SUPREME COURT OF YUKON

Citation: *38274 Yukon Inc v Fireweed Helicopters Ltd*, 2024 YKSC 12

Date: 20240205
S.C. No. 23-AP001
Registry: Whitehorse

BETWEEN:

38274 YUKON INC. DBA SUPER SAVE PROPANE (YUKON)

RESPONDENT

AND

FIREWEED HELICOPTERS LTD.

APPELLANT

Before Justice K. Wenckebach

Counsel for the Respondent — Mark Wallace and Dmitri Klinov

Counsel for the Appellant — James R. Tucker (by telephone)

This decision was delivered in the form of Oral Reasons on February 5, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The appellant, Fireweed Helicopters Ltd., had a multi-year contract with the respondent, 38274 Yukon Inc, which does business as Super Save Propane (Yukon). Under the contract, Super Save supplied propane to Fireweed. Fireweed became dissatisfied with Super Save's services. Before the end of

the contract, it stopped accepting propane from Super Save and entered into a contract with another propane company, Borealis Fuels & Logistics.

[2] Super Save then sued Fireweed in Small Claims Court for breach of contract and sought liquidated damages.

[3] The trial judge found that Fireweed did breach the contract. She determined that liquidated damages should not be awarded, but that contractual damages were appropriate.

[4] The trial judge calculated the damages as the net profit on propane that Super Save would otherwise have sold to Fireweed for the remainder of the contract. Her calculation of damages was $12,303.12.

[5] Fireweed has appealed the trial judge's decision. It takes no issue with the trial judge's decision that it breached the contract. It argues, rather, that the judge did not have evidence upon which to calculate damages. The judge, therefore, should not have awarded any damages.

[6] During the oral hearing, I asked whether Fireweed had argued this issue at trial. Counsel stated that it had not been explicitly argued but that it was clear from the submissions to the trial judge that whether there was evidence upon which to calculate damages was a live issue.

[7] In my opinion, the issue Fireweed raises on appeal was not argued either explicitly or implicitly at trial. Ordinarily, a party cannot raise a new issue on appeal. Here, Super Save did not argue that the issue should not be heard, so I will consider the appeal. However, this background helps to put the trial judge's decision in context. A judge's decision is responsive to counsel's arguments. In the case at bar, the trial judge

did not address the strength of the evidence on damages because counsel did not raise it in his submissions.

[8] Turning to the substance of the appeal, I will first discuss the standard of review and then address the appeal on the merits.

[9] A determination of damages is one that involves both fact and law and therefore attracts deference on review. Generally, then, the standard of review on appeal is palpable and overriding error. However, the standard of correctness applies where the determination involves an inextricable question of law. A court sitting in review can therefore intervene in a trial judge's decisions about damages where:

- the trial judge made an error of law;
- they misapprehended evidence;
- there was no evidence on which the trial judge could have reached their conclusion;
- the trial judge failed to consider all relevant factors, considered irrelevant factors; or
- made a "palpably incorrect" or "wholly erroneous" assessment of the damages (*Saramia Crescent General Partner Inc v Delco Wire and Cable Ltd*, 2018 ONCA 519 at paras. 28-29).

[10] Here, Fireweed argues that the trial judge did not have evidence before her upon which she should calculate damages. It states that the trial judge made a palpable and overriding error or failed to consider the evidence in its entirety.

[11] Super Save, on the other hand, submits that the trial judge did not err, as there was evidence before her upon which she could make the assessment of damages.

[12] I will therefore consider whether the judge had evidence upon which she could calculate damages.

[13] There was some evidence at trial of Super Save's profits and charges. This evidence was:

1. Super Save's profit on Fireweed's account on the last day it delivered propane to Fireweed was 76%;
2. Super Save's profit is equal to the costs for charging the customer fuel less Super Save's costs for fuel on the date of the charge;
3. Super Save's costs of propane are variable;
4. the level of profit is "a moving target";
5. Super Save has costs such as: transportation of propane to the Yukon; employees' wages; and buying and maintaining vehicles.
6. on an established and condensed route, other extra costs to Super Save are negligible; and
7. on its invoices, Super Save charges, in addition to the costs for fuel, flat fees for:
    - delivery;
    - storage;
    - hazardous material handling;
    - pipeline transportation; and
    - Federal Carbon Tax.

[14] In her decision, the trial judge calculated the total litres Fireweed would have received by multiplying the average monthly propane it received with the number of

months left in the contract. She then multiplied that figure by the cost of the propane to Fireweed. She determined that the resulting number was the total profit Super Save would have earned. She then reduced the total profit by 24% to reflect the refinery cost of the propane to reach the estimated lost net profit figure of $12,303.12.

[15] Fireweed takes issue with the judge's reliance on the profit figure of 76% and on her acceptance that Super Save's added charges are related to costs. I will address each argument in turn.

[16] Fireweed submits that the trial judge erred in relying on the 76% and 24% figures to determine Super Save's profit and refinery costs. Counsel argues that the evidence at trial was that those figures will vary depending on the costs of propane. As the level of profit is not stable, the profit obtained from one day is not an adequate basis upon which to calculate average profit and refinery costs.

[17] In my opinion, Fireweed's concern about the trial judge's use of the 76% figure to calculate Fireweed's profit is about the sufficiency of the evidence.

[18] Counsel for both parties provided me with case law in which an appeal court was asked to review the trial judge's determinations of damages in contract, which, they said, were analogous to the case at bar. For its part, Super Save pointed to *CM Callow Inc v Zollinger*, 2020 SCC 45 ("*CM Callow*"), as an example in which the Supreme Court of Canada concluded that the trial judge's calculation of damages based on the plaintiff's estimate of his expenses was valid.

[19] Fireweed, on the other hand, argued that *North America Construction (1993) Ltd v Yukon Energy Corporation*, 2018 YKCA 6 ("*North America Construction*"), is applicable. In that case, the assessment of damages was based on a witness' guess

about what the costs at issue would be. Fireweed submits that here, too, the judge's determination is based on speculation.

[20] In my opinion, the quality of the evidence before the judge in the case at bar fell somewhere between that provided in *CM Callow* and in *North America Construction*. Based on the information provided in the court decisions, it appears that in *CM Callow* the witness provided information about expenses over different years. Unlike here, then, the judge was not relying simply on one figure when determining damages. In *CM Callow*, there was more evidence than here upon which to calculate damages.

[21] *North America Construction* is also not directly on point. In the case at bar, the witness was able to state Super Save's actual profit for one day. The witness was not speculating, as occurred in *North America Construction*.

[22] The answer as to the sufficiency of the evidence here does not lie in comparing it with other cases, but in applying the correct standard of review. A determination of damages will be overturned where there is no evidence upon which the trial judge could make an assessment. The 76% figure is some evidence, which the trial judge was entitled to rely on, to determine damages. The trial judge did not err when using the profit figure provided by the witness to calculate costs.

[23] The trial judge also found that the fees Super Save charges are related to overhead costs. Counsel to Fireweed submits that Super Save's witness only spoke of the added fees as charges. There is no evidence that the charges are part of Super Save's expenses. In making the submission, Fireweed is arguing that the trial judge erred in drawing the inference that the charges arose out of Super Save's expenses.

[24] The standard of review on an inference of facts is whether the trial judge made a palpable and overriding error in coming to its inference based on accepted facts (*Housen v Nikolaisen*, 2002 SCC 33 at para. 21). In explaining this standard, the Supreme Court of Canada stated, in *Housen* at para. 23:

> … If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. … [emphasis in original]

[25] The underlying facts here are the charges themselves, and that they were charged for delivery, storage, hazardous material handling, pipeline transportation, and the Federal Carbon Tax. Counsel has not pointed to anything in the trial judge's inference drawing process that was palpably in error. Moreover, it seems to me not only permissible, but logical, to conclude that the charges are linked to Super Save's expenses.

[26] I therefore conclude that the trial judge did not err in relying on the evidence of Super Save's profit or in concluding that the charges were related to Super Save's expenses when calculating the damages award. I dismiss Fireweed's appeal.

_____
WENCKEBACH J.