

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Caterpillar Financial Services Limited v.  
0756556 B.C. Ltd.*,  
2023 BCSC 1387

Date: 20230808  
Docket: S221339  
Registry: Vancouver

Between:

**Caterpillar Financial Services Limited**

Plaintiff

And

**0756556 B.C. Ltd., JB & Sons Excavation Ltd. and  
Jeffrey Jacques Bouffard**

Defendants

Before: The Honourable Justice Kent

## **Oral Reasons for Judgment**

In Chambers

Counsel for the Plaintiff:

M. Wray

No other appearances

Place and Date of Hearing:

Vancouver, B.C.  
August 8, 2023

Place and Date of Judgment:

Vancouver, B.C.  
August 8, 2023

[1] Caterpillar Financial Services (“Caterpillar”) applies by way of a summary trial application for judgment against the defendant Mr. Bouffard pursuant to a certain continuing guarantee signed by him on December 31, 2014.

[2] Clause 1 of that Guarantee Agreement reads as follows:

For good and valuable consideration, each of us unconditionally guarantees to you that 0756556 BC LTD ("Customer") will fully and promptly pay and perform all its present and future obligations to you, whether direct or indirect, joint or several, absolute or contingent, secured or unsecured, matured or unmatured and whether originally contracted with you or otherwise acquired by you (collectively, the "Obligations"). This guarantee is irrespective of any validity or unenforceability of any security for any Obligation. We agree, without you first having to proceed against Customer or any security for any Obligation to pay on demand all sums due and to become due to you from Customer and all losses, costs, legal fees and disbursements (on a solicitor and own client basis), expenses or taxes that may be suffered or imposed on you by reason of Customer's default or default of any of us. We agree to be bound by and to pay on demand any deficiency established by a sale of any security, with or without notice to us. None of us shall be released or discharged, either in whole or in part, by your failure or delay to perfect or continue the perfection of any security interest in any property which secures the Obligations or any of us to you, or to protect the property covered by such security interest.

[3] Between the dates of for February 22, 2016 and May 15, 2018, Caterpillar entered into seven lease agreements and one conditional sale agreement with 0756556 B.C. Ltd. Pursuant to these agreements the numbered company agreed to make certain payments over various specified terms, ranging from 36 months to 60 months. The aggregate payments were based on the value of the equipment amortized over the specified term.

[4] The formal agreements contained what is known as a "cross – default" clause pursuant to which a default under any one agreement was deemed to be a default under all agreements between the parties.

[5] The formal agreements provided for repossession of the equipment in the event of default and for Caterpillar to sell the seized equipment and apply the net proceeds towards the amount due under the agreements, after deducting all expenses incurred by Caterpillar in the recovery and sale process, including legal

fees. In such circumstances, the numbered company and the guarantors were required to pay any deficiency remaining after the equipment was sold, along with additional administrative expenses, legal fees and other costs which were collectible as liquidated damages.

[6] Another company owned by Mr. Bouffard, JB & Sons Excavation LTD (“JB”), also executed a continuing guarantee of the numbered company’s obligations to Caterpillar.

[7] The numbered company first defaulted on the agreements in August 2019. Caterpillar subsequently repossessed all the equipment and thereafter sold it to third parties in their usual fashion between April 28, 2020 and May 7, 2021. Thereafter, it issued this action against the numbered company and the two guarantors to recover what it calls the "deficiency balance" due after accounting for the net sale proceeds, along with further accrued interest at the Court Order Interest rate and the legal fees incurred by Caterpillar.

[8] The Notice of Civil Claim was filed on February 7, 2022. No Response to Civil Claim was filed on behalf of either the numbered company or the guarantor JB. However, on July 6, 2022, Mr. Bouffard filed a Response to Civil Claim on behalf of himself personally. In that Response, beyond general denials, Mr. Bouffard raises two positive defences to the claim, namely:

1. an alleged failure by Caterpillar to reasonably mitigate the loss, damages or expenses alleged to have been incurred... No particulars of such failure to mitigate are pleaded; and,
2. an unspecified limitation defence under the *Limitation Act*, SCBC 2012, c. 13.

[9] On October 4, 2022, Caterpillar secured a default judgment against the numbered company and JB in the amount of \$189,327.46 together with interest in the amount of \$1488.21 plus costs to be assessed.

[10] The Notice of Application respecting this summary trial was filed on July 14, 2023, indicating that the matter would be heard in chambers on August 8, 2023. Mr. Bouffard has not filed any Response to the Application. I have been provided with an Affidavit of Service and I am satisfied that the application materials were properly served upon Mr. Bouffard by email on July 14, 2023 and in person on July 18, 2023. His knowledge of the pending application is confirmed by an email exchange he had with counsel on August 3, 2023, a copy of which was attached as an exhibit to the affidavit of service.

[11] Rule 22-1(2) of the *Supreme Court Civil Rules* provides that if a party to a chambers proceeding fails to attend at the hearing, the court may proceed in the absence of that party. Rule 22-1(3) then prohibits any reconsideration of the outcome unless the court is satisfied that the person failing to attend was not guilty of any wilful delay or default. In this case, it appears that Mr. Bouffard has decided not to contest Caterpillar's application, and I consider it appropriate to proceed in his absence.

[12] The application is supported by two affidavits sworn by Ms. Sherry Pottie, a "special accounts representative" employed by Caterpillar in Ontario. Her affidavits provide copies of the formal agreements between the parties and detail the defaults that have occurred, the proceeds secured by resale following repossession, and the amounts due to Caterpillar after taking all appropriate accounting, namely the said \$189,327.46 that was the subject of the default judgment against Mr. Bouffard's co-defendants.

[13] Her affidavits also address the defences raised by Mr. Bouffard in his Response to Civil Claim, namely failure to mitigate and an expired limitation period. She describes how the repossessed equipment was sold on consignment and was offered for sale on Caterpillar's website that is accessible not only to Caterpillar dealers worldwide but also to the general public. The sales had wide exposure throughout the United States and Canada and I am satisfied that they were

conducted in a commercially reasonable manner. There is thus no substance to Mr. Bouffard's allegation that Caterpillar has failed to mitigate its loss.

[14] The relevant limitation period under the *Limitation Act* applicable to the claim against the defendants is two years from the date of the first default. The uncontested evidence is that such default occurred on August 15, 2019, although the final formal demand for payment was issued to Mr. Bouffard on December 5, 2019. While, on its face, Caterpillar's Notice of Civil Claim was filed on February 7, 2022 outside the relevant two-year limitation period, it must be noted that the Province issued a ministerial order under the *Emergency Program Act* on March 26, 2020 suspending limitation periods in response to the Covid-19 pandemic. That suspension effectively gave Caterpillar an additional year to file a Notice of Civil Claim and there is thus no limitation defence available to Mr. Bouffard in the circumstances.

[15] I am satisfied on the evidence before me that Mr. Bouffard has no valid defence to Caterpillar's claim on his guarantee and that judgment must be awarded against him in the amounts claimed, namely \$189,327.46 together with interest in the amount of \$8,472.02.

[16] As noted above, the guarantee makes Mr. Bouffard liable to pay Caterpillar's legal costs on a solicitor-client basis. I have been provided with an affidavit sworn August 3, 2023 regarding the legal fees incurred by Caterpillar to June 15, 2023 and I accept the figure of \$16,417.00 as the appropriate costs to be assessed and awarded against Mr. Bouffard in that regard. Judgment is awarded accordingly.

“Kent J.”