CITATION: Huachangda Canada Holdings Inc. v. Solcz Group Inc., 2023 ONSC 2511
COURT FILE NO.: CV-18-604634-00CL
DATE: 20230409

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

B E T W E N:

Huachangda Canada Holdings Inc., Winvalco Limited, Valiant Holdings GMBH and TMS Turnkey Manufacturing Solutions GMBH

Plaintiffs

AND

Solcz Group Inc.

Defendant

A N D B E T W E N:

Solcz Group Inc.

Plaintiff by Counterclaim

AND

Huachangda Canada Holdings Inc. and Shanghai Xianxing Intelligent Technology LLP

Defendants to the Counterclaim

BEFORE: Osborne J.

COUNSEL: *David Fould and Swetha Popuri*, on behalf of Huachangda Canada Holdings Inc., Winvalco Limited, Valiant Holdings GMBH and TMS Turnkey Manufacturing Solutions GMBH

Stephen Taylor and Alan Merskey, on behalf of Solcz Group Inc.

HEARD: April 9, 2023

ENDORSEMENT

JUSTICE OSBORNE:

[1] The Defendant (Plaintiff by Counterclaim), Solcz Group Inc. ("Solcz" or "the Defendant") seeks an order pursuant to r. 30.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194,

requiring the Plaintiffs to produce in this action certain documents on an annual basis for the top five contracts by bid price entered into in each year between 2006 and 2016 by Valiant TMS, as set out in the Notice of Motion at subparagraph (s), (collectively, "the Documents").

[2] Some background and context is in order.

[3] The Plaintiff Huachangda Canada Holdings Inc. acquired the businesses of the Defendant Solcz, Valiant Corporation and Winvalco Limited, pursuant to a share purchase agreement dated August 18, 2016 (the "SPA") for a purchase price of $374,600,000 (subject to adjustments). The business of the Defendant that was purchased by the Plaintiffs includes the development and installation of systems and solutions in the automotive manufacturing process by which component parts are welded together to form vehicle bodies.

[4] In this action, the Plaintiffs allege that the Defendant perpetrated a financial fraud, causing the Plaintiffs to incur damages of approximately $130 million. In the main, the allegations of the Plaintiffs focus on an agreement entered into by the Plaintiff TMS Turnkey Manufacturing Solutions GmbH ("TMS"), (a subsidiary or affiliate of Valiant Corporation and Winvalco Limited), and Porsche AG (the "Porsche Agreement") and the disclosure related to the Porsche Agreement made to the Plaintiffs by the Defendant.

[5] As noted above, the parties entered into the SPA on August 18, 2016. The SPA closed on March 16, 2017. The Porsche Agreement was awarded during the period between the execution and the closing of the SPA, and when it was disclosed to the Plaintiffs, the Plaintiffs agreed with Porsche that the Porsche Agreement would be retained in light of the contemplated change of control.

[6] The position of the Plaintiffs is that the Porsche Agreement was outside the ordinary course of business with respect to the manner in which it was bid, entered into and accounted for. The "ordinary course of business" is defined in the SPA to mean "consistent with …. past practices". The Plaintiffs further allege that the books and records of the Defendant were inaccurate in respect of the Porsche Agreement, with the result that representations and/or covenants by the Defendant in the SPA were fraudulently breached.

[7] Relying on external but contemporaneous estimates of losses on the Porsche Agreement that were not reflected in the accounting system of the Defendant, the Plaintiffs allege that management of the Defendant knew or ought to have known, based on their experience, that the loss provisions reflected in the books and records were not achievable and that higher losses ought to have been expected.

[8] The Defendant denies the allegations, alleges that the Porsche Agreement was not outside the ordinary course of business, that the books and records were accurate, and that preliminary internal loss estimates relied upon by the Plaintiffs were disregarded by management of the Defendant, but appropriately so, based on the experience of management, and again consistent with the ordinary course of business.

[9] The position of the Defendant, moving party, on this motion is that no documents have been produced by the Plaintiffs that would allow the Defendant to compare the actual bidding, accounting and the result in respect of the Porsche Agreement on the one hand to ordinary course practice on other projects of TMS on the other hand. This has the effect, the Defendant submits, of preventing it from testing (and therefore properly defending) the allegations of the Plaintiffs' that the treatment of the Porsche Agreement was outside the ordinary course and that the cost provisions were unrealistic based on past practice and experience.

[10] The Documents fall into four categories. The Defendant seeks to have the Plaintiffs produce the Documents, on an annual basis, for each of the top five contracts (by bid price) entered into in each year between 2006 and 2016:

a. total estimated costs to fulfil the contract at the time of the bid, as entered into the SAP system;

b. total actual costs incurred to fulfil the contract, as reported within the SAP system;

c. between the date of the bid and the completion of the contract, the highest estimate of the costs required to fulfil the contract (found anywhere in Valiant TMS' records, regardless of source); and

d. the initial cost estimate ("Best Case Offer") that was prepared by Valiant TMS' process estimating group at the time of bidding and the revised (final) and cost estimates produced by process estimating after agreement on the final offer price.

[11] The Documents in the first two categories were conceded by the Plaintiffs at the hearing of this motion and will be produced. Accordingly, the outstanding issues on this motion relate to the production of the Documents in the latter two categories.

[12] For the reasons expressed below, I am satisfied that the Documents in the latter two categories should be produced.

[13] Rule 30.02 provides that every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed.

[14] Rule 30.06 provides that, where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, the court may order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged (r. 30.06(c)).

[15] The parties do not dispute the test for production pursuant to r. 30.06. In such circumstances, the court may, among another things, order the disclosure of the document. To be satisfied that a document may have been omitted, the following factors apply:

a. there must be evidence that specific documents exist that have not been produced;

b. the documents meet the test of relevance; and

c. the documents must satisfy the proportionality requirements of r. 29.2.03

See *Gamble v. Black & McDonald Limited*, 2020 ONSC 811, at paras. 3-4, quoting with approval *Bow Helicopters v. Textron Canada Ltd*., [1981] O.J. No. 2265, at paras. 5-9.

[16] Rules 29.2.03(1) and (2) provide that, in making a determination as to whether a party must produce a document, the court shall consider whether:

a. the time required for the party to produce the document would be unreasonable;

b. the expense associated with producing the document would be unjustified;

c. requiring the party to produce the document would cause him or her undue prejudice;

d. requiring the party to produce the document would unduly interfere with the orderly progress of the action;

e. the information or the document is readily available to the party requesting it from another source; and

f. such an order would result in an excessive volume of documents required to be produced by the party.

[17] The principal allegations in this action are summarized above. In a nutshell, the dispute is about whether and when an accounting provision ought to have been booked in the business formerly owned by the Defendant and now controlled by the Plaintiffs. Since a loss ought to have been recorded but was not, according to the Plaintiffs, the representations and warranties of the vendor (Defendant) in the SPA were therefore inaccurate.

[18] Section 5.4(a) of the SPA provided that: "…. The Seller shall cause the Group Members to conduct the Business in the Ordinary Course ….". Section 5.4(1) provided that "Ordinary Course" meant that the conduct must be "consistent with the past practices of [a] Person or its business …. and … taken in the ordinary course of the normal operation of the Person or its business".

[19] It really boils down to whether the Porsche Agreement was "outside the Ordinary Course" and whether it was "consistent with the past practice".

[20] I am satisfied that the Documents meet the Bow Helicopters test for production.

[21] The evidence is clear that the Documents exist, and that is not seriously disputed. Mr. Wipfler for the Plaintiffs admits that the Documents exist although vigorously asserts that production would be time-consuming.

[22] I do recognize that there appears to be a dispute about whether some of the Documents, such as the Highest Cost Estimates, exist. The Defendant relies on the cross-examination of Mr. Wipfler as an admission, in part, that those Documents do in fact exist. I am satisfied, for the purposes of this motion, that the Defendant, Moving Party, has established that the Documents exist. I recognize the position of the Plaintiffs (as expressed, for example, at paragraph 5(a) of the factum), that there is insufficient evidence to support the position of the Defendant that documents setting out cost estimate information for each of the 50 other projects even exists. I am satisfied that they likely exist, and if they do not, the Plaintiff can formally confirm, but only after the appropriate searches have been made.

[23] In my view, the documents are clearly relevant. Given that the key issues revolve around what constituted "Ordinary Course" and "Past Practice", as those relate to the accuracy of the representations and warranties, it is appropriate to look at what that past practice in fact was.

[24] The examinations for discovery conducted to date reinforce my conclusions in this regard. The discovery witness of the Plaintiffs, Mr. Thomas Wipfler, gave evidence and subsequently provided answers to undertakings, advisement and refusals with reference to other projects and to the recollection of Messrs. Birklbauer and Zopf to the effect that they could not recall projects that would be relevant to the necessary analysis (i.e., a project where the bid was 20 percent before full cost, where it turned positive or it could be recovered; or where losses approaching those projected on the Porsche Project were recovered). (Transcript of examination, June 1, 2021 at page 438; Refusals Chart #49; and Birklbauer Will-Say, CaseLines A1863).

[25] It appears, however, that the evidence of Mr. Wipfler is all secondhand and he relies on the direct evidence of others such as the two individuals referred to above. The Plaintiffs take the position that the hearsay evidence in his affidavit is admissible on this motion for the reasons ably set out in their factum, and that his providing the evidence of Birklbauer and Zopf is "simply a by-product of Mr Wipfler being the most suitable affiant and for this motion.". That may well be, but in my view, it is not a sufficient response to the request that the Documents be produced.

[26] The evidence on this motion is to the effect that the Plaintiffs have not produced records to address the treatment of other estimates for Valiant TMS projects and the variances from SAP inputs.

[27] The Plaintiffs submitted in argument that even if produced, none of the Documents sought could be relevant unless fully explained. Again, that may well be, and the Plaintiffs should and will have the opportunity to explain the Documents as they see fit, but the Documents do need to be produced.

[28] The Defendant's business valuation expert, Chris Polson of PwC, states that in his view, the Documents would be beneficial to an expert assessing whether the accounting practices in respect of the Porsche Agreement were outside the ordinary course. I accept the submission of the Plaintiffs that this expert evidence is general and that Mr. Polson does not explain with specificity why these particular documents are required. To me and based on the limited evidence I have on

the Record on this motion, however, the Documents are relevant for the reasons expressed above, even without the opinion evidence of Mr. Polson.

[29] As noted above, the Defendant seeks to have the Plaintiffs produce the Documents, on an annual basis, for each of the top five contracts (by bid price) entered into in each year between 2006 and 2016.

[30] A "sampling", or representative cross-section of documents from past or prior key (and therefore comparable) contracts, is appropriate. In my view, such would represent a fair and reasonable representation of past practice against which the Porsche Agreement could be measured.

[31] The fact that data and Documents relating to the top five contracts are sought (rather than only one contract or alternatively, every contract) strikes a reasonable and proportionate balance. Requiring production of the Documents for the top five contracts ensures that there will be a sufficient number of contracts such that one outlier would not skew the result and lead to increased risk of an inaccurate conclusion about what constituted "past practice" or "ordinary course". Equally, the fact that the data are requested for a period of 10 years mitigates the risk of a single year or annual cycle representing a temporal outlier and similarly skewing the result.

[32] Taken together, the two factors - the number of contracts for which documentation is requested; and the number of years for which that documentation is requested - operate together so as to strike a reasonable balance.

[33] For the same reasons, I find that the proportionality requirement is also satisfied. The universe of documents to be produced is proportionately measured and limited (i.e., not every document for every single contract is requested). I recognize that an order requiring production of the Documents in question will of course increase the scope of production, and associated expense, although the fees and/or disbursements would form part of the costs of the action and could presumably be a factor to be taken into account at the end of the day in the usual and ordinary course.

[34] The Plaintiffs submit that the requirement that they be required to produce the Documents would cause undue prejudice and in particular, that the Documents by themselves do not allow for an appreciation of whether any of the 50 other projects are indeed comparable to the Porsche Project. That may be the case, and the Documents by themselves may not fully inform the requisite comparison analysis. However, that issue is for another day, and engages many of the issues in this proceeding on the merits, as opposed to the issue before me today which is whether or not they should be produced.

[35] Moreover, it seems to me that when parties, and particularly sophisticated commercial parties entering into a very sophisticated commercial agreement (such as is the SPA here), and do so with the benefit of counsel, agree by the terms of their bargain to measure or evaluate important terms of the agreement (in this case, the accuracy of the representations and warranties) not by a defined financial threshold or objective figure, for example, but rather by the much broader manner in which the business had been conducted (i.e., "ordinary course" and "past practice"), those

parties can and should reasonably expect to be required to produce a sufficient number of documents, representing a sufficient sample of agreements over a sufficient period of time, so as to, in the aggregate, enable the parties and therefore the court to have an accurate sense of what that past practice or ordinary course was. That is what is being requested here.

[36] Order to go in accordance with these Reasons, directing production of the Documents, recognizing that the first two of the four categories were conceded in argument.

[37] Subsequent to the hearing of this motion, counsel for the parties advised the Court that they had agreed upon the appropriate quantum of costs in this matter to be awarded to the successful parties. Given that the Defendants, moving parties, have been successful on the motion, they are entitled to costs in the agreed amount, being $26,000 inclusive of all fees, disbursements, taxes and interest, payable within 90 days.

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Osborne J.

Date: April 9, 2023