TAB 12

2016 ABQB 577
Alberta Court of Queen's Bench

Bussey Seed Farms Ltd. v. DBC Contractors Ltd.

2016 CarswellAlta 2026, 2016 ABQB 577, [2016] A.W.L.D. 5007, 272 A.C.W.S. (3d) 178

Bussey Seed Farms Ltd., Gordon J. Bussey and Joanne Bussey (Plaintiffs) and DBC Contractors Ltd. (Defendant)

Master J.T. Prowse, In Chambers

Heard: October 6, 2016
Judgment: October 13, 2016
Docket: Calgary 1601-03841

Counsel: Terry L. Czechowskyj, for Plaintiffs
Elmer S. Chiu, for Defendant

Subject: Contracts; Corporate and Commercial; Property

Related Abridgment Classifications

Commercial law
V Sale of goods
V.2 Transfer of property
V.2.e Miscellaneous

Headnote

Commercial law --- Sale of goods — Transfer of property — Miscellaneous
Plaintiffs signed written contract allowing defendant to extract gravel aggregates from their land — Plaintiffs took position that defendant was in arrears of payments under agreement and they barred defendants from entering onto land to remove 42000 tonnes of crushed gravel which defendant had stockpiled on land — Plaintiffs brought application to determine preliminary issue of ownership of stockpiled aggregate — Defendant was owner of stockpiled aggregate — Both case law and wording of agreement support conclusion that agreement in question was profit a prendre — Review of agreement showed that it did not grant exclusive possession to defendant — Plaintiff's contention that it was lease was rejected — Payments to be made to plaintiffs were royalties and not rent.

Table of Authorities

Cases considered by *Master J.T. Prowse, In Chambers*:

Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co. (1975), 12 N.S.R. (2d) 179, 62 D.L.R. (3d) 663, 1975 CarswellNS 92 (N.S. C.A.) — considered

BC Rail Ltd. v. Biro (2001), 2001 BCSC 264, 2001 CarswellBC 318, [2001] B.C.T.C. 264 (B.C. S.C. [In Chambers]) — considered

Berkheiser v. Berkheiser (1957), [1957] S.C.R. 387, 7 D.L.R. (2d) 721, 1957 CarswellSask 60 (S.C.C.) — considered

Lenko v. Grabler (1993), 14 Alta. L.R. (3d) 414, 1993 CarswellAlta 201 (Alta. Q.B.) — considered

Saskatoon Sand & Gravel Ltd. v. Steve (1973), 40 D.L.R. (3d) 248, 1973 CarswellSask 175 (Sask. Q.B.) — followed

1056 Enterprises Co. v. Katchmar Enterprises Inc. (1987), 1987 CarswellBC 2491 (B.C. S.C.) — considered

Statutes considered:

Sale of Goods Act, R.S.A. 2000, c. S-2
Generally — referred to

s. 19 — considered

s. 20(4) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 7.1 — considered

APPLICATION by plaintiffs to determine preliminary issue of ownership of stockpiled aggregate.

***Master J.T. Prowse, In Chambers*:**

1 The issue to be determined is the ownership of gravel aggregate crushed and stockpiled on the plaintiffs' land.

2 On December 1, 2010, the plaintiffs signed a written contract allowing the defendant DBC Contractors Ltd. ("DBC") to extract gravel aggregates from their land until 2015. The term was subsequently extended to March 31, 2018. I will refer to this agreement and the extending agreement together as "the agreement".

3 In January of 2016 the plaintiffs took the position that DBC was in arrears of payments under the agreement, and they barred DBC from entering onto the land to remove 42,000 tonnes of crushed gravel which DBC had stockpiled on the land.

4 The plaintiffs seek the Court's ruling on a preliminary issue pursuant to Rule 7.1, namely, the ownership of the stockpiled aggregate.

5 For the reasons which follow and based on the written agreement between the parties, it is my conclusion that DBC is the owner of the stockpiled aggregate.

Case law on the ownership of stockpiled aggregate

6 The leading case is *Saskatoon Sand & Gravel Ltd. v. Steve*, 1973 CarswellSask 175, 40 D.L.R. (3d) 248 (Sask. Q.B.), a decision of Bayda, J. He stated:

> The gist of the defendants' argument is that the formula for ascertaining the price as prescribed by the agreement is such that the defendants were bound to weigh or measure the gravel for the purpose of ascertaining the price; as a matter of normal procedure the weighing and measuring was done after the gravel was taken off the premises; and because the provisions of this Rule stipulate that the property does not pass until that act of weighing or measuring occurs, it follows that the ownership in the gravel was not intended to pass to the plaintiff until after the gravel was hauled off the premises. The short answer to the defendants' argument is that the *Sale of Goods Act* does not apply for the simple yet cogent reason that the sale of the gravel in question was not a sale of goods (see *Morgan v Russell & Sons*, [1909] 1 K.B. 357).

My answer to the secondary question is that ownership in the gravel passed to the plaintiff at the time of severance from the soil.

7 This decision was followed by the Nova Scotia Supreme Court, Appeal Division, in *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.*, 1975 CarswellNS 92 (N.S. C.A.) where Cooper, J.A. stated at para's 71 and 76:

The respondent, which I shall also refer to as "B & D", entered into an oral agreement with Angus A. MacDonald to extract rock from the quarry at George's River and to pay ten cents per ton by way of royalty for the rock that B & D "moved over the scale at the quarry" . . .

I am in respectful agreement with Mr. Justice Bayda that where an interest in land of the nature of a profit à prendre is conferred "ownership in the subject-matter is transferred to the grantee at the moment the subject-matter is severed from the soil".

8 In his concurring reasons, Coffin, J.A. stated at para's 90 and 94:

. . . the trial judge was not in error in adopting the reasoning of Bayda, J., in *Saskatoon Sand & Gravel Ltd. v. Steve* (1974), 40 D.L.R. (3d) 248.

I realize that in the Saskatoon Sand and Gravel case the gravel was stockpiled, but none the less Bayda, J. set forth the general principle that transfer of ownership takes place "at the moment the subject matter is severed from the soil."

9 In *1056 Enterprises Co. v. Katchmar Enterprises Inc.*, 1987 CarswellBC 2491 (B.C. S.C.), the Court stated:

Saskatoon Sand & Gravel Ltd. v. Steve et al, 40 D.L.R. (3d) 248 bears directly on the issue. It is apparent from that case that gravel is, prior to its severance from the soil, a profit a prendre. Once it is severed from the soil and processed, it becomes a chattel. Furthermore, paragraph 3 of the agreement between Cantex and Block Bros. Contracting Ltd. leads to the inference that the plaintiff [lessee] was to obtain title to the gravel once it was processed.

In my opinion therefore the stockpiled gravel belonged to the plaintiff. It is also clear from the *Saskatoon Sand & Gravel* case that the *Sale of Goods Act* has no application to situations of this type. The conclusion I have reached is that the plaintiff, 1056 Enterprises Inc. is the owner of the stockpiled gravel . . .

10 In *Lenko v. Grabler*, 1993 CarswellAlta 201, 14 Alta. L.R. (3d) 414 (Alta. Q.B.) at para. 26, the Court stated:

At best, the 1976 agreement is a profit à prendre. Case authorities establish that the grantee acquires ownership of the material severed from lands when the material is taken out of the ground. See *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.* and *Saskatoon Sand & Gravel Ltd. v. Steve*.

11 In *BC Rail Ltd. v. Biro*, 2001 BCSC 264 (B.C. S.C. [In Chambers]), the Court stated:

In this regard, I find that the residual rail ballast and the spur line were not the property of Graehold [lessee] at the expiration of the lease and the grace period for several reasons. First, clause 5.2 provides that rock product, equipment and stockpiles not removed at the end of the grace period "will become the property" of the Owners Group. However, with respect to the residual rail ballast, Graehold sold it to BCR during the term of the lease at a time when it had an ownership interest in the rock and authority to manufacture it into rail ballast and stockpile it in the quarry.

Furthermore, while I accept that the [*Sale of Goods*] Act does not apply to the issue of whether Graehold acquired an ownership interest in the rock, in my opinion, insofar as the sale of rail ballast by Graehold to BCR is concerned, the [*Sale of Goods*] Act does apply. As between these parties it was a contract for the sale of goods. Thus, in my opinion, the residual rail ballast became the property of BCR from the moment that it was weighed and stockpiled alongside the

spur line in the quarry for removal by BCR. At that point the rail ballast became "ascertained" goods.

Is the agreement a lease or a profit a prendre?

12 The case law cited above makes it clear that one must have regard to the provisions in the agreement between the parties when considering the question of ownership of stockpiled aggregate.

13 The plaintiffs attempt to support their claim to ownership of the stockpiled aggregate by asserting that the agreement was simply a lease, and when the lease came to an end so did DBC's right to the stockpiled aggregates.

14 In my view, the amended agreement is a classic profit a prendre. I reject the contention of the plaintiffs that it is a lease. It contains the three key ingredients of a profit a prendre, namely:

(1) The right to enter the lands of the plaintiffs, and

(2) The right to dig for and sever the gravel from the soil, and

(3) The right to haul away the gravel so severed for the use of the defendant.

15 The primary right given to DBC, under clause 2.01 (which describes the plaintiffs as "the vendors" and not as "the lessors") is as follows:

> The Vendors agree to allow DBC, during the term of and in accordance with the provisions of this agreement, the exclusive right to, at its sole expense, on the land, explore for, prospect for, test for, extract, remove, process, crush, wash, stockpile, mix and dispose of aggregates located within or on the land . . .

16 The plaintiffs base their argument that the agreement on the assertion that it provides exclusive possession of the land to DBC. A close review of the agreement shows that it does *not* grant exclusive possession to DBC.

17 Firstly, the only exclusive grant to DBC is an exclusive grant to gravel aggregates. See clause 2.01 quoted above.

18 The payments to be made to the plaintiffs by DBC are "royalties" and not rent.

19 Clause 3.08 makes it clear that the plaintiffs reserve rights to concurrently use the land, such as the right to conduct mines and minerals exploration on the land. This is inconsistent with an allegation that DBC has exclusive possession.

20 One clause which is consistent with a lease is the plaintiffs' promise to provide 'quiet enjoyment' of the land, which is a phrase more commonly associated with a lease, but this can simply be construed as a promise not to interfere with DBC's exclusive right to the aggregates.

21 The plaintiffs also support their argument that the agreement is a lease, and not a profit a prendre, by pointing to clause 3.05, which requires the plaintiffs to pay:

> any assessment, levy or other charge to be paid to Rocky View County with respect to the Aggregates produced or removed from the Land . . .

22 The plaintiffs note that this type of clause was discussed in *Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.) at para 13, as being consistent with a lease, but it is not conclusive. I note that a similar clause was in the agreement being considered by the Supreme Court of Canada in *Berkheiser* and it concluded that the agreement was a profit a prendre or an irrevocable license to search for and to win the substances named.

23 In my view, both the case law and the wording of the agreement support the conclusion that the agreement in question is a profit a prendre.

If the agreement is a profit a prendre, who is the owner of the stockpiled aggregate?

24 The plaintiffs argue that, even if the agreement is a profit a prendre, the ownership of the stockpiled aggregate would remain with the plaintiffs until it was removed from the land, weighed and paid for.

25 The plaintiffs invoke section 19 of the *Sale of Goods Act*, RSA 2000, c.S-2, but the more pertinent reference is to section 20(4) of the *Act* which states:

> When there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice of it.

26 The argument that section 20(4) of the *Sales of Goods Act* supports the land owner's claim to ownership of stockpiled aggregates was considered and rejected in the cases cited previously, which determined that the *Act* does not apply to the relationship between parties to a profit a prendre. See: *Saskatoon Sand & Gravel*, *supra*, *1056 Enterprises Co.*, *supra*, and *BC Rail*, *supra*.

27 While the *Sale of Goods* Act would apply to subsequent sale by DBC to an ultimate purchaser, it does not apply to the profit a prendre between the plaintiffs and DBC.

28 More importantly, the agreement itself provides that DBC owns the stockpiled aggregate. Specifically, clause 5.04 states:

> Notwithstanding the term granted herein, at the expiration of this agreement, DBC shall have the right to remove its stockpiles of aggregates from the land for a further period of one year immediately following the last day of the term of this agreement, provided however, that DBC shall continue to be obligated, in accordance with the provisions of this agreement, to pay royalty payments to the vendors for these aggregates removed from the land. (emphasis added)

29 Clause 5.04 clearly envisages ownership of the stockpiled aggregate belonging to DBC prior to the aggregates being removed from the lands and weighed.

Conclusion

30 My conclusion on the preliminary issue of ownership of the stockpiled aggregates, is that they are owned by DBC, and I so declare.

Costs

31 If the parties cannot agree on costs of this application, they may approach me for a ruling in that regard.

Defendant was owner.