TAB 11

2020 SKQB 37
Saskatchewan Court of Queen's Bench

Last Mountain Valley No. 250 (Rural Municipality) v. Ter Keurs Bros. Inc.

2020 CarswellSask 77, 2020 SKQB 37, 316 A.C.W.S. (3d) 58

RURAL MUNICIPALITY OF LAST MOUNTAIN VALLEY NO. 250 (PLAINTIFF) and TER KEURS BROS. INC. (DEFENDANT)

B.L. Klatt J.

Judgment: February 11, 2020
Docket: Regina QBG 1468/17

Counsel: William R. Howe, Tarissa Peterson, for Plaintiff
Kevin C. Mellor, Nicolas L. Brown, for Defendant

Subject: Civil Practice and Procedure; Contracts; Public; Municipal

Related Abridgment Classifications

Contracts
VII Construction and interpretation
VII.3 Surrounding circumstances

Headnote

Contracts --- Construction and interpretation — Surrounding circumstances
In 1987, former landlord entered agreement allowing former tenants to excavate, process and remove all sand and gravel found on or beneath land for fixed sum plus amount per cubic yard of sand or gravel removed — Agreement also permitted tenants to stockpile gravel on land during 10-year term — In 1988, tenants assigned agreement to plaintiff municipality and term was extended from 10 to 20 years — Upon expiry in 2007, landlord and municipality negotiated new agreement with different rates — In 2014, municipality decided to increase production significantly as result emergency created by flooding — Not long after, landlord sold land and assigned rights under agreement to defendant owner — There was approximately 8,500 yards of gravel stockpiled on land at that time — New owner claimed that it had concerns about amount of gravel being extracted from and stockpiled on land, and that its representative asked municipality to remove all gravel it intended to take before agreement expired — Municipality claimed owner asked it to cease production until renewal agreement was entered, and that it agreed to do so on basis existing stockpile was sufficient to meet its needs — When renewal agreement was not entered before existing agreement expired, owner refused to renew and claimed ownership over existing stockpile — Municipality brought action for declaration it owned existing stockpile and order giving it reasonable time to remove it, and brought motion for summary judgment — Motion granted in part — Interpreting lease agreement on basis of words used as well as factual matrix surrounding its making, agreement between parties was in nature of profit a prendre and municipality was owner of gravel that had been extracted and stockpiled — In absence of provision requiring otherwise, municipality was entitled to reasonable time to remove it — Although agreement referred to stockpiling for term, ownership of stockpile did not revert to owner upon expiration of term — Such interpretation would be patently unfair — What constituted reasonable time could not be determined on basis of available record and, in absence of agreement, was left to be determined by further application.

Table of Authorities

Cases considered by *B.L. Klatt J.*:

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.) — referred to

British Columbia v. Tener (1985), [1985] 1 S.C.R. 533, [1985] 3 W.W.R. 673, 17 D.L.R. (4th) 1, 36 R.P.R. 291, 32 L.C.R. 340, 59 N.R. 82, 28 B.C.L.R. (2d) 241, 1985 CarswellBC 7, 1985 CarswellBC 2562 (S.C.C.) — considered

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.) — followed

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

Tchozewski v. Lamontagne (2014), 2014 SKQB 71, 2014 CarswellSask 149, [2014] 7 W.W.R. 397, 24 B.L.R. (5th) 141, 440 Sask. R. 34 (Sask. Q.B.) — considered

Viczko v. Choquette (2016), 2016 SKCA 52, 2016 CarswellSask 212, 83 C.P.C. (7th) 219, 396 D.L.R. (4th) 449, [2016] 6 W.W.R. 479, (sub nom. *Choquette v. Viczko Estate)* 476 Sask. R. 273, (sub nom. *Choquette v. Viczko Estate)* 666 W.A.C. 273 (Sask. C.A.) — considered

Rules considered:

Queen's Bench Rules, Sask. Q.B. Rules 2013
R. 7-5(1)(a) — considered

MOTION by municipality for summary judgment in action for declaration it owned stockpile of gravel on leased land and order granting reasonable time to remove it.

***B.L. Klatt J.*:**

1 The plaintiff, the Rural Municipality of Last Mountain Valley No. 250 [RM] has applied for summary judgment against the defendant, Ter Keurs Bros. Inc. [Ter Keurs]. The RM seeks a declaration that it is the owner of extracted, processed gravel that was stockpiled on land owned by Ter Keurs and an order that it be given reasonable time to remove the stockpile from the land.

2 Rule 7-5(1)(a) of *The Queen's Bench Rules* authorizes a summary judgment procedure if the court is satisfied that there is no genuine issue requiring a trial. In this case, there was considerable affidavit evidence as well as questions and answers taken at a formal questioning of several witnesses.

3 Both parties agree that this matter can and should be resolved by a summary judgment proceeding. There were several affidavits filed, mostly on behalf of the RM. Cross-examination of several witnesses occurred in 2019 and the parties filed transcripts of questions and answers from those proceedings.

4 I have considered the framework as set out in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) as well as the principles emerging from the more recent cases of *Tchozewski v. Lamontagne*, 2014 SKQB 71, 440 Sask. R. 34 (Sask. Q.B.) and *Viczko v. Choquette*, 2016 SKCA 52, 476 Sask. R. 273 (Sask. C.A.). I am satisfied that both parties have had the

opportunity to put "their best foot forward" and that the issue in this case can be resolved through the summary judgment process.

Background

5 At the heart of this dispute is the interpretation of the terms of an agreement between the parties that pertained to the RM's right to extract and stockpile gravel on the land, NW 13-24-23 W2 [the Land], owned by Ter Keurs. Pursuant to some gravel extraction leases, the RM has been a continuous tenant of the Land. This is not in dispute.

6 On August 6, 1987, a former owner of the Land, Alvin Kelln, entered into a 10-year lease agreement with Sherman Stenson and James Bleackley [original tenants]. This agreement [1987 Lease] granted the original tenants the exclusive right to excavate, sift, process, remove and sell all sand and gravel found on or beneath the Land. In consideration, the original tenants agreed to pay the initial sum of $10,000.00 and $0.35 per cubic yard of sand or gravel removed from the Land. The 1987 Lease also granted the original tenants the right to stockpile gravel during the term of the agreement.

7 In May 1988, the original tenants assigned their interest in the 1987 Lease to the RM. The assignment also extended the term of the lease to 20 years and continued to permit the RM to excavate, process and remove sand and gravel as well as to stockpile it on the Land.

8 Upon the expiration of the 1987 Lease in 2007, Alvin and Marlene Kelln [the Kellns] negotiated a new agreement with the RM, entitled the "Gravel Removal Agreement" [Gravel Agreement]. Some of those terms include:

(a) The RM has the right to enter upon the Land to "test, search for, dig and carry away such sand, gravel or stone deposits found in any part of the lands as it may desire...";

(b) Upon expiration of the Gravel Agreement, the RM has the right "to remove any of its fixtures within a reasonable time period as agreed to by both parties";

(c) The RM may at any time during the term of the Gravel Agreement stockpile any sand or gravel on the Land;

(d) The RM will pay $1.00 for each cubic yard of sand, gravel or stone deposits removed from the Land, "payable following the excavation of the gravel during each consecutive year of the Term of the Agreement and no later than December 31 of each year";

(e) The RM will pay to the owner the amount owing for stockpiled materials from the previous agreement at the rate provided for in that agreement; and

(f) The RM was entitled to stockpile any sand or gravel on the Land during the term of the agreement.

9 In October 2014, the Kellns sold the Land to Ter Keurs and assigned their rights under the Gravel Agreement to them.

10 At the time the Land was sold to Ter Keurs, there was an inventory of about 8,500 yards of gravel on the Land. The RM made the payments required pursuant to the Gravel Agreement to Ter Keurs as the new owners of the Land.

11 The parties filed some of the cross-examination questions and answers taken on May 14, 2019. Arend Jan Ter Keurs [Mr. Ter Keurs] was questioned and stated that before buying the Land, he reviewed the Gravel Agreement with the Kellns and "it looked okay". He stated he also understood from the Gravel Agreement that the RM could excavate, stockpile and remove as much gravel as they wanted.

12 According to the August 15, 2017 affidavit of Allan Magel [Mr. Magel], the reeve of the RM, the stockpiles ranged from a low of 22,324 yards to a high of 69,644 yards for the period 2007 to 2014 inclusive. He deposed that for the 10-year period up to 2016, the average crushed product was 26,875 yards, the average annual amount used was 20,116 yards and the average stockpile was 58,446 yards. Specifically, the documents show that in 2013 and 2014 respectively the stockpiles were 23,890 yards and 36,098 yards. The amounts crushed in 2013 and 2014 were 30,000 yards and 27,500 y[illegible]

2015, the amount crushed was 109,800 yards with a stockpile of 119,723 yards. By the end of 2016, the stockpile was 109,634 yards.

13 In July 2014, the disastrous flooding resulted in the RM declaring a state of local emergency. Mr. Magel deposed that due to the extreme flooding, road washouts and severe road deterioration caused by the high water levels, the RM began to experience financial pressures. Mr. Magel deposed that as a result of the flood devastation, it was decided to substantially increase the amount of gravel crushing to ensure healthy stockpiles were maintained and to repair the damage caused to the RM's roadways. Accordingly, the RM contracted with L & G Crushing Corp. [L & G] to extract as much gravel from the Land as was available. In early spring of 2015, L & G advised the RM that they could extract approximately 100,000 cubic yards of gravel from the Land.

14 Mr. Magel deposed that because the RM had contracted with L & G to do such a significant extraction, it was necessary to obtain a $650,000.00 loan from the bank to pay the new owner, Ter Keurs, as well as L & G. Due to other commitments, L & G could not start the extraction on the Land until March 2015 with the majority being done in the fall and into December 2015. The invoice indicates that the RM paid L & G a total of $627,322.50 for the excavation and crushing of 109,800 yards of gravel in 2015. In December 2015, the RM contacted Mr. Ter Keurs to advise him that he would be receiving a cheque for $137,300.00 which was paid to him in January 2016. This cheque represented an amount outstanding pursuant to the Gravel Agreement as well as the 109,800 cubic yards of gravel that the RM paid to be crushed and stockpiled on the Lands in 2015.

15 None of the facts outlined thus far appear to be in dispute. The conflicting evidence arises as to the discussions the parties had thereafter.

16 Mr. Ter Keurs deposed that he had concerns with the amount of excavation that was being done on the Land and went to the council meeting in February 2016. He said he told the council he did not think it was fair for the RM to "suddenly extract so much gravel just before their contract expired" and that the RM should remove all the gravel it intended to take from the Land before the contract expired. He said he told them Ter Keurs was not in the business of storage.

17 Mr. Magel and RM councillor Kenneth Hagen [Mr. Hagen] both stated there was no discussion of any kind at the meeting about the RM having to remove their stockpiles if the lease was not renewed. Further, they said there was no suggestion at that time that the lease would not be renewed after its expiry in 2017. They both deposed that Mr. Ter Keurs spoke about the anticipated increase in the royalty rate in a renewal contract and asked that no more processing be done until then. Mr. Magel said the council explained to him that the decision to increase extraction was made before he bought the Land from the Kellns but that since the RM had the much-needed stockpile, the RM would not process any more until after the renewal agreement was entered into. Mr. Hagen confirmed this in his affidavit. Mr. Magel said they agreed the RM representatives would attend to Mr. Ter Keurs' residence to discuss renewal terms.

18 Mr. Magel said he and three other councillors went to Mr. Ter Keurs' residence on February 15, 2016 to discuss the renewal contract and the terms of compensation. They told Mr. Ter Keurs that the new royalty rate was $4.50 per yard of gravel processed and, additionally, that there was a new policy to pay $100.00 per acre of land used for storage. Mr. Magel said there was no discussion that led him to believe the lease would not be renewed.

19 Mr. Magel said as they had no response from Mr. Ter Keurs, they went to see him on April 22, 2016. Mr. Hagen also attended and deposed that Mr. Ter Keurs spoke to them about needing gravel to shore up some bins but, because of the lease, they did not have access to the gravel. Mr. Hagen said they discussed the possibility of reaching an agreement whereby the RM would give up their claim on the other quarter section Ter Keurs had bought from the Kellns and then they could use as much gravel as they needed. He said they reiterated the RM's proposal and told Mr. Ter Keurs that although the RM was seeking a 10-year lease, the proposed price of $4.50 per yard would be adjusted after five years. He said the discussion was very cordial and, again, there was no indication a new agreement would not be reached.

20 Mr. Hagen deposed that they had still not had a response from Ter Keurs so another councillor, Shawn Flavel [Mr. Flavel], went to see Mr. Ter Keurs. At the council meeting on January 30, 2017, Mr. Flavel advised the council that Ter Keurs did not want to enter into a renewal agreement at the terms proposed and that they wanted $1.00 per yard of gravel for each year of storage. Mr. Hagen said the RM instructed their lawyer to send a formal renewal agreement package to Ter

Keurs to "ensure there was no misunderstanding".

21 Mr. Hagen deposed that in March 2017, he spoke with Mr. Ter Keurs' brother, Gerrit Ter Keurs [Gerrit], about the agreement. He said they discussed the storage fee proposed by Mr. Ter Keurs and he told Gerrit the RM could not afford such a fee. He said Gerrit told him they were displeased that the lawyers got involved because they thought an agreement could be reached without them. The discussion ended with Gerrit stating they would call the RM when they returned from their vacation in Holland. There was no evidence from Gerrit.

22 Mr. Hagen deposed that the RM had no response whatsoever from Ter Keurs until they received the letter on April 4, 2017, which was the day the lease expired. In the letter, Ter Keurs stated they were not renewing the agreement and that they were claiming ownership of the gravel stockpiles. Ter Keurs prohibited the RM from entering the Land and erected "No Trespassing" signage.

23 Mr. Ter Keurs deposed that after the February 2016 RM meeting, the RM tried to get them to renew the agreement but they refused every time. When he was questioned on May 14, 2019, he stated that he told the RM at the meeting in February 2016 that the RM should clean everything on the Land up. Ter Keurs thought possibly they would renew at some point but on their terms. Later, he said they were not going to renew because they wanted to farm the Land and that Ter Keurs did not want to be in the gravel business.

24 The RM acknowledges that at no time did they arrange for their stockpiles to be removed from the Land prior to the expiration of the lease. They thought an agreement could be reached and that they owned the stockpiles.

Positions of the Parties

25 The RM's position is that it owns the gravel stockpiles that it paid L & G to extract and process gravel. The RM asserts that the Gravel Agreement constituted a *profit á prendre* whereby the RM acquired ownership of the gravel at the time it was severed from the soil. It also posits that upon expiration of the Gravel Agreement, the ownership of the stockpiles that already existed did not revert to Ter Keurs.

26 Ter Keurs asserts that the Gravel Agreement was a typical lease agreement and that once the agreement expired, any gravel the RM left on the Land became their property. Ter Keurs relies on the wording of the agreement and states that the RM had the contractual right to stockpile gravel and sand but only for the term of the agreement. Thus, it contends, once the agreement expired, so did the right to stockpile gravel and any stockpiles left on the Land belonged to Ter Keurs.

Analysis

27 The issue in this case is the ownership of the gravel stockpiles. Resolution of this issue comes down to the interpretation of the Gravel Agreement.

28 The Supreme Court of Canada in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) [*Sattva Capital Corp.*], changed the landscape of contract interpretation, rejecting the historical approach of considering solely the language and terms of the contract. Rather, the court adopted a practical approach and favoured a more contextual exercise that would better lend itself to determining the intention of the parties and the scope of their understanding of the agreement. Rothstein J., in writing for the court, said:

> [47] ...[A] decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
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> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which it

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parties are operating.

(*Reardon Smith Line* [*Reardon Smith Line Ltd. v Hansen-Tangen*, [1976] 3 All ER 570] at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall [Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2d ed (Markham: LexisNexis, 2012], at p. 22; and McCamus [John D. McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012)], at pp. 749 - 50).

29 What this means is that contractual interpretation is not confined to the words used in the contract, but also to the factual matrix surrounding the making of it. Here, I must determine what the parties agreed to when they entered into the Gravel Agreement as it relates to the ownership of the gravel and the rights of the RM to stockpile gravel, particularly after the expiration of the agreement.

30 The parties agree that, in following the guidance set out in *Sattva Capital Corp.*, I am not confined by the language and terms of the agreement itself. Ter Keurs, however, urges me to consider only the terms of the Gravel Agreement and argues that it is unnecessary to consider any of the other evidence. I disagree. There is considerable evidence in the various affidavits to assist me in a proper interpretation of the rights of the parties under the Gravel Agreement.

31 Ter Keurs, in their brief of law and in the hearing before me, indicated that this case does not turn on whether the contract amounts to a *profit à prendre*. In my view, however, it is necessary to determine if and when ownership of the gravel passed to the RM. To answer this question, I must assess whether the contractual relationship was a *profit à prendre*.

32 In *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (S.C.C.) (QL) [*Tener*], Wilson J., in her dissenting decision, analyzed the right conferred by a *profit á prendre* as follows:

> 12 A profit à prendre is defined in *Stroud's Judicial Dictionary*, 4th ed., vol. 4, at p. 2141, as "a right vested in one man of entering upon the land of another and taking therefrom a profit of the soil". In *Black's Law Dictionary*, 5th ed. (1979), it is defined as "a right to make some use of the soil of another, such as a right to mine metals, and it carries with it the right of entry and the right to remove and take from the land the designated products or profit and also includes the right to use such of the surface as is necessary and convenient for the exercise of the profit".
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> 13 Wells J. elaborated on the nature of a profit à prendre in *Cherry v. Petch*, [1948] O.W.N. 378 (H.C.), where he said at p. 380:
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> > It has been said that a *profit à prendre* is a right to take something off the land of another person. It may be more fully defined as a right to enter on the land of another person and take some profit of the soil such as minerals, oil, stones, trees, turf, fish or game, for the use of the owner of the right. It is an incorporeal hereditament, and unlike an easement it is not necessarily appurtenant to a dominant tenement but may be held as a right in gross, and as such may be assigned and dealt with as a valuable interest according to the ordinary rules of property.
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> It is important to note that it is the right of severance which results in the holder of the profit à prendre acquiring title to the thing severed. The holder of the profit does not own the minerals *in situ*. They form part of the fee. What he owns are mineral claims and the right to exploit them through the process of severance. ...
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> [Emphasis in original]

33 The RM relies on the seminal decision of *Saskatoon Sand & Gravel Ltd. v. Steve* (1973), 40 D.L.R. (3d) 248 (Sask. Q.B.) (QL) [*Saskatoon Sand*] in support of its position that once the RM severed the gravel from the soil, it owned it. It asserts that the expiration of the Gravel Agreement did not have the effect of ownership of the gravel revesting in Ter Keurs

34 The facts in *Saskatoon Sand* are similar to the facts in this case. The parties had an agreement allowing the plaintiff to process and remove gravel from the land. The agreement expired and there was a dispute over who owned the stockpile. The 1966 agreement was a simple, one-page document that provided for payment to the owner of $0.15 per cubic yard for the "removal of gravel from the ...land by Saskatoon Sand and Gravel Ltd or their authorized agents" (para. 1). The agreement was to end on April 1, 1968.

35 The plaintiff paid a contractor to excavate the gravel, crush, process and stockpile it. At the end of 1966, there were just over 20,000 cubic yards of processed, stockpiled gravel. The plaintiff had not paid the defendant for this and nor had the defendant asked for payment. In all of 1967, the plaintiff removed only about 4,000 cubic yards from the stockpile and it became apparent that its anticipated contracts were not going to materialize. The defendant testified that he told the plaintiff's representative that the stockpiles would have to be moved by April 1,1968, the expiry date of the contract. The plaintiff did not remove any of the stockpiled gravel and, on the date the contract expired, the stockpiles contained about 16,500 cubic yards of processed gravel.

36 The question that Bayda J. (as he then was) grappled with in *Saskatoon Sand* concerned the ownership of the gravel. The subordinate question was at what point did the parties intend ownership to pass? To resolve those issues, Bayda J. looked to the essence of the agreement. On the basis that the contract gave the plaintiff rights to enter the lands, dig for and sever the gravel from the soil and haul away the severed gravel, he concluded that the nature of the interest intended to be conferred was that of a *profit á prendre*. Thus, he said:

> [20] ...[W]here a *profit à prendre* is created by an agreement of the kind we have in the present case, the grantee (here the plaintiff) acquires a terminable right to sever the subject-matter from the soil together with a right to remove such subject-matter from the premises and, unless the agreement provides otherwise, ownership in the subject-matter is transferred to the grantee at the moment the subject-matter is severed from the soil. It follows that unless the agreement before me contains some clause of which it can be said that it "provides otherwise", my finding should be that the plaintiff acquired ownership of the gravel at the time the gravel was severed from the soil. This is a right which flows from the legal relationship created by the written agreement between the parties and a right accorded, by implication of law, to the plaintiff as the grantee of a *profit à prendre*.

37 In this case, the essence of the Gravel Agreement was to create an interest in the gravel severed from the soil. There was no evidence that the intention of the parties was that the Gravel Agreement would provide "otherwise". The RM had the right to enter the Lands, to dig for, sever and stockpile the gravel and to haul away the stockpiled gravel. On the basis of the evidence presented, I find that when the Gravel Agreement was reached, the parties understood and intended that the processed and stockpiled gravel belonged to the RM. Thus, I conclude, as Bayda J. did in *Saskatoon Sand*, that the nature of the interest in this case is a *profit á prendre*.

38 Other cases establish that ownership of materials in the context of a *profit á prendre* arises upon severance of the material from the land (see for example: *Saskatoon Sand*; *Atlantic Concrete Ltd. v. MacDonald Lavatte Construction Co.* (1975), 62 D.L.R. (3d) 663 (N.S. C.A.); *Tener*). In applying these principles, I find that ownership of the stockpile had already transferred to the RM and, without a contractual provision stating otherwise, it follows that the RM should have reasonable time to remove the gravel they processed.

39 On the issue of whether the ownership of the gravel reverted to the landowner when the agreement came to an end, Bayda J. said:

> [23] I now turn to the first alternative argument put forward by the defendants: even if the gravel were at one point owned by the plaintiff, the ownership came to an automatic end on April 1, 1968, and such ownership reverted to the defendants. The basis for this assertion is found in the term "This agreement expires April First 1968." The proper construction to be placed on this term is that on April 1,1968, the plaintiff's right to enter the defendants' lands for the purpose of digging for and severing the gravel from the soil was terminated. The term, however, cannot be said to operate as a conveyance of or as a transfer of the ownership in the severed and stockpiled gravel. To impute to the term a meaning such as that would be to add words to the term or read words into it which are not there. It is not for me to rewrite the parties' contract.

40 Ter Keurs suggests that clause 5(b) of the Gravel Agreement provides that the parties did not intend for the RM to have stockpile remaining after the Gravel Agreement expired. Ter Keurs asserts that this language precludes stockpiling once the term has ended. I do not find this conclusion is supported by the words of the document or the surrounding circumstances. Although the Gravel Agreement would certainly preclude the RM from adding gravel to the stockpile, it does not suggest it should not have reasonable time to remove the gravel or that there would be a reversion of ownership to Ter Keurs if it did not. This would be patently unfair.

41 To be precise here, Ter Keurs was not under any misapprehension about the rights of the RM. They knew that there was a substantial amount of gravel extraction being done in 2015 because they were farming around the gravel pit and could see the operation. They also had to know that any gravel stockpiles belonged to the RM because the RM had already paid for them: $137,300.00 in fact, most of which was for the 109,800 cubic yards of gravel processed and stockpiled in 2015. It was unreasonable for Ter Keurs to assume that once the agreement ended, they automatically became owners of stockpiles they had already been paid for but that remained on the Land when the agreement expired. Such a position is not only unsupported by the law but is wholly unjust.

42 Ter Keurs also argues that the RM was motivated by greed and, knowing the contract was soon to expire and not be renewed, they moved to extract and process as much gravel as they possibly could. I am not convinced that the RM knew the agreement would not be renewed. Mr. Ter Keurs says he expressed concern to the RM at the council meeting in February 2016 over the amount of excavation the RM was doing. He also says he told the RM the agreement would not be renewed. I do not accept that he was as unequivocal as he suggests. The RM visited him at his farm on three occasions to discuss negotiations for a new agreement. I accept that the RM believed that a new agreement could be reached as, historically, it always was. According to Mr. Hagen and Mr. Magel, there continued to be discussions with both parties suggesting possible terms. Even by Mr. Ter Keurs' own evidence, he was willing to enter a new agreement on "his terms". Although he said he just wanted to farm, it is clear that he would continue to negotiate and enter into a gravel agreement with the RM if the price was right. These discussions continued, one being with Gerrit, up until shortly before the agreement expired.

43 As to the assertion that the RM was being greedy and excavating as much as they could for as cheaply as possible, all the excavation and stockpiling had been done before Mr. Ter Keurs raised his concerns at the February 2016 council meeting. In any event, the disastrous 2014 flooding placed the RM in a precarious position. I do not find that its decision to substantially increase its gravel reserves was an unreasonable one in the circumstances.

44 I have found that the RM is the owner of the processed gravel stockpiles on Ter Keurs' Lands. The question next to be addressed is how the RM can remove its stockpiles and the time limitations within which to do it.

45 This issue was also dealt with in *Saskatoon Sand*:

> [30] There is no doubt that the plaintiff by an oral agreement collateral to the written agreement or by an implied term to the written agreement (it is not necessary for me to decide which) acquired the right, the licence, to use the defendants lands for the purpose of storing in stockpiles its processed gravel. The right or licence to store is separate and apart from the plaintiff's express recorded right to dig for, sever from the soil and haul away the gravel so dug and severed. It is either a bare (gratuitous) licence or a contractual one. It is not necessary to decide the category. If the category is the first one, then the licence is revocable at will and the licensee (the plaintiff) is to be given a reasonable time to remove its property, namely, the processed gravel (see *Minister of Health v. Bellotti*, [1944] K.B. 298; *C.P.R. v. The King*, [1931] 2 D.L.R. 386, [1931] A.C. 414, [1931] 1 W.W.R. 673; *Winter Garden Theatre (London), Ltd. v. Millennium Productions Ltd.*, [1948] A.C. 173 at p. 179; *Australian Blue Metal Ltd. v. Hughes*, [1963] A.C. 74). If the second, then, it is revocable on reasonable notice (see *Lttxor (Eastbourne) Ltd. et al. v. Cooper*, [1941] 1 All E.R. 33 at pp. 52-3, [1941] A.C. 108; *Winter Garden Theatre v. Millennium*, *supra*; *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board*, [1973] 2 All E.R. 260 at p. 265.

46 If the right to stockpile was a contractual one, then it could be revoked on reasonable notice. If it was a "gratuitous license", then Ter Keurs was obliged to give the RM a reasonable time within which to remove its stockpiles. Either way, Ter Keurs did not give reasonable notice to the RM nor did they give it a reasonable time to remove its gravel. Rather, they elected to wrongfully appropriate the processed gravel and assert ownership over it on the date the co[illegible]

erected "No Trespassing" signs and gave the RM immediate notice that it was prohibited from entering the Land to remove its property.

47 Ter Keurs understood that the RM could extract and stockpile as much gravel as it desired. I find that implicit in the Gravel Agreement was an intention by the parties that should the agreement expire before the RM could remove its stockpiles, a reasonable opportunity should be afforded to it to remove the stockpiles. To find otherwise would mean that excavation and extraction would have to cease long before the contract expired so that removal could be effected by that time. As I said earlier, I am not satisfied that Ter Keurs gave notice in 2016 that the Gravel Agreement would not be renewed and that the RM would have to remove its stockpiles by the expiration date. I find as a fact that negotiations were ongoing up until a few months before the expiration date and that the RM genuinely believed a new agreement would be reached. I also find that even after Mr. Ter Keurs told Mr. Flavel he did not want to renew the agreement, the negotiations were renewed to some extent with Gerrit.

48 Even if there was a misunderstanding about the likelihood of the Gravel Agreement being renewed, it does not change the nature of the agreement. The RM still owned the stockpile. While it was obviously imprudent for the RM to not pursue inking a deal with Ter Keurs more aggressively, equity demands that it be given a reasonable time to remove its stockpiled gravel. The RM suggests that it be given five years to remove its gravel, based on the historical use of 20,000 cubic yards per year. I find that to tether Ter Keurs to the RM, allowing it access for five years is unreasonable; it would be equivalent to half the term of another lease and the current standard gravel agreements provide for storage fees which is not provided for in the Gravel Agreement. The RM cannot expect to be able to store its stockpile for that length of time, without adequate and fair compensation, especially in light of the fact it processed, with reason, significantly more than it had historically.

49 Just what would be a reasonable period of time is difficult to assess. Although I find a term of five years is wholly inappropriate, I find I have insufficient evidence before me to decide what is just and equitable in the circumstances. It may be that the RM will need to pay to have the stockpile hauled away to another location. It would be preferable for the parties to reach a settlement on this issue but if they are unable to do so, I give them leave to file additional affidavit evidence addressing this.

Conclusion

50 In summary, I order:

1. There shall be a declaration that the RM is the owner of the processed gravel currently stockpiled on the Land;

2. Ter Keurs is required to give the RM reasonable time to remove its stockpiles for processed gravel on the Land;

3. The issues of what constitutes reasonable time for the RM to remove its gravel stockpiles for the Land and any damages that result from its failure to do so are left to be determined by an application brought before me, with further affidavit evidence on the issues and in any manner as the parties may agree;

4. The RM has the right to enter upon the Land, with 48 hours' notice to Ter Keurs, for the purpose of removing all or part of its gravel stockpiles without further compensation to Ter Keurs until further court order or written agreement between the parties; and

5. As the RM has been successful on its application, it is entitled to its costs. I find that Ter Keurs' position was completely without merit and unnecessary. It has resulted in detriment to the RM because it has been unable to access and use its stockpile that it compensated Ter Keurs for. The RM is entitled to costs assessed under the Tariff of Costs, Column 2 of tariff items 29, 30, 31 and 32.

Motion granted in part.

