IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wolverine Construction Inc. v. Trisura Guarantee Insurance Company,* 2023 BCSC 405

Date: 20230316
Docket: S208726
Registry: Vancouver

Between:

Wolverine Construction Inc.

Plaintiff

And

Trisura Guarantee Insurance Company

Defendant

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Plaintiff:	S. Nicoll E. Thompson
Counsel for the Defendant, Trisura:	D.H. Laudan C. Conly
Counsel for the Defendant, Peace River Regional District:	S. Manhas
Place and Date of Hearing:	Vancouver, B.C. December 13, 2022
Place and Date of Judgment:	Vancouver, B.C. March 16, 2023

Table of Contents

Introduction

[1] This is an application by the defendant, Trisura Guarantee Insurance Company (“Trisura”), for summary judgment dismissing the claim of the plaintiff pursuant to Rule 9-6. Alternatively, Trisura requests an order dismissing the claim pursuant to Rule 9-7, the summary trial rule. The application is opposed by the plaintiff.

[2] The underlying action concerns a construction project on land owned by the Peace River Regional District (“PRRD”).

[3] The action was commenced by notice of civil claim filed August 31, 2020. The sole defendant at the time of commencement of the action was Trisura. A related proceeding, S-1913395, was also commenced by the plaintiff against the PRRD. By consent order dated September 21, 2022, Master Schwartz consolidated the two actions and ordered that a consolidated notice of civil claim be filed. The consolidated notice of civil claim was filed on October 12, 2022 (the “NCC”).

[4] The underlying action relates to a construction project on lands owned by the PRRD (the “Chetwynd Project”). The plaintiff was involved in the project, although the capacity in which was involved is disputed. There are two distinct but related aspects to the underlying action. First, the plaintiff advances various causes of action against PRRD. None of these claims are relevant to the application before me. The second aspect concerns a labour and materials payment bond (“L&M Bond”) that was issued by Trisura in relation to the Chetwynd Project. The plaintiff alleges, *inter alia*, that it was a subcontractor on the project, that it is a proper claimant under the L&M Bond, and that Trisura is obliged to pay it the sums the head contractor has failed or refused to pay. Trisura denies the plaintiff was a subcontractor on the project and denies it is a claimant under the L&M Bond.

[5] For the reasons that follow, I have determined that the plaintiff is not a claimant within the meaning of the L&M Bond and that the action as against Trisura must therefore be dismissed.

Suitability

[6] The defendant and PRRD submit that this matter is suitable for both summary judgment under Rule 9-6 and summary trial under Rule 9-7. In its application response, the plaintiff submitted that this matter was not suitable for summary judgment under Rule 9-6 and took no position on whether the issues were suitable for summary trial under Rule 9-7. However, at the hearing before me, plaintiff's counsel advised that the matter was suitable for summary trial.

[7] Having heard the submissions of counsel and read the materials filed, and in the exercise of my gatekeeping function, I agree with counsel that the matter is suitable for summary trial. In other words, I am of the view that the material is sufficient to find the facts necessary to decide the issues of fact and law and that it would not be unjust to do so: *Main Acquisitions Consultants Inc. v. Yuen,* 2022 BCCA 249, at paras. 88-90.

[8] Accordingly, I proceed to address the application as one for summary trial under Rule 9-7, only.

Pleadings

[9] In relation to the claim as against Trisura, the consolidated NCC alleges that the plaintiff is a claimant under the L&M Bond "because it had a direct contract with [the head contractor] for labour, material or both, used or reasonably required for use in the construction of the project". The relief sought in the consolidated NCC as against Trisura is a declaration that the plaintiff is an eligible claimant under the L&M Bond and an order that Trisura pay the sums due and owing to the plaintiff by the head contractor.

[10] In the response to civil claim, Trisura denies that the plaintiff is a claimant as defined in the bond. It also denies that various procedural requirements were satisfied, however, the parties made no submissions before me on the procedural requirements and I will not consider this aspect of Trisura's defence.

Background Facts and Chronology

[11] Many of the relevant facts are not in dispute.

[12] The PRRD is the owner of land legally described as District Lot 1935, Peace River District.

[13] By contract "dated for reference" April 25, 2019, the PRRD and Frontline Civil Holdings Ltd. ("Frontline") entered into an agreement for the construction by Frontline of "a Landfill Closure System, LFG Management System, Surface Water Management System and Crest Road Construction at the Chetwynd Landfill" (the "Chetwynd Project").

[14] Trisura issued a labour and materials payment Bond, No. CCS-032-0509 in the amount of $714,386.53 (the "L&M Bond") in relation to the Chetwynd Project. Frontline was named as the "principal" on the L&M Bond and PRRD was named as "obligee". The L&M Bond made Trisura and Frontline jointly and severally liable for payments to "Claimants" (a defined term) up to the maximum amount of the L&M Bond.

[15] The term "Claimant" is defined in clause 1 of the L&M Bond as follows:

> 1. A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal for labour, material or both, used or reasonably required for use in the performance of the Contract …

[16] Clause 2 of the L&M Bond established the joint and several liability as follows:

> 2. The Principal and the Surety, hereby jointly and severally agree with the Obligee, as Trustee, that every Claimant who has not been paid as provided for under the terms of its contract with the Principal … may as a beneficiary of the trust herein provided for, sue on this Bond … and have execution thereon.
>
> …

[17] Frontline commenced work on the Chetwynd Project but, by June 2019 was having financial difficulties. As a result of these financial difficulties, Frontline entered into discussions with the plaintiff for assistance. The plaintiff then became involved

with the project. The capacity in which the plaintiff was acting is disputed. What is not disputed is that the plaintiff undertook certain work and paid various expenses associated with the project from July 2019 onwards.

[18] On July 19, 2019, Frontline filed a notice of intention to make proposal in bankruptcy under s. 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]. Pursuant to s. 69(1) of the *BIA*, all proceedings against it were stayed.

[19] On August 19, 2019, Justice J.H. Goss of the Court of Queen's Bench of Alberta, extended the stay of proceedings to September 3, 2019.

[20] On August 21, 2019, at a meeting between PRRD and Frontline, Frontline advised that it was working towards assigning its contract to the plaintiff. PRRD advised that it was open to discussing an assignment agreement but required additional information. By letter dated August 22, 2019, PRRD's engineer for the Chetwynd Project, Sperling Hansen, advised of the specific documents and information required and requested that the information be provided by August 28, 2019.

[21] On September 19, 2019, Frontline was assigned into bankruptcy.

[22] On October 1, 2019, the PRRD issued a notice of default to Frontline and to its Trustee in Bankruptcy. Shortly thereafter, PRRD instructed that all work on the project was to cease.

[23] On January 31, 2020, the plaintiff gave written notice to Trisura and PRRD that Frontline had failed to pay it the amount of $476,048.14 in respect of labour and materials supplied to the Chetwynd Project and claimed this amount plus interest as against the L&M Bond.

[24] By letter dated February 4, 2020, Stuart Detsky, the VP Surety and Warranty Claims of Trisura, acknowledged receipt of the plaintiff's claim and requested copies of various documents including contracts, purchase orders and invoices between the

plaintiff and Frontline. The plaintiff's solicitors responded by letter dated May 22, 2020. The letter began as follows:

> Further to your letter from February 4, 2020, please find Wolverine's information below.
>
> Following Frontline's Notice of Intention to Make Proposal in Bankruptcy, discussions ensued among Frontline, Wolverine, and PRRD for Wolverine to take an assignment of the PRRD contract. No assignment was formalized. On this basis:
>
> > 1. Wolverine is entitled to payment from Frontline in accordance with the amounts that Frontline would be entitled to receive from the PRRD, and additionally any further amounts which are necessary to compensate Wolverine for additional work owing to Frontline's actions (such as early demobilization); and
> >
> > 2. Frontline was responsible to submit to PRRD the payable line items under the head contract and to forward funds received in connection with such work to Wolverine plus any additional items outlined above.
>
> While Frontline and Sperling Hansen Associates (PRRD's representative for the project), were kept abreast of work and completion of line items pursuant to the head contract, Wolverine has not been paid any amounts. This context is necessary to understand the responses to your inquiries below.

[25] The letter from the plaintiff's solicitors included various attachments. One such attachment was described in the letter as "a master costs plus summary containing all outstanding charges as authorized by Frontline". The actual attachment is in the form of an invoice dated March 31, 2020 made out to the PRRD in the amount of $509,333.13. It is notable that this document was not referred to in the body of the letter as an invoice but as a summary of all outstanding charges. It is also notable that the invoice was not addressed to Frontline but to PRRD.

[26] On June 25, 2020, the plaintiff's solicitors wrote a further "With Prejudice" letter to Trisura in which they stated, *inter alia*:

> We write further to our conversations and correspondence with both the PRRD and Trisura. As you are aware, Wolverine remains unpaid for a substantial amount of work done at the Project.
>
> It appears that there is no serious dispute that Wolverine has done substantial work at the Project, which has advanced the Project and from which PRRD has benefited. <u>This work may have been pursuant to an agreement with Frontline or it may not have been</u>. Regardless, Wolverine is entitled to payment either:

> 1. from the LMP Bond if a contract is determined to exist between Frontline and Wolverine and directly from PRRD which has been enriched by the work; or
>
> 2. directly from PRRD if there is no contract for work.
>
> [Emphasis added.]

[27] By email dated June 26, 2020, Mr. Detsky responded to the plaintiff's solicitors noting that the documents requested had not been provided and advising that the claim under the L&M Bond was denied.

> As we discussed at length at the end of May and as Trisura confirmed in an e-mail dated May 25, 2020, your client has not provided any evidence that it had a contract with Frontline for the project and your client has still not even been able to state that it had a contract with Frontline for the project. In your letter dated yesterday, your client still cannot state whether or not it had a contract with Frontline for the project. Therefore, as your client has not been able to meet the definition of "claimant" pursuant to the payment bond, your client's claim is denied. [Emphasis added.]

[28] As indicated, on August 31, 2020, the plaintiff filed its notice of civil claim against Trisura alleging it had a subcontract agreement with Frontline and was a "Claimant" within the meaning of the L&M Bond.

Issues

[29] The sole issue for determination is whether the plaintiff is a "Claimant" within the meaning of the L&M Bond. This, in turn, depends on whether it had a direct contract with Frontline for labour, material or both, used or reasonably required for use in the performance of the head contract between Frontline and PRRD.

Submissions

[30] Trisura submits that whatever labour and materials were provided to the Chetwynd Project by the plaintiff, the supply was not pursuant to a subcontract with Frontline. Rather, Trisura submits that it is more likely that the plaintiff provided labour, materials and financing with a view to taking over the entire project from Frontline by way of an assignment of the head contract. Trisura relies on the absence of a signed written contract between Frontline and the plaintiff, admissions made by the plaintiff's representative at examination for discovery, Mr. Rick Quigley,

and on the absence of any correspondence or contemporaneous documents, including invoices, supporting the existence of a subcontract.

[31] The plaintiff submits that there was a written contract between it and Frontline, although that contract and supporting documentation has been lost as a result of a server failure. The plaintiff further submits that a contract between it and Frontline can be inferred from the fact that the plaintiff did work on the project and from the fact that the plaintiff billed Frontline for such work. The plaintiff relies heavily, if not exclusively, on the affidavit of Mr. Quigley made November 22, 2022, in support of the existence of a direct contract between the plaintiff and Frontline for the supply of labour and materials to the Chetwynd Project.

Legal Principles

[32] The legal principles applicable are not in serious dispute.

[33] As this is a summary trial, the parties are required to take the necessary steps and to put forward all of their case. A party who fails to do so risks judgment going against it. (See: *Tut v. Evershine Land Group Inc.*, 2022 BCCA 63, at para. 34 and the cases cited therein.)

[34] Additionally, although this is a summary trial application brought by the defendant, it is the plaintiff that has the onus of establishing its case on a balance of probabilities: *Gichuru v. Pallai*, 2013 BCCA 60, at para. 35. This means the plaintiff has the onus of proving on a balance of probabilities the existence of a direct contract between it and Frontline for labour, material or both, used or reasonably required for use in the performance of the head contract between Frontline and PRRD.

[35] The existence of a contract depends on the objective intentions of the parties, not their subjective intentions, and is to be determined by looking at all of the circumstances or all of the material facts. Ultimately the question is whether an objective reasonable bystander would conclude the parties intended to contract.

These principles are set out by Justice MacKenzie writing for the Court of Appeal in *Leemhuis v. Kardash Plumbing Ltd.*, 2020 BCCA 99 at paras. 15–17.

> [15] While the existence of a binding and enforceable contract requires an intention to contract, it is not subjective intention that is relevant, but objective intention: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 35; *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 23. This principle stems from the seminal case, *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607:
>
> > If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that [the] other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.
>
> [16] This Court in *Berthin v. Berthin*, 2016 BCCA 104, put the requirement this way:
>
> > [46] The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15. As stated by Mr. Justice Williams in *Salminen v. Garvie* 2011 BCSC 339:
> >
> > > The test for determining *consensus ad idem* at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": *Fridman*, *supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, 1964 CanLII 88 (SCC), [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power Authority*, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. … [At para. 27.]
>
> [17] In determining intention to contract, a court is not confined to the four corners of the agreement, but may look at "all the circumstances" or "all the material facts": *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at para. 21; *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2015 BCCA 144 at para. 75; *Lacroix v. Loewen*, 2010 BCCA 224 at para. 36 (per Finch C.J.B.C.). In Langley, McEachern C.J.B.C. observed that McLachlin J. (as she then was) in Osorio v. Cardona (1984),

> 1984 CanLII 364 (BC SC), 15 D.L.R. (4th) 619 (B.C.S.C.), considered "evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties."

[36] Further, it is not enough that the parties intended to contract, they must also have agreed on the essential terms of the contract for it to be enforceable, although the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted. These principles are expressed in *Berthin v. Berthin*, 2016 BCCA 104, at para. 47.

> [47] Of course, the terms in question must be enforceable – i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, *supra*:
>
> > An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.
> >
> > If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.
> >
> > Lambert J.A. observed in *Griffin v. Martens* (1988), 1988 CanLII 2852 (BC CA), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves."

[37] More recently, in *Hodder Construction (1993) Ltd. v Topolnisky*, 2021 BCSC 666, Justice Riley addressed some of the principles applicable in determining

whether a contract existed. The case is of particular interest as it dealt with a construction contract. After noting, at paras. 114-115, the basic requirement for the parties to have formed a *consensus ad idem* as to the essential terms of the contract, Riley J. observed that "the fact that the parties have agreed to work together on a building project is not enough to create a legally enforceable contract". They must have also agreed to the nature of the construction, the timeline for completion, and the price:

> [116] Nonetheless, in the construction context, the fact that the parties have agreed to work together on a building project is not enough to create a legally enforceable contract: *Rafal* at para. 23. There is ample authority for the proposition that an enforceable construction contract generally requires agreement as to the nature of the construction, the timeline for completion, and the price: *Rafal* at para. 23 citing *Fame Construction Ltd. v. 430863 B.C. Ltd*. (1997), 1997 CanLII 4342 (BC SC), 30 B.C.L.R. (3d) 68 (S.C.) at para. 47, aff'd [1998] B.C.J. No. 2300 (C.A.); *Limen Forming West Ltd. v. Stuart Olson Dominion Construction Ltd.*, 2017 BCSC 1485 at para. 33.

[38] The parties did not provide me with any authorities that specifically addressed labour and material bonds with wordings similar to the Bond before me. There are, however, authorities that address such bonds. One such authority is *Procrane Inc. v Intact Insurance Company*, 2018 BCSC 1477 [*Procrane*]. In *Procrane*, a claimant under an L&M Bond sought to recover from the Principal and Surety sums allegedly owed to it by the head contractor/Principal. In *Procane*, it was not disputed that the plaintiff was a subcontractor but the amounts owing to the plaintiff by the head contractor/Principal were disputed. In resolving the issue, at paras. 33-34, Justice Sharma held that the Principal under the bond was only required to pay what was justly due to the plaintiff by the head contractor.

> [33] In *APM Construction Services Inc. v. Caribou Island Electric Ltd.*, 2013 NSCA 62 at para. 62, the Nova Scotia Court of Appeal commented on the rules of contractual interpretation applicable to surety bonds. Those principles include recognizing that a bond is a freestanding contract and that its terms govern its interpretation. The words cannot be interpreted in isolation, but must be looked at in the context of the Bond as a whole. <u>The defendant submits that it is entitled to question the invoices issued and the amount being claimed because it only has to pay out what is "justly due" to the plaintiff</u>.
>
> [34] <u>This reasoning is sound. Thus, the plaintiff has the evidentiary and legal burden to establish in this proceeding why the amounts it claims in</u>

> addition to the lump sum are justly due. I am not satisfied the plaintiff has adduced that evidence. It attached invoices to an affidavit with the affiant (Mr. Picken) simply deposing that they are "in accordance with the Contract". However, that is a matter of controversy. The defendant challenges some of the invoices (paras. 30 and 31), but also asks why any overtime was charged at all. What is missing in the plaintiff's evidence is any explanation or justification of those charges that exceed the lump sum listed in the Contract.
>
> [Emphasis added.]

[39] Synthesizing and summarizing the above principles, the plaintiff has the onus of proving on a balance of probabilities the existence of a contract between it and Frontline, the essential terms of the contract and that the amount claimed is justly due and owing to it by Frontline.

The Evidence

Quigley Affidavit

[40] As indicated, the plaintiff relies on the affidavit of Mr. Quigley, the Chief Operating Officer of the plaintiff, made on November 22, 2022. He deposes that in June 2019 Frontline was facing financial issues and that Frontline and Wolverine were in discussions regarding Frontline's projects. (paras. 3-4) He deposes that Wolverine and Frontline "agreed to work together towards an assignment" of the Chetwynd Project (para. 5). At para. 6 of his affidavit, he states that while they "worked on receiving an assignment" of the head contract from the PRRD, "a subcontract was prepared and agreed to between the parties".

[41] I note that Mr. Quigley's statement that a subcontract was prepared and agreed is a conclusory statement devoid of any particulars. He does not identify any of the individuals involved in reaching the alleged agreement nor does he identify any of the terms of the alleged agreement. He does not even say that he was personally involved in the discussions leading to the agreement.

[42] In any event, at para. 7 of his affidavit, he states as follows:

> 7. Attached as Exhibit "A" is a draft copy the Wolverine Subcontract between Frontline and Wolverine. I understand from our corporate records that this document, or a further draft of it, was signed by both parties. The purpose of the contract was to compensate Wolverine for the work it would

> perform on the Project, on the same basis as Frontline would receive compensation for that work on the Project. [Emphasis added.]

[43] There are several difficulties with this paragraph. First, it is apparent that Mr. Quigley is deposing to something about which he does not have personal knowledge. He does not know whether there were further drafts of exhibit "A" and he does not know whether it was signed.

[44] The second difficulty with para. 7 is that Mr. Quigley purports to rely on "corporate records" for his understanding that exhibit "A" was signed. Trisura has objected to this paragraph as hearsay. The plaintiff responded to the objection with a submission that the business records exception to the hearsay rule applies. I do not agree. The business records exception to the hearsay rule allows for the admission of business records into evidence where certain criteria are met. (See *Oswald v. Start Up SRL*, 2020 BCSC 205 at paras. 16-22) It is the document or record that is admissible under this exception, not a reader's interpretation of the record. In any event, the exception has no application here as the "corporate records" referred to are not identified. Additionally, the underlined portion of para. 7 is essentially a statement based on information and belief and, pursuant to Rule 22-2(13), such statements are not admissible on an application such as this where a final order is sought.

[45] The final difficulty with para. 7 of Mr. Quigley's affidavit is that exhibit "A" is an incomplete standard form of contract entitled "Subcontract Agreement". The document contains the names and addresses for Frontline and Wolverine but otherwise contains no particulars. More specifically, although there are spaces for identifying the head contract and the project, these spaces are blank. These omissions are significant because the plaintiff and Frontline were not only in discussions about the Chetwynd Project but were also in discussions about at least two other projects unrelated to the Chetwynd Project. Hence, I cannot infer that exhibit "A" is in relation to the Chetwynd Project. It may have been in relation to those other projects.

[46] In the circumstances, I can give no weight to Mr. Quigley's understanding as set out in para. 7 that a subcontract agreement was signed. In my view, this is a clear attempt to obfuscate and to disguise the fact that Mr. Quigley simply does not know whether a subcontract agreement was entered into.

[47] At para. 8 of his affidavit, Mr. Quigley attempts to explain his inability to attach a copy of the alleged signed subcontract agreement to his affidavit. He deposes that in December 2019 Wolverine had a server failure which resulted in the loss of many files and documents. He says "It is believed that the signed Wolverine Subcontract and related correspondence such as emails may have been lost due to this event".

> 8. In December 2019, Wolverine suffered a data loss due to a server failure which resulted in the loss of many files and documents. While some materials were saved in other forms or on other systems, it is not clear exactly which data was lost, which cannot be verified because it is gone. It is believed that the signed Wolverine Subcontract and related correspondence such as emails may have been lost due to this event.

[48] I have difficulty with this paragraph which is overly vague and again discloses a lack of personal knowledge on the part of Mr. Quigley. He does not state that the subcontract and related correspondence was lost as a consequence of the server failure. He merely states that these documents may have been lost. In other words, he does not appear to know whether they existed or not. This is not proof on a balance of probabilities of the existence of a subcontract.

[49] The balance of Mr. Quigley's affidavit relates to the general chronology and to the efforts to obtain an assignment of the head contract from the PRRD. He deposes that between July and September 2019, Frontline and Wolverine were actively working on obtaining an assignment and that they were also discussing an asset purchase agreement. He deposes that as a result of discussions with Sperling Hansen, the PRRD's engineers, a procedure for the assignment of the head contract was prepared. He deposes that on August 22, 2019, Sperling Hansen sent a letter requesting documents to assess the proposed assignment. At para. 18, He deposes:

> I understand from our corporate records that Sperling Hansen advised that all information required to complete the assignment had been received, though no emails were recovered of this confirmation.

[50] This statement suffers from the same problems as para. 7 of the affidavit. It is inadmissible hearsay and, in any event, does not prove the existence of a subcontract and an amount owing from Frontline to the plaintiff. In fact, if Mr. Quigley is suggesting that the assignment was completed, then it would be the PRRD that owed the plaintiff not Frontline.

[51] There is also an important omission in Mr. Quigley's affidavit. Specifically, although he deposes to the existence of a subcontract, he does not depose to the plaintiff sending any invoices to Frontline. The only references to invoices in his affidavit are at paras. 14 and 20. At para. 14 he refers to invoices addressed to the plaintiff from its suppliers. At para. 20, he deposes that on September 27, 2019 "draft progress billing invoices were provided to Sperling Hansen for work until September 15". Significantly, he does not depose that the plaintiff sent any invoices to Frontline for the work done pursuant to the alleged subcontract. This supports an inference that there was no subcontract.

Quigley Discovery

[52] The difficulties that I have identified with Mr. Quigley's affidavit evidence are magnified when his discovery evidence is considered. Pursuant to Rule 7-7(6), Trisura has read into the record various portions of his discovery evidence. Importantly, at Q. 96, he was asked how Wolverine would be paid for the work it was doing on the Chetwynd Project. He replied that originally there was a discussion about a subcontract but he did not know if that ever got finalized. At Q. 97-99, he testified that there was a discussion with Frontline about negotiating and drafting a written subcontract but that was being handled by Mr. Smith and he again testified that he did not know if a written subcontract was ever drafted.

[53] Accordingly, based on Mr. Quigley's discovery admissions, he did not know if a subcontract agreement was ever drafted or finalized. Moreover, he was not involved in the discussions relating to the subcontract, which were being handled by Mr. Smith. Thus, his affidavit evidence that there was an agreement is wholly undermined by his discovery admissions.

[54] Other admissions made by Mr. Quigley at his examination for discovery relate to the purported assignment of the head contract. From his discovery evidence, it is abundantly clear that Frontline was pursuing an assignment of the head contract, not a subcontract. At Q. 55, he testified that the plaintiff simply took over Frontline's jobs. At Q. 62, he testified that the plaintiff took over the payroll and all of the expenses of Frontline. At Q. 101 he testified that the assignment of the head contract was the intent. At Q. 176, he testified that "the assignment was definitely something that was supposed to happen".

[55] A request made at Mr. Quigley's examination for discovery was for production of invoices from the plaintiff to Frontline. In response to that request, the plaintiff produced three invoices. The first is dated September 13, 2019 in the amount of $313,000.38. This invoice is made out to "Frontline". The second invoice is dated September 17, 2019 and is in the amount of $211,743.47. It is also made out to "Frontline". The third invoice is dated March 31, 2020 and is in the amount of $509,333.13. This third invoice is another copy of the invoice dated March 31, 2020 that was attached to the letter dated May 22, 2020 from the plaintiff's solicitor to Trisura and which was described in the body of the letter as a summary of outstanding charges. There is, however, an important difference between the two copies of the invoice. The copy attached to the letter of May 22, 2020 is made out to only the PRRD whereas the copy that was delivered in answer to the discovery requests is made out to both Frontline and PRRD. No explanation has been provided for this discrepancy.

Conclusions on the Evidence

[56] I have outlined above the many problems with Mr. Quigley's evidence. That evidence falls far short of establishing the existence of a subcontract agreement between the plaintiff and Frontline or the essential terms of that subcontract.

[57] Mr. Quigley's affidavit evidence that "a subcontract was prepared and agreed to between the parties" is fatally inconsistent with his discovery evidence. He

testified twice at his discovery that he did not know if a subcontract agreement was ever finalized. This inconsistency has not been explained.

[58] It is also apparent from both Mr. Quigley's discovery evidence and his affidavit evidence, that he has minimal first-hand personal knowledge of the alleged discussions or negotiations involving a subcontract. He testified that the discussions were handled by Mr. Smith. In the circumstances, his evidence is simply not reliable first-hand evidence of the existence of a subcontract.

[59] Additionally, if the hearsay and reliability problems with the plaintiff's evidence are disregarded, the evidence proffered does not establish any of the terms of the alleged contract. Most significantly, there is no evidence of the prices agreed to as between the plaintiff and Frontline. This is fatal to the submission that a contract existed between the two for the supply of goods and materials and is fatal to the plaintiff's request for a declaration that Trisura pay the sums due and owing to it by Frontline. It cannot be determined that any amount is due and owing by Frontline in the absence of evidence of the prices agreed to.

[60] I add that the various invoices in evidence before me do not fill the lacuna in the evidence as to the terms of the alleged subcontract or otherwise support the existence of a direct contract between the plaintiff and Frontline for the supply of goods and materials. This is so for the following reasons:

a) First, there is no evidence that any of the invoices were delivered to Frontline by the plaintiff. In his affidavit, Mr. Quigley does not attest the invoices were prepared and delivered to Frontline. In fact, at his discovery, he testified that he was unaware of any demand for payment from Frontline having been made.

b) Second, the timing of the invoices suggests that they were made for purposes other than billing Frontline for services rendered or materials supplied. Although the plaintiff had been working on the project since at least July 2019, the first invoice is dated September 13, 2019, which is after Frontline

filed a notice of intention to make a proposal in bankruptcy and days before it filed for bankruptcy.

c) Third, at para. 20 of his affidavit, Mr. Quigley deposes that on September 27, 2019 “draft progress billing invoices were provided to Sperling Hansen (PRRD’s engineer) for work until September 15”. He does not specifically identify these invoices, and they are not attached to his affidavit, but the only invoices he could possibly be referring to are the September 13 and 17, 2019 invoices. The only reasonable inference to be drawn from this evidence is that these invoices were not prepared for Frontline but for PRRD.

d) Fourth, the March 31, 2020 invoice was prepared after Frontline made its assignment into bankruptcy and one copy is addressed only to PRRD. Moreover, this invoice addresses the entirety of the plaintiff’s involvement in the project, which is to say it encompasses all of the plaintiff’s costs, expenses and charges. The inference is that this invoice was prepared not for Frontline but for PRRD, which Mr. Quigley stated at his examination for discovery.

[61] I also do not accept that I can infer a subcontract from the mere fact that the plaintiff did work on the Chetwynd Project and incurred costs and expenses in relation to the project. The evidence is overwhelming, and I find as a fact, that the plaintiff took over the entire project with the intent of procuring an assignment of the head contract rather than as a subcontractor to Frontline. The fact that the assignment did not come to pass does not alter the basis upon which the plaintiff became and was involved in the project. The plaintiff did not contract with Frontline for the supply of goods and materials to the project on terms that rendered Frontline liable to the plaintiff for the costs of the goods and materials supplied.

[62] Finally, the lack of evidence of a subcontract between the plaintiff and Frontline was acknowledged by the plaintiff’s solicitors as late as June 25, 2020. In their letter of that date they wrote “<u>This work may have been pursuant to an agreement with Frontline or it may not have been”.</u>

[63] In conclusion, the plaintiff has not discharged its onus of proving on a balance of probabilities that there was a direct contract with Frontline for the supply of labour and materials by the plaintiff to the Chetwynd Project and that amounts are owing to the plaintiff by Frontline. It follows that the plaintiff is not a claimant within the meaning of the L&M Bond and the action as against Trisura must be dismissed.

Order

[64] Trisura's application for summary trial is allowed and the action as against it is hereby dismissed.

[65] The parties have liberty to appear before me to make submissions on costs, if necessary.

"Giaschi J."