminal services agreement.
- [136] SBT asserts that the measure of damages must be valued in relation to the rights in the tipping table purchased by Sidhu Trucking. The Receiver could not sell more than the rights in the tipping table possessed by Maple Leaf. This means that any measure of damages must include a reduction for the costs of removing the tipping table and repairing the YZC building to its original condition.
- [137] The Elima defendants assert that damages are appropriate because of the difficulty and the damage that would be caused by removing the crane.
- [138] Sidhu Trucking says that the only remedy that is appropriate in these circumstances is the return of the tipping table and the crane. It asserts that damages cannot restore Sidhu Trucking to the position it would have been in had the tort not been committed. Because the tipping table and the crane are unique pieces of equipment that were custom-made to allow the Maple Leaf trucks to operate and were purchased as a package along with the Maple Leaf trucks and other equipment, the market value of these assets cannot be looked at in isolation.
- [139] Sidhu Trucking says that without the return of the tipping table and the crane, in order to operate the Maple Leaf trucks, it would have to have a new tipping table and crane custom-made at significant cost.
- [140] In respect of inconvenience to the contracting parties to SBT and the Elima defendants, Sidhu Trucking argues that SBT benefited from the increased tonnage of concentrate its facility received from the use of the tipping table from 2010 to 2015. SBT have since benefitted from it in contracts it has made with other parties using the YZC building and the tipping table, without paying any costs in relation to the same. Whatever arrangements SBT has with contracting parties using the tipping table, it entered into those contracts with knowledge that Sidhu Trucking had a claim on the tipping table.

- [141] It makes the same argument with regard to the Elima defendants. Those defendants entered into contracts with third parties knowing that Sidhu Trucking had a claim on the crane.
- [142] In these circumstances, Sidhu Trucking submits that it would not be unfair to allow Sidhu Trucking to recover its property from the YZC building and the Elima defendants' property.

Discussion

- [143] Sidhu Trucking has established the elements of the tort of detinue: the tipping table and crane are specific personal property. Sidhu Trucking has a possessory interest in both, since it purchased them from YZC. The defendants are in actual possession of them. Sidhu Trucking made demands for their return. The defendants refused to return these assets without lawful excuse.
- [144] In respect of the remedy, I agree with Sidhu Trucking that return of the goods is the only proper remedy in the circumstances. Sidhu Trucking bought the assets of Maple Leaf from YZC as a package. The Maple Leaf trucks, the tipping table and the crane were designed and manufactured together; the tipping table and the crane are the essential loading and unloading equipment for those trucks. They are unique and replacement of them is not a full remedy.
- [145] I reject the Elima defendants' assertion that it will cause them inconvenience and damage to their property. They were aware that Sidhu Trucking was claiming ownership of the crane and sought its removal. I reach the same conclusion in respect of SBT's argument regarding the inconvenience and damage to their property that removing the tipping table will cause.
- [146] In respect of removal of the tipping table, I accept the evidence of Mr. Sidhu that it is straightforward and something that he can do with his own equipment. The evidence of remediation of the YZC building is vague, in regard to whether it is required and if so, exactly what SBT wished to have installed to replace the tipping table, once it is removed.
- [147] Similarly, I accept Mr. Sidhu's evidence about the removal of the crane from the Elima defendant's property: it is uncomplicated and can be accomplished with his own equipment. The remediation evidence is similarly vague.
- [148] In terms of inconvenience, the defendants have had the use of the tipping table and the crane for five years, without any compensation to Sidhu Trucking. In contrast, Sidhu Trucking has had to idle the Maple Leaf trucks, because it has not had possession of the tipping table and crane and thus has been unable to load or unload them.
- [149] I agree with Sidhu Trucking that whatever contracts the defendants have entered into with third parties, involving the use of the tipping table and the crane, they have been with the knowledge that Sidhu Trucking was asserting a proprietary claim on them. They could have included contractual terms to protect them if Sidhu Trucking was successful in its claim.

[150] I therefore order that the tipping table and the crane be returned to Sidhu Trucking.

[151] I grant leave to the parties to call evidence and make submissions about the practical aspects of this order, including in respect of the issue of remediation. I will leave it to the parties to determine the forum for such evidence and submission, and the schedule they wish to adopt.

Is Sidhu Trucking Entitled to Damages from the Elima Defendants for Loss of Profit and Opportunity in Respect of its Deprivation of the Crane?

Legal Framework

[152] In *detinue*, the court may award both return of the asset and damages flowing from the detention: *Sabo v. Canada (Attorney General)*, 2013 YKCA 2 at para. 78.

Positions of the Parties

[153] Sidhu Trucking submits it has suffered loss and damage from being deprived of both the tipping table and the crane, because it has been unable to bid for hauling contracts with the benefit of the Maple Leaf trucks. However, Sidhu Trucking acknowledges that the only quantifiable damages available are against the Elima defendants for the deprivation of the crane.

[154] Mr. Sidhu said that without the use of the crane, Sidhu Trucking could not use the Maple Leaf trucks to perform the Arrow contract. It had to use its lower capacity trucks for that work, as set out in paras. 60 & 61 above. The difference in profit amounts to approximately \$85,565. Alternatively, Sidhu Trucking argues that if I find that those damages are inappropriate, Sidhu Trucking says it is clear that it could have hauled the concentrate it did under the Arrow contract in 26 less trips, resulting in a loss of profit of \$25,087.

[155] The Elima defendants assert that Sidhu Trucking entered the Arrow contract in December 2019 knowing that it did not have possession of the crane to perform the contract. Further, Sidhu Trucking could have mitigated its losses by purchasing another crane.

Discussion

[156] The evidence of Mr. Sidhu was unchallenged and I accept it.

[157] Having found that the crane is Sidhu Trucking's property, it would be inconsistent to determine that Sidhu Trucking ought to have purchased another crane to perform the Arrow contract. He purchased the crane in 2014, but could not use it because the Elima defendants wrongfully retained it.

[158] Sidhu Trucking is entitled to damages for loss of profit from the Elima defendants in the amount of \$85,565.

Conclusion

[159] Sidhu Trucking owns the tipping table and the crane and is entitled to their return.

[160] I will hear further evidence and submissions in respect of the return of the tipping table and the crane and remediation.

[161] Sidhu Trucking is entitled to damages for loss of profit from the Elima defendants in the amount of \$85,565, plus interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79.

Costs

[162] Sidhu Trucking is entitled to costs. The parties have leave to make submissions regarding costs if there are matters of which I am unaware.

"Gropper J."

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