

CANADA / JUDGMENT

Vuk (iPhoenix Builder Developers) v. Alto Construction Ltd.

2022 BCSC 440

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 440 Vuk (iPhoenix Builder Developers) v. Alto Construction Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vuk (iPhoenix Builder Developers) v. Alto Construction Ltd.,

2022 BCSC 440

Date: 20220316

Docket: S186402

Registry: Vancouver

Between:

Dionizije Vuk doing business as iPhoenix Builder Developers

Plaintiff

And

Alto Construction Ltd. and Amy Barsha Washington

Defendants

Before: Master Harper

Reasons for Judgment

The Plaintiff, appearing on his own behalf via video conference:

D. Vuk

Counsel for the Defendant, Alto Construction Ltd. and other non-parties to this proceeding, namely, Alto Construction Management Ltd., Alto Construction West Coast Ltd., and Orama Holdings Ltd., appearing via video conference:

D. Claassen

Place and Date of Hearing:

Vancouver, B.C.

January 24, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 16, 2022

TABLE OF CONTENTS

Introduction. 3

Background. 3

The Legal Test. 4

The Profit Share Formula. 6

Analysis. 9

Are the documents sought relevant to the calculation of profit?. 9

Requests 1 to 3 - Monthly bank account statements for the non-party companies for the period March 2015 through April 2017. 10

Requests 4, 7, 10 - Progress draw cheques payable by the owners to Alto and other non-party companies. 11

Requests 6 and 9 - CCDC5A Contracts between the owners and Alto Construction Management Ltd. (or its affiliated companies) for the 35 Park West and ITC projects. 12

Requests 5, 8, and 11 - Monthly Progress Draws. 13

Request 12 - Project invoices Alto and/or the non-party companies sent to the owners of the projects from March 2015 through April 2017. 14

Requests 13 to 18 - Documents related to Alto profit and loss statements. 14

Bank accounts and monthly statements that construction revenue, construction fee, and management fee were deposited to. 15

Detailed receipts and monthly accounting of cost of goods sold and project related expenses. 16

Receipts and monthly accounting for payroll expenses. 16

Detailed receipts and monthly accounting of the management fees described as "5930" and "5900" in the P&L Statement 16

Detailed receipts for bad debt expense. 16

Detailed receipts and monthly accounting of legal fees, accounting - external, and miscellaneous consulting. 16

Summary. 16

Costs. 17

Introduction

[1] The plaintiff, Dionizije Vuk, seeks production of certain financial documents from the defendant, Alto Construction Ltd. ("Alto"), and from companies related to Alto, namely, Alto Construction Management Ltd., Alto Construction West Coast Ltd., and Orama Holdings Ltd. (collectively, the "non-party companies").

Background

[2] Between March 2015 and January 2017, Mr. Vuk provided construction management and project supervision services for Alto, a general contractor and manager of construction projects. Gordon Sookaveiff is Alto's sole director and shareholder.

[3] The projects for which Mr. Vuk provided his services are described by him as mid-size construction projects with budgets in the range of \$32 million to \$57 million. The three projects at issue are 35 Park West; 41 West; and International Trade Center ("ITC") (collectively, the "projects").

[4] Alto paid Mr. Vuk a monthly fee for his services. Mr. Vuk asserts that, in addition, he and Alto entered into a profit-sharing agreement (the "PSA") in the terms of an unsigned document entitling him to 5% of the profits made by Alto for the previous fiscal year (the "profit share"). Mr. Vuk sues Alto for monies he alleges Alto owes him pursuant to the PSA.

[5] Alto says the parties did not enter into a PSA, but agrees that, if there was a PSA, it is in the form produced in this litigation. The PSA provides that Alto's profit would be determined by a set formula, based on calculations provided to an independent accountant. The calculations would be reviewed and agreed to by both parties.

[6] Alto says that when the various dollar amounts are plugged into the formula, there is no profit. Alto says that the "profit" was, in fact, a loss of \$1,099,350.59 in 2015 and a loss of \$1,171,440.36 in 2016.

- [7] Mr. Vuk has made a rough estimate of the profit he would expect the projects to have made based on the information he has and his knowledge of how the projects were managed. On a preliminary basis (and very roughly), Mr. Vuk estimates the profit overall might be in the order of \$2,882,916.
- [8] Mr. Vuk questions the figures that Alto is using to calculate the profit (or lack thereof), and seeks production of further documents that he says are relevant to the calculation of the profit share. Mr. Vuk also seeks documents from the non-party companies which are owned and controlled by Mr. Sookaveiff.
- [9] To put the document requests in context, the overarching theory of Mr. Vuk's case is that the projects could not have produced losses. The projects were well-managed and experienced no financial setbacks. A profit margin was built into the personnel costs charged to the owners. Also, each contract provided a 2% management fee which ought to have been pure profit.
- [10] Alto's position is that all documents relevant to the calculation of profit within the meaning of the PSA have already been disclosed, and that a general analysis of the profitability of the projects is irrelevant. At his examination for discovery, Mr. Vuk's previous counsel asked Mr. Sookaveiff to advise what Alto's profit margin was on the 35 Park West and 41 West projects. Alto's counsel replied by letter:

This question is vague and irrelevant. Alto's profit margin on any individual project is irrelevant to the matters at issue between the parties.

- [11] I take Alto's position to be, in effect, that since Mr. Vuk does not dispute the formula, if the application of the formula reveals that Mr. Vuk made a bad bargain, that is an unfortunate result for Mr. Vuk, but not Alto's fault.

The Legal Test

- [12] Production of documents is governed by Rule 7-1 of the Supreme Court Civil Rules. A party is required to list "all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact" (Rule 7-1(1)). The documents required to be listed under Rule 7-1(1) are sometimes referred to as Tier 1 documents.
- [13] In the present case, Mr. Vuk is seeking disclosure of Tier 2 documents. Tier 2 documents are described in Rule 7-1(11):

Party may demand additional documents

- (11) If a party who has received a list of documents believes that the list should include documents or classes of documents that
- (a) are within the listing party's possession, power or control,

- (b) relate to any or all matters in question in the action, and
- (c) are additional to the documents or classes of documents required under subrule (1) (a) or (9),

the party, by written demand that identifies the additional documents or classes of documents with reasonable specificity and that indicates the reason why such additional documents or classes of documents should be disclosed, may require the listing party to

- (d) amend the list of documents,
- (e) serve on the demanding party the amended list of documents, and
- (f) make the originals of the newly listed documents available for inspection and copying in accordance with subrules (15) and (16).

[14] Alto refuses to produce the documents requested and, therefore, Mr. Vuk brings this application under Rule 7-1(13), which reads:

Application for production of documents

(13) If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.

[15] Mr. Vuk argues that the additional documents he seeks relate to the essential matter at issue which is the calculation of the profit share. He has made a demand for the documents or classes of documents with reasonable specificity as to why the documents should be disclosed.

[16] Because some documents are in the possession of non-parties, Mr. Vuk also applies under Rule 7-1(18):

Documents not in possession of party

(18) If a document is in the possession or control of a person who is not a party of record, the court, on an application under Rule 8-1 brought on notice to the person and the parties of record, may make an order for one or both of the following:

- (a) production, inspection and copying of the document;
- (b) preparation of a certified copy that may be used instead of the original.

[17] The same test applies to production of documents from a non-party as in Rule 7-1(11)(b): do the documents "relate to" a matter in question in the action?

- [18] The words "relate to any or all matters in question in the action" is close to the traditional Peruvian Guano test of relevancy and refers to documents that may either directly or indirectly enable the party requiring the document either to advance their own case or damage the case of their adversary, or which may fairly lead them to a train of inquiry, or either of those two consequences: *Global Pacific Concepts Inc. v. Owners of Strata Plan NW 141*, 2011 BCSC 1752 at para. 9.
- [19] Under the broader disclosure rule that applies to Tier 2 documents, the applicant must demonstrate a connection between the documents sought and the issues beyond a mere possibility. There must be an air of reality between the documents and the issues in the action: *Addison v. Whitefox Technologies Ltd.*, 2014 BCSC 633 at para. 28.
- [20] The "matter in question" in this litigation is the calculation of the profit share. The question for determination on the application is whether the documents sought may either directly or indirectly enable Mr. Vuk to establish, or which may fairly lead to a train of inquiry, that Alto's calculation of the profit share is incorrect and that there is, in fact, a profit within the meaning of the PSA.

The Profit Share Formula

- [21] The relevant terms of the profit share formula are as follows:

3.2 the profit share will be calculated as follows:

3.2.1 the profit share calculation will be based on the fiscal year of Alto which end [sic] on April 30.

[...]

3.2.4 the formula for calculating the profit will be in four (4) steps as described below

3.2.4.1 Step 1 is to determine the 'Revenue' for Alto. The 'Revenue' for the purpose of this calculation and this calculation only is defined as the proceeds received from General Contract and Construction Management contracts less all of the operating expenses of the company (ie, all of the costs necessary to operate Alto such as project specific overheads, subtrade and supplier costs, head office overhead costs, legal costs, accounting costs etc.)

3.2.4.2 Step 2 is to determine if there are any losses that impact this calculation. A 'Loss' for the purposes of this calculation and this calculation only is defined as having a negative revenue (ie the operating expenses exceeding the proceeds).

3.2.4.3 Step 3 is to determine the 'Profit' of the company. The 'Profit' of the company for the purpose of this calculation and this calculation only is defined as the 'Revenue' less the following:

3.2.4.3.1 Less any loss as defined by 3.2.4.2 above (losses are carried forward until they are fully repaid)

3.2.4.3.2 Less the value of the 'Overhead' for the company for that fiscal year. The 'Overhead' of the company is the sum of all head office costs (office rent, office supplies, legal costs, accounting costs, other professional services etc)

3.2.4.3.3 Less all staff costs (hourly, salary and contract)

3.2.4.4 Step 4 is to calculate the value of the profit share. 50% of the profits calculated above in 3.2.4.3 are eligible for profit share of which 10% of 50% of the profits will be payable in accordance with 3.2.3 above.

3.2.4.5 For clarity purposes, the Accountant (outside accountant) will prepare a detail [sic] calculation of the above (in an excel spreadsheet format) for review and acceptance by both parties. This detail [sic] calculation will follow the completion of the year end and will be available for review in late summer/early fall.

[22] Mr. Sookaveiff's evidence is that he has gone through Alto's bank statements for the 2015 and 2016 fiscal years to calculate the profit share. He confirms that there were no losses in either year as per Step 2 of the formula and, yet, he says that there was no profit.

[23] As I understand Alto's position, the lack of profit as defined in the formula is due to the formula allowing for the deduction of the same expenses twice: first in Step 1, and then again in Step 3.

[24] The PSA requires the parties to use an outside accountant to verify the calculations. This step has not yet occurred. I would expect that an outside accountant would question whether deducting the same expenses twice is reasonable and in accordance with generally-accepted accounting principles. I query whether the double deduction is a mutual mistake on the part of both parties, or a unilateral mistake on the part of Mr. Vuk. Mutual or unilateral mistake is not pleaded in the notice of civil claim and the point was not argued by Mr. Vuk at the hearing. The double deduction was only mentioned briefly by counsel for Alto in response to my question as to why the formula failed to produce a profit when the projects were "profitable" in the broadest sense in that they made money for Mr. Sookaveiff.

[25] The difficulty with the double deduction question is that the court cannot determine the merits of this application on claims that Mr. Vuk might have made. The application can only be decided on the claim as set out in the notice of civil claim. The claim is narrowly framed as a breach of contract claim. It is not a claim in fraud or mistake. The double deduction issue is perplexing, but unfortunately cannot be resolved at this stage of the proceeding.

[26] Mr. Vuk relies on an affidavit of Cameron Bakker. Mr. Bakker worked with Alto between 2008 and 2014. He says that he had a profit-sharing agreement with Mr. Sookaveiff on behalf of Alto. Mr. Bakker's evidence is that Mr. Sookaveiff promised him a profit share, but that none was ever paid. Mr. Bakker further says that Mr. Sookaveiff used company funds to pay Mr. Sookaveiff's wife (although she was a stay-at-home mother), to pay the family's nanny, and to divert company funds to other entities.

- [27] Mr. Vuk tenders Mr. Bakker's evidence as similar fact evidence to establish that Mr. Sookaveiff treated Mr. Vuk similarly to Mr. Bakker. Therefore, as the argument goes, Mr. Bakker's evidence supports a finding that Mr. Sookaveiff's modus operandi is to promise a profit share but not follow through, and to attempt to artificially reduce profit.
- [28] Alto did not object to the admissibility of the Bakker affidavit. I have considered Mr. Bakker's evidence as it went in without objection, but I have not found it necessary to rely on it in reaching my conclusions on this application. The admissibility of Mr. Bakker's evidence is best left for determination by the trial judge if Mr. Vuk calls Mr. Bakker as a witness at trial.

Analysis

Are the documents sought relevant to the calculation of profit?

- [29] Mr. Vuk seeks eighteen categories of documents. The documents and the rationale for production are set out in a schedule to his notice of application.
- [30] Counsel for Alto submits that the application is a "make-work fishing expedition" and a "smear campaign" against Mr. Sookaveiff. I disagree with both assertions. In my view, Mr. Vuk seeks disclosure of an extensive range of documents in order to get to the bottom of the essential question which is: what documents are required to calculate the profit share? Mr. Vuk has reviewed the Alto HSBC account statements. He says they do not adequately answer this question. I agree with Mr. Vuk on this point.
- [31] For example, there do not appear to be any progress draw payments such as the construction manager's fees or Division 1 fees deposited to this account as expected. Further, there do not appear to be any directly related project expenses coming out of this HSBC bank account. Nor do the salaries for Mr. Sookaveiff and his wife appear to be paid from this account. Mr. Sookaveiff does not offer any explanation to answer these concerns.
- [32] Mr. Vuk says that he cannot find in the HSBC account statements the revenue received by Alto from the owners pursuant to the various construction management contracts.
- [33] I agree with Mr. Vuk that Mr. Sookaveiff's calculations cannot be taken at face value because the PSA itself requires an independent accountant to prepare a detailed calculation of the dollar figures that are applied to the formula for review and acceptance by both Alto and Mr. Vuk. Such a provision in the PSA, to my mind, acknowledges first, that the calculations are complicated enough to require an accountant to perform them and, second, that an objective, professional opinion is required to ensure a fair result.
- [34] In considering the application as a whole, and even though a large number of documents are being sought which will require some work on the part of Alto and the non-party companies to produce, I have determined that most of the documents requested are necessary to ensure an absence of bias in the calculation of the profit share. A fair process is more likely to lead to a fair result in the litigation.

[35] I will now turn to the documents sought. The requests are grouped into categories.

[36] Where I have ordered documents to be produced, the deadline for production is 28 days from the date of the release of these reasons.

Requests 1 to 3 - Monthly bank account statements for the non-party companies for the period March 2015 through April 2017

[37] Mr. Sookaveiff asserts that during the fiscal years May 1, 2015 to April 30, 2016 and May 1, 2016 to April 30, 2017, Alto had only one bank account, which was an HSBC account (the account number for which has been disclosed).

[38] Mr. Vuk says that on reviewing the statements for the HSBC account, he could not find the proceeds received as required for Step 1 in the calculation of the profit share, which is, "proceeds received from the General Contract and Construction Management contracts" as per the PSA.

[39] Mr. Vuk says that the bank statements indicate deposits made from other bank accounts, including those of Orama Holdings Ltd. and Alto Construction Management Ltd. Mr. Vuk, therefore, asserts that the project proceeds may have been deposited into bank accounts other than Alto's HSBC account.

[40] Alto Construction West Coast Ltd. was incorporated on September 29, 2016. At this time, Mr. Vuk worked for Alto and was eligible for profit share.

[41] There is an "air of reality" to Mr. Vuk's concern that the project proceeds may not have been deposited solely into Alto's HSBC bank account. Disclosure of the monthly bank statements of these three non-party companies will, in my view, assist in solving the mystery as to why Alto's HSBC bank account statements reveal modest deposits and may lead to a train of inquiry which addresses the material fact of whether there was a profit within the meaning of the PSA.

[42] It is possible that the disclosure will not assist Mr. Vuk's case, but, if so, Mr. Vuk will have the information he needs to assess the merits of his case.

[43] These documents will be produced.

Requests 4, 7, 10 - Progress draw cheques payable by the owners to Alto and other non-party companies

[44] The rationale for production is that project proceeds were paid by the owners to Alto and/or to the non-party companies.

[45] Mr. Vuk seeks the progress draw cheques because he questions (reasonably in my view) how the projects could fail to produce a profit if all the "proceeds" had been properly deposited into Alto's HSBC account.

- [46] The cheques will establish what payments were made by the owners and into which account. The rationale for production of the cheques is so that Mr. Vuk can verify whether all payments were made into Alto's HSBC account as asserted by Mr. Sookaveiff. I agree with this approach. I note that Mr. Sookaveiff says that Alto does not keep copies of cheques. However, copies of cheques should be obtainable from the bank.
- [47] I accept that Mr. Sookaveiff will have to request copies of the cheques which may be time-consuming. Keeping in mind the principle of proportionality, the application for requests 4, 7 and 10 is adjourned generally. In adjourning this part of the application, it is my hope that after disclosure of the documents ordered in these reasons, sufficient information will be available to both parties (with the assistance of the outside accountant if necessary) to calculate the profit pursuant to the formula. If not, the application may be reset for hearing before me after production of the documents ordered to be produced by these reasons.

Requests 6 and 9 - CCDC5A Contracts between the owners and Alto Construction Management Ltd. (or its affiliated companies) for the 35 Park West and ITC projects

- [48] The industry standard CCDC5A contract sets out the terms of the amounts of the project proceeds, and how and when the proceeds are paid. Mr. Vuk describes CCDC5A contracts as "no risk" contracts in the construction industry as they provide for clearly defined profit. The project owner contracts directly with the trades and suppliers and pays them directly via monthly progress draws. The construction manager (in this case, Alto) monitors the progress of the trades and reviews the progress draws each month so that the owner pays the trades and suppliers the correct amount each month.
- [49] The owner also pays a progress draw each month to the construction manager for the personnel (whether employees or independent contractors) assigned to the project. The amount billed to the owner for personnel is greater than the amount the construction manager pays the personnel; in other words, their time is "marked up". As a result, the construction manager makes a profit off the amount charged to the owner for personnel.
- [50] The construction manager also makes a profit off the construction management fee which ranges between 2% and 5% of the total construction cost of the project. In the 41 West CCDC5A contract, the construction manager's fee is 2% of the construction cost, and 2% of reimbursable expenses. Mr. Vuk asserts that the personnel fees as set out in Schedule C to the contract are marked up from the amounts Alto actually paid the individual contractors or employees.
- [51] Alto and the non-party companies object to production of these contracts because there is no claim against any non-party company. Alto says that Alto Construction Management Ltd. did enter into a CCDC5A agreement with the owner of the 35 Park West project similar in terms to the CCDC5A agreement that Alto entered into with the owner of the 41 West project that has already been produced.

[52] I think that production of these contracts is relevant even if to answer the reasonable question: is Alto's position that the PSA only covers the 41 West and ITC projects and not 35 Park West? I did not take Alto's position on this application to be that the 35 Park West project was excluded from the profit share (acknowledging, again, Alto's position that there was no PSA agreement at all).

[53] These documents will be produced.

Requests 5, 8, and 11 - Monthly Progress Draws

[54] Progress draws are how the project proceeds get paid. Mr. Vuk seeks all of the monthly progress draws for the projects from March 2015 through April 2017.

[55] Mr. Vuk saw evidence of the monthly progress draws when he worked for Alto. The progress draws included the 2% management fee, payments for tradespeople, and reimbursable expenses.

[56] Mr. Vuk points to the CCDC5A construction management contracts. These contracts (which apply to the projects managed by Alto) specify how the project is funded by progress draw payments. Alto says that progress draws are irrelevant to the calculation of "proceeds", but Mr. Vuk says that disclosure of the progress draws would resolve doubt about the accuracy of Alto's figures. Mr. Vuk says that once the proceeds from the projects can be seen by both parties (and not just by Mr. Sookaveiff), a consensus can be reached on the first step of the formula.

[57] I agree with Mr. Vuk's argument. Step 1 of the formula refers to "proceeds received". It may be that the progress draws turn out not to assist Mr. Vuk in his action, but they are relevant and may lead to a train of inquiry that would assist the court in ascertaining the "proceeds" as defined by the formula.

[58] These documents will be produced.

Request 12 - Project invoices Alto and/or the non-party companies sent to the owners of the projects from March 2015 through April 2017

[59] The rationale for this request is that progress draws would be accompanied by Alto or its affiliated companies' invoices for payment. The invoices would confirm proceeds.

[60] This request is related to the progress draws in requests 5, 8, and 11. Alto argues that invoices issued by a company other than Alto are irrelevant, and that even invoices rendered by Alto are irrelevant to the calculation of profit share.

[61] I agree with Mr. Vuk's position. Given the minimal deposits into Alto's HSBC bank account, there is sufficient reason to further investigate whether proceeds that Mr. Vuk reasonably understood would be deposited into Alto's HSBC account were in fact deposited elsewhere because the invoices were from a different entity than Alto.

[62] These documents will be produced.

Requests 13 to 18 - Documents related to Alto profit and loss statements

[63] These requests refer to questions arising from the profit and loss ("P&L") statements generated by Alto.

[64] The source documents that form the basis in the preparation of the P&L statements have not been produced. Alto says that it produced the P&L statements in this litigation to avoid an argument over their relevance, but that the P&L statements are, in fact, irrelevant to the calculation of profit.

[65] The documents Mr. Vuk seeks in this category are extensive. Alto makes a fair point that former counsel for Mr. Vuk could have asked Mr. Sookaveiff questions at his examination for discovery about any specific item in the P&L statements. However, it would not be efficient to adjourn this part of the application pending a further examination for discovery of Mr. Sookaveiff. Both parties are better served if relevant documents are produced, bearing in mind proportionality principles.

[66] I agree with Mr. Vuk that the documents are relevant, but I accept Alto's position that production of the documents related to the P&L statements would be disproportionate to the amount at issue in the litigation as there are more than 1,100 individual payments made by Alto in the relevant fiscal years.

[67] Balancing proportionality principles with relevance, I adjourn the application for the documents in this category generally, with leave to reset the application for hearing before me following the production of the documents ordered to be produced in these reasons. By deferring this part of the application, it is my expectation that the parties will work together to attempt to resolve what should be resolvable questions: first, where are the "proceeds" located in the documents and where were the proceeds deposited; and second, is the double deduction of expenses in the formula a mistake or an intentional agreement of the parties?

[68] I will address the relevance of the documents in requests 13 to 18 in turn.

Bank accounts and monthly statements that construction revenue, construction fee, and management fee were deposited to

[69] These documents are relevant because they establish the relationship between progress draws and project proceeds and profits.

Detailed receipts and monthly accounting of cost of goods sold and project related expenses

[70] For a project management contract, a line item for "cost of goods sold" seems unusual. I accept Mr. Vuk's evidence that a project management company on a CCDC5A contract does not produce goods to be sold. The claim of \$817,634.94 for cost of goods sold appears excessive and calls out for an explanation.

Receipts and monthly accounting for payroll expenses

[71] Staff pay rates are marked up and billed to the projects as Division 1 and paid for by progress draws. These documents will establish the relationship between the amounts of head office payments to staff versus the Division 1 payments via the progress draws.

Detailed receipts and monthly accounting of the management fees described as "5930" and "5900" in the P&L Statement

[72] Mr. Vuk points out that a management fee paid to an unknown recipient of \$250,000 in one year is odd given that a project management company on a CCDC5A contract does not typically employ another project manager to do its work. I agree with Mr. Vuk that these items require explanation.

Detailed receipts for bad debt expense

[73] Mr. Vuk queries how Alto could have incurred \$28,809.52 in bad debts. Although this question could have been put to Mr. Sookaveiff at his examination for discovery, the documents are relevant so as to verify the calculation of profit.

Detailed receipts and monthly accounting of legal fees, accounting - external, and miscellaneous consulting

[74] The expenses claimed appear excessive. Mr. Vuk queries whether the expenses properly apply to the fiscal years at issue. I agree that these documents are relevant to the issue of calculation of profit.

Summary

[75] The documents will be produced in accordance with these reasons.

Costs

[76] As Mr. Vuk has been substantially successful, Alto will pay Mr. Vuk his costs in the cause.

"Master Harper"

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