
CANADA / JUDGMENT

Van-Air Holdings Ltd. v. Delta Charters (1982) Inc.

2017 BCSC 232

COURT

Supreme Court of British Columbia

DECIDED

25 January 2017

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2017 BCSC 232 Van-Air Holdings Ltd. v. Delta Charters (1982) Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Van-Air Holdings Ltd. v. Delta Charters (1982) Inc.,

2017 BCSC 232

Date: 20170125

Docket: S118503

Registry: Vancouver

Between:

Van-Air Holdings Ltd. and Van-Air Marina Motel Ltd.

Plaintiffs

And

Delta Charters (1982) Inc.

Defendant

Before: District Registrar Nielsen

Oral Reasons for Decision

In Chambers

Counsel for the Plaintiffs:

T.G. Keast, Q.C.

Appearing for the Defendant:

A. Cockburn

Company Representative

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 23 - 24, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 25, 2017

[1] THE COURT: These are oral reasons for decision, if a transcript is requested; I reserve the right to edit them. The result will not change.

Introduction

[2] This is a reference to the registrar pursuant to an order of Mr. Justice Grauer dated November 17, 2015, which provides in part:

THIS COURT ORDERS that:

1. . . . the issue of the entitlement of the parties to the funds held in trust, pursuant to an agreement between the parties, be referred to the Registrar;
2. That, in the furtherance of the above, the Registrar determine the revenue and expenses of the marina operation for the relevant period;
3. . . . the Registrar determine how much of the 50% of marina revenue set aside by the parties is payable to the defendant; and
4. . . . the registrar certify his or her findings.

[3] My role is to issue a certificate pursuant to Supreme Court Civil Rule 18-1(2). The parties have resolved most of the issues between themselves. What remains to be determined are four distinct issues that have been defined by the parties as follows:

1. The Pacific Yachting Enterprises billings for February through April 2013, and September 2013;
2. The Pacific Yacht Enterprise billings for accounting services for the relevant period;
3. The alleged electricity billings which went uncollected; and finally

4. Claims for unrecorded moorage revenue consisting of of Van-Airs' floats, new office, and Mr. Chung's yacht, "The Blue Sky".
- [4] Two witnesses gave oral evidence at this reference. Mr. Watson, the CEO of the plaintiff testified, as did Mr. Cockburn, the owner of the defendant, Delta Charters (1982) Incorporated.

Background

- [5] The plaintiffs purchased a hotel property in Richmond, British Columbia. At the time of purchase, the defendant was a tenant who operated a marina adjacent to the hotel pursuant to a lease. The defendant had operated the marina since 1979 and had seen a number of purchasers of the hotel come and go. In the past, this had always occurred without difficulty in the defendant's view. The defendant had expected to carry on operating the marina under the new ownership. However, when the plaintiff purchased the hotel, they wanted the defendant to vacate so they could operate their own marina.
- [6] The defendant, as the operator of the marina, had collected moorage fees and parking deposits for 110 boat slips. There were various discrete issues surrounding the ending of the moorage contracts and vacating the existing marina. The deposits had to be repaid as did some of the moorage contracts. The parties were unable to agree on the various issues involved in the termination of the lease and litigation ensued. Reasons for judgment were issued July 26, 2016, resolving the matter. Those reasons are cited as Van-Air Holdings Limited v. Delta Charters (1982) Inc., 2013 BCSC 1322.

Analysis

- [7] Four issues remain to be resolved on this reference. I intend to address the first two issues together as they are related. Those issues are the Pacific Yachting Enterprises billings for February through September 2013 and the related accounting services.
- [8] The defendant vacated the premises January 31, 2013. There was a management and accounting vacuum that needed to be filled due to the defendant's departure. The plaintiffs retained Pacific Yachting Enterprises to manage the marina and perform other functions. They also retained IAG Enterprises to do the accounting services. The accounting services were specifically performed by Linda Chung, the daughter of the owner of the plaintiff company.
- [9] The plaintiffs claim the costs of the services of Pacific Yachting Enterprises for the first three months, February 1, 2013, through April 30, 2013, and the month of September 2013. For the three months of February 1, 2013, to April 30, 2013, they claim reimbursement for \$9,450 per month, inclusive of taxes, and for the month of September 2013, the plaintiffs claim expenses of \$4,725, inclusive of taxes. The defendant disputes these costs.

- [10] For separate accounting services over the relevant time period, the plaintiffs claim an expense of \$7,680. In support of the plaintiffs' claims, Mr. Watson, the plaintiff's CEO, provided oral evidence to complement the plaintiffs' documentary evidence. Mr. Watson described his role as one of managing managers and that his role encompassed both the hotel and the marina. He also testified that as long as things ran smoothly, he essentially did not become involved. He would intervene if there was a problem. For the first three months, February, March, and April of 2013, the bills of Pacific Yachting Enterprises were paid by the plaintiffs at \$9,000 plus GST. Thereafter, for the next five months, from May to September 2013, they were paid at \$4,500 plus GST. The defendant does not dispute the charges for May to August 2013.
- [11] The defendant testified that he had a full-time on-site office person whom he paid to operate the marina at a rate of \$5,000 per month. He referred to her as an accountant, but explained that she virtually ran the day-to-day operations of the marina, including the accounting work. The defendant testified that the defendant's annual accounting work would be done by a professional accountant, Mr. Yoshida.
- [12] The defendant also gave evidence that the individuals who comprised Pacific Yachting Enterprises were two yacht brokers, not experienced marina operators. This evidence was not challenged by the plaintiffs.
- [13] The defendant agrees that the marina needed to be managed and there was a cost associated with this. However, he objects to the \$9,000 per month paid during the first three months of February, March, and April of 2013. Instead, he submits \$4,724 per month inclusive of taxes is more than fair for the relevant time period which is half the expenses claimed by the plaintiffs. With respect to the month of September, the defendant submits that August 31, 2013, was the last date after which all the boats at the marina were to be evicted, and therefore, the shared expenses should not include the month of September.
- [14] On Pacific Yachting Enterprises' first bill dated April 3, 2013, the work for which they billed \$9,000 a month and tax was described as:
1. Connecting with the Tenants
 2. Dock Management
 3. Support Van Air Management and Administration
 4. Equipment and Supplies
 5. Contract, Guidelines and Marina Management
 6. Operations Manual
 7. Planning and Development

- [15] There was no evidence of the amount of time spent in providing the different services outlined on the bill, or a breakdown of the \$9,000 and tax billed. Details are lacking in regard to the total amount that Pacific Yachting Enterprises spent in exchange for the amount of time billed. All the bills make reference to the work Pacific Yachting Enterprise spent on an "operations manual", and "planning and development". Mr. Watson appeared to concede that these tasks were meant to establish the new marina and replace the defendant. They did not relate to the interim operations of the marina for the purpose of generating revenue to be shared between the plaintiff and defendant. Some of Pacific Yachting Enterprises' bills also make reference to "contract guidelines" and "support Van-Air management and administration." What this entailed is vague at best. I do not find that it was directed to the operations of the marina during the relevant period. I find it was related to the future new marina's operations meant to replace those of the defendant.
- [16] In terms of overall expenses billed for the first three months, I have the bills of Pacific Yachting Enterprises that lack specific particulars of the work done, the time it took, or the accompanying reasons why the work was necessary.
- [17] The marina needed to remain in operation while the transition took place. There was a vacuum created by the removal of the defendant. However, prior to his removal, the defendant was able to run the marina, at full capacity, for \$5,000 per month with an additional amount paid for Mr. Yoshida's annual accounting services. By August 2013, the evidence of both the plaintiffs and defendant is that the marina was virtually empty except for two derelict boats that required eviction. From February 1, 2013, to August 31, 2013, the marina's operations were in a state of decline to the eventual shutdown of the operations.
- [18] The evidence does not allow for a calculation of allowable expenses with mathematical precision. However, the defendant was able to operate the marina at full capacity for \$5,000 a month. I allow this amount plus applicable taxes for a monthly rate of \$5,250 for February, March, and April of 2013. For the month of September 2013, I allow a further reduced amount to reflect the fact that the marina had virtually ceased operations except for the most basic. I allow \$1,750 inclusive of taxes for the month of September 2013.
- [19] With respect to the accounting costs claimed in the amount of \$7,680, there was no evidence of what was done, why it was done, the time it took, the benefit to the marina operations, or any tangible work product related to the accounting services. Nevertheless, the defendant provided evidence that he retained the accounting services of Mr. Yoshida in the course of his marina operations in addition to the \$5,000 per month paid to his in-house operations/accountant marina manager. I accept that the services of an accountant would have been required for the relevant time period and I allow \$3,000 for the accounting services.
- [20] The next issue is the alleged lost electricity revenue. The defendant claims that the plaintiffs' failure to enforce the terms of the existing moorage contracts denied an expected profit on electricity costs. The moorage contract states at paragraph 10:

The owner agrees to pay electricity at a rate from time to time charged by BC Hydro plus an administration and meter reading fee payable to the company.

- [21] It was the defendant's practice to calculate the slip owner's actual electricity costs, and then increase this amount to generate a profit for the marina. The exact formula for calculating the "administration and meter-reading fee" is not explained in the moorage contract. However, the defendant testified it was essentially double that charged by BC Hydro. Mr. Watson testified that he was not aware of this practice and, if he had been, he likely would not have been prepared to charge the customer an extra amount based on their actual power consumption. He expressed concerns that charging extra for power consumption might be illegal.
- [22] I was not referred to any legislation or case law that suggests doing so is prohibited. However, I find the contract is not specific in this regard and can find no fault in the plaintiffs for having failed to impose a surcharge on the slip owner's power consumption. The plaintiffs were not aware of the defendant's practice in this regard, and the contract, in regards to this provision, is far from clear. The electricity revenue is disallowed.
- [23] That takes us to the final issue of unrecorded moorage revenue. The defendant claims unrecorded revenue for the marina's new office, the plaintiffs' floats brought to the marina during the relevant period and moored to the defendant's existing docks, and for the moorage of a 71-foot yacht, The Blue Sky, owned by Mr. Chung who is the owner of the plaintiff company. The defendant testified he attended the marina almost daily during the relevant period as he was concerned with his investment in the marina and wanted to keep an eye on things. The defendant testified that The Blue Sky was moored at the marina during the relevant period, as were the plaintiffs' floats and the new office. The defendant submits that moorage was not charged in this regard, and therefore, this represents lost revenue.
- [24] Again, the evidence in this regard lacks mathematical precision. At best, we have footage estimates that pertain to an inexact period of time.
- [25] The plaintiffs testified that Mr. Chung owned another water lease where his floats were occasionally moored.
- [26] I accept the defendant's evidence that The Blue Sky, the plaintiff's floats and office were moored at the defendant's docks for periods during the relevant time. In the circumstances, moorage revenue ought to be attributed accordingly. The plaintiffs did not charge themselves for the moorage in question and they have no records in that regard. Again, there is no mathematical roadmap by which to calculate an exact amount to be attributed in this regard. Taking a global approach, I allow \$4,000 for unrecorded moorage revenue.

Costs

[27] In my view, success on this reference has been mixed. Each party will bear their own costs. I am going to leave it to the parties to prepare a certificate for my signature based on these reasons. The certificate can be submitted through the registry for signature. If there is a dispute, the parties can arrange a further appearance if necessary, which can be scheduled through the registry.

"District Registrar Nielsen"

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