

In the Court of Appeal of Alberta

Citation: Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd, 2025 ABCA 117

Date: 20250403
Docket: 2401-0003AC
Registry: Calgary

Between:

RMC Construction Materials Ltd

Appellant

- and -

FTI Consulting Canada Inc

Respondent

- and -

**Crown Capital Partner Funding LP, by its manager Crown Private Credit Partners Inc,
and RBee Aggregate Consulting Ltd**

Not Parties to the Appeal

The Court:

**The Honourable Justice Kevin Feehan
The Honourable Justice William T. de Wit
The Honourable Justice Kevin Feth**

Memorandum of Judgment

Appeal from the Order of
The Honourable Justice B.E. Romaine
Dated the 18th day of December, 2023
Filed the 29th day of January, 2024

(2023 ABKB 724, Docket: 2201 02948)

Memorandum of Judgment

The Court:

Introduction

[1] This case involves the interpretation of an agreement between the appellant, RMC Construction Materials Ltd (RMC) and its gravel supplier, RBee Aggregate Consulting Ltd (RBee). That agreement required RBee to deliver aggregate to a stockpile and then invoice RMC for the aggregate delivered.

[2] RBee became insolvent and the respondent, FTI Consulting Canada Inc (FTI), was appointed as receiver for RBee's property by court order. FTI sought payment from RMC of outstanding invoices in the amount of \$4,485,480.64. RMC takes the position that the amount is not due and owing because RBee had not delivered the amount of aggregate invoiced and overbilled RMC. RMC claims a set-off resulting in no amount owing.

[3] The chambers justice found that the respondent receiver had established that the invoices were due and payable according to the supplier agreement.

[4] She further found that the evidence put forward by RMC for its set-off claim was fraught with issues and RMC had not established on a balance of probabilities that RBee invoiced RMC for more aggregate than it delivered. The reasons are found at *Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd*, 2023 ABKB 724 (RBee).

[5] For the reasons that follow, we allow the appeal and return the matter for a new hearing.

Underlying Facts

[6] RMC supplies ready mix concrete and concrete related services for construction projects and RBee was an operator of gravel crushing plants. On May 7, 2018, RMC and RBee entered into a supplier agreement (Agreement) where RBee supplied quantities of washed and crushed aggregate gravel to RMC for a project owned by BC Hydro. RBee was to deliver the aggregate to a stockpile located on the worksite.

[7] From the beginning of the arrangement in May 2018 until September 2021, RBee issued approximately 35 invoices which were paid by RMC.

[8] Between September 2021 and December 2021, RBee issued three invoices to RMC for aggregate delivered to and services performed at the worksite. RMC refused to pay these outstanding invoices, which amounted to \$4,485,480.64 plus accrued interest, because it claimed

that the volume of aggregate delivered by RBee was less than that invoiced. RMC also claimed a set-off of over \$7 million against the \$4,485,480.64 for overbilling, which RMC claimed occurred throughout the duration of the arrangement beginning in 2018.

[9] On March 11, 2022, the respondent was appointed receiver of RBee's property. After failing to resolve the dispute with RMC, the respondent applied for an order declaring the unpaid invoices are due, owing and payable, and directing RMC pay the respondent \$4,485,480.64 plus interest. RMC countered that it has a valid set-off claim.

Issues

[10] As a new hearing is necessary, we will only address the relevant issues which are:

- A. Did the chambers justice err in her interpretation of the Agreement?
- B. Did the chambers justice err in not considering all of RMC's evidence?

Standard of Review

[11] Contractual interpretation is generally treated as a question of mixed fact and law and reviewed on a deferential standard of palpable and overriding error: *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 50; *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 21. However, if a judge failed to consider a required element of a legal test or failed to consider a relevant factor, those are extricable questions of law reviewed on a correctness standard: *Sattva* at para 53.

Interpretation of the Agreement

[12] The chambers justice concluded that the Agreement permitted RMC to undertake a "third-party verification" of the volume of aggregate delivered to the stockpile within 60 days of delivery failing which RMC could not contest the volume reported by RBee on its invoice. The chambers justice held that the section of the Agreement referring to "third-party verification" was unambiguous, extrinsic evidence about its meaning was therefore inadmissible, and RBee was not required to prove the quantities delivered if RMC did not effect the verification process within the 60 days.

[13] The key terms of the Agreement are found in paragraphs 5 and 9 which provided in relevant parts:

5. Payment Terms. . . .

Each provision of Products shall be invoiced separately. Subject to the terms of this Agreement, [RMC] shall pay each invoice no later than sixty (60) days from the date of the invoice . . .

All payments from [RMC] to [RBee] will be subject to third-party verification (the Verifications”) of volume of Products, and a certification will emanate from [RMC] or its designates within sixty (60) days of delivery. [RBee’s] entitlement to payment will be based on such verification, and subject to the terms of this Agreement . . .

9. Product Provision and Risk of Loss. Unless otherwise agreed upon by the Parties in writing and in advance, all Products provided pursuant to this Agreement will be provided to [RMC] in stockpiles in the area east of the batch plant, as depicted on the map on the operational area attached hereto as Schedule “C” (the “Delivery Point”), at which time risk of loss shall pass to [RMC] . . .

[14] The chambers justice found at paragraph 31:

The supply agreement is clear: verification of supply is required to be done within 60 days of delivery of the product. RMC’s rights of verification have long since expired, and there is no reason to imply any right of verification outside of the terms of the agreement.

[15] She rejected the appellant’s position that paragraph 5 was an “option” for its benefit and that it did not foreclose challenging the volumes delivered through other means, including the dispute resolution mechanism in the Agreement. Instead, she held that third-party verification was exhaustive because “it is the manner in which RMC could have verified that the amount of aggregate billed in an invoice was in fact delivered”: *RBee* at para 32.

[16] The chambers justice correctly held that where there is a written contract, “the court must first interpret the words of the contract delivered according to their ordinary and natural sense in the context of the contract as a whole” and the factual matrix existing at the time of contract. “It is only if the words of the contract bear more than one reasonable interpretation that the court will consider extrinsic evidence to assist it in determining the intentions of the parties: *Paradigm Holdings Ltd v Ngan & Siu Investments Co Ltd*, 2008 BCCA 172”: *RBee* at para 34. She further noted that in *Paradigm Holdings*, a buyer’s failure to verify a material provision of a contract that was its responsibility to verify disentitled it from seeking to vary the purchase price stipulated by contract. She further cited *Arrow Transfer Co v Royal Bank*, [1972] SCR 845, where the Supreme Court held that a customer’s failure to verify its statements of account with a bank within the prescribed period of a verification clause was a complete defence to any claims against the bank: *RBee* at paras 34-35.

[17] The chambers justice recognized that generally payment is dependent on product delivered but held that the Agreement “does not require RBee to prove delivery: it requires only that each provision of product be invoiced separately, that payments of the invoices ‘will be subject to verification’ of volume of products and that a certification ‘will emanate from RMC within 60

days of delivery”’: *RBee* at para 29. She further held that the verification clause modified the normal relationship between a buyer and seller and found that the risk of loss provision in paragraph 9 supported her interpretation: *RBee* at para 39.

[18] In our view, the words of the Agreement in paragraph 5 respecting the verification provision were ambiguous.

[19] At issue is the volume of aggregate delivered by RBee. Paragraph 5, as reproduced above, is entitled “Payment Terms” and stated, “All payments . . . will be subject to third-party verification . . . of volume of Products”. The words of that paragraph are open to alternative interpretations and do not on their face express conclusively that the volume delivered was as stated in the invoice. For example, one alternative is that the provision set out the obligation to pay, within 60 days, which RMC could dispute by third-party verification, but if RMC did not obtain third-party verification, the amount invoiced was to be paid within the time limit while any dispute about the volume actually delivered and a possible back-charge would be referred to the contractual dispute resolution mechanism.

[20] Paragraph 9, the shift of risk of loss provision, also does not expressly confirm that the volume delivered was as stated in the invoice. That provision merely made clear that once RMC had possession of the product upon delivery, it assumed the risk of loss from the stockpile. However, another interpretation is possible. Paragraphs 5 and 9 read together may create a presumption that the volume of aggregate stated on the invoice was the volume delivered and therefore, if RMC wished to dispute the volume after delivery, the onus would be on RMC to prove that it received less than the volume recorded on the invoice.

[21] Nothing in the Agreement expressly set out specific consequences if RMC did not verify the invoices, such as a waiver of rights, or expressly stated RMC could not dispute the invoices after the time limit for third-party verification.

[22] Verification clauses are to be strictly construed. As stated by the British Columbia Court of Appeal, “unless a contract clearly states an intention to exclude rights normally arising from it, such an intention should not be inferred”: *Ainsworth Lumber Co v KMW Energy Inc*, 2004 BCCA 415 at para 19.

[23] Paragraph 22 of the Agreement contemplated that access to dispute resolution was generally possible as it provided:

22. Dispute Resolution. Any differences between the Parties as to the interpretation, application or administration of this Agreement, or any failure to agree where agreement between the Parties is called for (collectively, a “Dispute”) shall be settled as follows . . .

[24] The appellant argued that the verification of the amount of aggregate could be done later at a final verification once the project was completed. The appellant submits that some support for its position can be found in paragraph 18, which provided that in the event of termination, RBee's compensation "shall be limited to payment for product actually delivered and verified". The Agreement did not refer to a final verification but nothing in the Agreement expressly excluded a final verification.

[25] As discussed below, because the Agreement was ambiguous, the chambers justice ought to have considered the relevant extrinsic evidence filed by RMC when interpreting the Agreement.

RMC's Evidence

[26] The chambers justice erred in excluding evidence filed by RMC and specifically, the second affidavit of Nicholas Burak, Vice-President and Chief Financial Officer of RMC (second Burak affidavit). Among other things, the second Burak affidavit included Mr. Burak's evidence about industry practice.

[27] The chambers justice rejected this evidence as being contrary to the parol evidence rule because the meaning of the words in the agreement was unambiguous: *RBee* at para 33. However, as discussed above, the Agreement was ambiguous and therefore relevant extrinsic evidence should have been considered to determine the objective intent of the parties and should also have been considered as part of the factual matrix *per Sattva*.

[28] The chambers justice also rejected the second Burak affidavit as "contrary to the litigation scheduling order" and that it was essentially "case-splitting", and further, the testimony of industry practice was expert evidence by a witness not qualified as an expert: *RBee* at para 41.

[29] Filing the second Burak affidavit was not contrary to the litigation scheduling order and therefore not case-splitting. The November 29, 2022 consent order of Hollins J set out a schedule, specifying dates, including the following steps: (c) permitting RMC to provide evidence, (d) permitting questioning, (e) permitting the Receiver to file a brief of law and supplemental report, (f) permitting RMC to file a brief of law and supplemental evidence, and (g) permitting the Receiver to file a responding brief of law. The second Burak affidavit was filed, as permitted, under step (f) in response to step (e), the Receiver's supplemental report.

[30] The rule against case-splitting requires a party to file all its evidence at the outset and not to adduce more evidence on known issues once the first set of evidence has been shaken. One of its purposes is fairness to the opposing party by allowing it to know the case to be met, and an additional purpose is to avoid endless hearing of new evidence: *Kissel v Rocky View (County)*, 2020 ABQB 406 at paras 88-90.

[31] This was not case-splitting when a series of filings, including supplemental evidence, was specifically contemplated in the scheduling order and responsive to new matters raised by the Receiver.

[32] Additionally, the evidence of Mr. Burak regarding industry practice was not impermissible expert evidence in the sense that he needed to be qualified as an expert. His evidence was his observations regarding aggregate production projects seen during his 12 years of working with RMC. Testifying about personal experiences within an industry was held by this Court not to be expert evidence: *Bourbonnais v Gauvreau*, 2005 ABCA 154 at para 13.

[33] Consideration of admissible extrinsic evidence filed by RMC may have resulted in a different interpretation of the Agreement. As a result, this matter needs to be reheard to determine whether the outstanding amounts invoiced by RBee to RMC are due and owing, and whether RMC has a set-off claim.

Conclusion

[34] This appeal is allowed and the matter remitted to the Court of King's Bench for a new hearing.

Appeal heard on March 13, 2025

Memorandum filed at Calgary, Alberta
this 3rd day of April, 2025

Feehan J.A.

de Wit J.A.

Feth J.A.

Appearances:

C.B. Zelyas
for the Appellant

K.J. Bourassa
W. Sattar

J. MacKinnon (no appearance)
for the Respondent