Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Whissell Contracting Ltd. v. Calgary (City) | | (S.C.C., Aug 21, 2018)

2018 ABCA 204
Alberta Court of Appeal

Whissell Contracting Ltd. v. Calgary (City)

2018 CarswellAlta 1032, 2018 ABCA 204, [2018] A.W.L.D. 2302, 20 C.P.C. (8th) 43, 292 A.C.W.S. (3d) 548, 71 Alta. L.R. (6th) 28, 78 C.L.R. (4th) 217

Whissell Contracting Ltd. (Appellant / Plaintiff) and The City of Calgary, SNC Lavalin Constructors (Pacific) Inc., SNC Lavalin Constructors (Western) Inc., Graham Infrastructure, a JV, SNC Lavalin Constructors (Western) Inc. and Graham Infrastructure a JV, carrying on business under the firm name and style of SNC Lavalin Graham Joint Venture and otherwise known as SLG and the Said SNC Lavalin Graham Joint Venture and the said SLG (Respondents / Defendants)

Brian O'Ferrall, Thomas W. Wakeling, Frederica Schutz JJ.A.

Heard: April 9, 2018
Judgment: May 25, 2018
Docket: Calgary Appeal 1701-0325-AC

Proceedings: affirming *Whissell Contracting Ltd v. Calgary (City)* (2017), 2017 ABQB 644, 2017 CarswellAlta 2047, A.D. Macleod J. (Alta. Q.B.)

Counsel: W.D. Goodfellow, Q.C., T. Brookes, for Appellant
P.D. Banks, L.F. Mangano, for Respondents, SNC Lavalin Constructors (Pacific) Inc., SNC Lavalin Constructors (Western) Inc. and Graham Infrastructure, A JV, SNC Lavalin Constructors (Western) Inc. and Graham Infrastructure

Subject: Contracts
Related Abridgment Classifications
Construction law
II Contracts
II.4 Payment of contractors and subcontractors
II.4.d Unit price contract
Headnote
Construction law --- Contracts — Payment of contractors and subcontractors — Unit price contract
Payment of contractors and subcontractors — Unit price contract — Subcontractor provided labour, materials, services, tools and equipment for light rail transit construction project — Subcontract provided for payment on unit rate basis — Subcontractor claimed original unit rates became inapplicable and that contractor agreed to reprice work on force account basis — Subcontractor alleged invoices were paid on that basis until contractor realized project was over budget — Subcontractor commenced action for payment of remaining amounts owed on force account basis — Subcontractor was not successful in bringing motion for summary judgment — Subcontractor appealed — Appeal dismissed — Chambers judge could not have granted summary judgment on record before him — Absence of incontrovertible factual foundation made it impossible for chambers judge to conclude that strength of subcontractor's case exceeded that of contractor's by margin that law required to justify resolution of dispute without trial or at all.
Table of Authorities
Cases considered by *Brian O'Ferrall, Thomas W. Wakeling JJ.A.*:

Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc. (2014), 2014 ABCA 280, 2014 CarswellAlta 1662, 584 A.R. 68, 623 W.A.C. 68 (Alta. C.A.) — considered
Adickes v. S. H. Kress & Co. (1970), 26 L.Ed.2d 142, 90 S.Ct. 1598, 398 U.S. 144 (U.S. Sup. Ct.) — considered
Agar v. Hyde (2000), 74 A.L.J.R. 1219, 173 A.L.R. 665, 201 C.L.R. 552, [2000] H.C.A. 41 (Australia H.C.) — considered
Beier v. Proper Cat Construction Ltd. (2013), 2013 ABQB 351, 2013 CarswellAlta 1141, 35 R.P.R. (5th) 105, 564 A.R. 357 (Alta. Q.B.) — considered
Berscheid v. Federated Co-operatives et al (2018), 2018 MBCA 27, 2018 CarswellMan 86 (Man. C.A.) — considered
Can v. Calgary Police Service (2014), 2014 ABCA 322, 2014 CarswellAlta 1836, 315 C.C.C. (3d) 337, [2015] 2 W.W.R. 695, (sub nom. *Can v. Calgary Chief of Police*) 584 A.R. 147, (sub nom. *Can v. Calgary Chief of Police*) 623 W.A.C. 147, 3 Alta. L.R. (6th) 49 (Alta. C.A.) — considered
Canada (Attorney General) v. Lameman (2008), 2008 SCC 14, 2008 CarswellAlta 398, 2008 CarswellAlta 399, 86 Alta. L.R. (4th) 1, [2008] 5 W.W.R. 195, (sub nom. *Lameman v. Canada (Attorney General)*) 372 N.R. 239, 68 R.P.R. (4th) 59, 292 D.L.R. (4th) 49, [2008] 2 C.N.L.R. 295, (sub nom. *Lameman v. Canada (Attorney General)*) 429 A.R. 26, (sub nom. *Lameman v. Canada (Attorney General)*) 421 W.A.C. 26, [2008] 1 S.C.R. 372 (S.C.C.) — considered
Charles v. Young (2014), 2014 ABCA 200, 2014 CarswellAlta 957, 97 E.T.R. (3d) 1, 577 A.R. 54, 613 W.A.C. 54 (Alta. C.A.) — considered
Composite Technologies Inc. v. Shawcor Ltd. (2017), 2017 ABCA 160, 2017 CarswellAlta 871, 100 C.P.C. (7th) 52, 51 Alta. L.R. (6th) 91, [2017] 8 W.W.R. 427 (Alta. C.A.) — considered
Condominium Corp. No. 0321365 v. Cuthbert (2016), 2016 ABCA 46, 2016 CarswellAlta 222, 612 A.R. 284, 662 W.A.C. 284, 33 Alta. L.R. (6th) 209 (Alta. C.A.) — considered
Esses v. Friedberg & Co. (2008), 2008 ONCA 646, 2008 CarswellOnt 5526, 241 O.A.C. 134 (Ont. C.A.) — considered
Ghost Riders Farm Inc. v. Boyd Distributors Inc. (2016), 2016 ABCA 331, 2016 CarswellAlta 2044 (Alta. C.A.) — considered
Mulholland v. Rensonnet (2018), 2018 ABCA 24, 2018 CarswellAlta 93 (Alta. C.A.) — considered
Murphy Oil Co. v. Predator Corp. (2006), 2006 ABCA 69, 2006 CarswellAlta 233, 55 Alta. L.R. (4th) 1, [2006] 5 W.W.R. 385, 384 A.R. 251, 367 W.A.C. 251 (Alta. C.A.) — considered
O'Hanlon Paving Ltd. v. Serengetti Developments Ltd. (2013), 2013 ABQB 428, 2013 CarswellAlta 1426, 18 B.L.R. (5th) 73, 91 Alta. L.R. (5th) 1, 567 A.R. 140 (Alta. Q.B.) — considered
P. (W.) v. Alberta (2014), 2014 ABCA 404, 2014 CarswellAlta 2152, 378 D.L.R. (4th) 629, 62 C.P.C. (7th) 111, [2015] 5 W.W.R. 430, 588 A.R. 110, 626 W.A.C. 110, 7 Alta. L.R. (6th) 319 (Alta. C.A.) — considered
Rich v. CGU Insurance Ltd. (2005), 79 A.L.J.R. 856, 214 A.L.R. 370, [2005] H.C.A. 16 (Australia H.C.) — considered
Rotzang v. CIBC World Markets Inc. (2018), 2018 ABCA 153, 2018 CarswellAlta 765, 35 E.T.R. (4th) 173 (Alta. C.A.) — considered
Shaw v. Deputy Commission of Taxation (2016), [2016] QCA 275 (Queensland S.C.) — considered
Stoney Tribal Council v. Canadian Pacific Railway (2017), 2017 ABCA 432, 2017 CarswellAlta 2729, 87 R.P.R. (5th) 251, 66 Alta. L.R. (6th) 33, [2018] 5 W.W.R. 32, 15 C.P.C. (8th) 232 (Alta. C.A.) — considered
Swain v. Hillman (1999), [2001] 1 All E.R. 91, [1999] EWCA Civ 3053, [2001] C.P. Rep. 16, [2000] P.I.Q.R. 51, [1999] C.P.L.R. 779 (Eng. & Wales C.A. (Civil)) — considered
776826 Alberta Ltd. v. Ostrowercha (2015), 2015 ABCA 49, 2015 CarswellAlta 155, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 593 A.R. 391, (sub nom. *Ostrowercha v. 776826 Alberta Ltd.*) 637 W.A.C. 391 (Alta. C.A.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
R. 7.3 — referred to

APPEAL by subcontractor from decision reported at *Whissell Contracting Ltd v. Calgary (City)* (2017), 2017 ABQB 644, 2017 CarswellAlta 2047 (Alta. Q.B.), which dismissed motion for summary judgment.

***Brian O'Ferrall, Thomas W. Wakeling JJ.A.*:**

1 Modern civil procedure codes have a summary judgment protocol. [1] They are designed to remove from the litigation stream proceedings the outcomes of which are obvious — they feature either unmeritorious claims or defences [2] — and warrant allocation of minimal public and private resources.

2 Summary judgment may be appropriate "if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low". [3] This is an onerous standard and rightly so. A grant of summary judgment ends a dispute without affording the litigants full access to the civil procedure spectrum. [4]

3 While summary judgment is a superb protocol [5] for disputes if there is marked disparity in the strengths of the parties' cases, it is not the appropriate methodology for resolving disputes that do not display this feature. This may occur because the material facts are the subject of controversy. [6] An incontrovertible factual foundation is an essential aspect of a controversy ripe for summary adjudication. [7]

4 This is such a case.

5 Justice Macleod dismissed Whissell Contracting Ltd.'s application for summary judgment because the record left unresolved several important facts: [8]

> In my view, the record is insufficient for the Court to determine the contractual basis on which Whissell is entitled to payment from SNC.
>
> There is a written subcontract which sets out the basis of payment as unit prices. There is an "entire agreement" clause. Furthermore, given the scope and complexity of this project it is understandable that the parties would want the terms of the agreement to be in writing and readily ascertainable. SNC has raised evidence that, if accepted, would defeat Whissell's claim that SNC agreed that unit prices no longer applied.
>
> Whissell relies upon the Force Account sheets as an effective amendment to the subcontract. But there is a problem with that argument based on the record as it stands. The wording of the Force Account sheets was never the subject of discussions with SNC and, in particular, with anyone who was a party to negotiating the original subcontract. Can they be effective under the circumstances? SNC takes the position that there could be no reasonable expectation on the part of Whissell that the field personnel employed on behalf of SNC had authority to bind SNC to a contractual amendment because they were not given apparent or ostensible authority to do so. The evidence contains a number of assertions on the part of SNC to Whissell that the claim process ought to be based upon the unit price contract. There is an issue, in my view, as to whether or not Whissell had any reasonable expectation that the notations attached to the Force Account sheets would operate under these circumstances to amend the written contract.

6 Justice Macleod came to this conclusion after reviewing an extensive record and hearing two days of argument. [9] He gave written reasons that demonstrated his appreciation of the arguments advanced by both sides.

7 The chambers judge did not make the errors the appellant attributes to him.

8 There are fundamental unresolved factual controversies.

9 The appellant asserts that it encountered unanticipated site problems not contemplated when it signed the unit-price contract in July 2010. The respondent challenges this, claiming that the appellant had site access since January 2010.

10 The appellant alleges that the parties amended the July 2010 contract. Not so says the respondent. The respondent states that it generated the subtrade change orders on which the appellant relies after the appellant completed its work and for administration purposes only. It points out that the appellant never saw some of them.

11 The appellant maintains that senior officers of the respondent acknowledged its indebtedness to the appellant in the amounts claimed. Again, the respondent contests this claim. It maintains that it objected to the appellant's billing practices from the outset.

12 Having carefully considered the excellent written and oral submissions of counsel, we have concluded that Justice Macleod could not have granted summary judgment on the record before him. The absence of an incontrovertible factual foundation made it impossible for the chambers judge to conclude that the strength of the appellant's case exceeded that of the respondent's by the margin that the law requires to justify a resolution of this dispute without a trial or at all.

13 Given that this action must continue, neither side would welcome a detailed recitation of the strengths and weaknesses of its case. In any event, both Mr. Goodfellow, Q.C., counsel for the appellant, and Mr. Banks and Ms. Mangano, counsel for the respondents, have already persuasively recorded the limitations of the opposition's position in their briefs and oral arguments.

14 The appeal is dismissed.

Frederica Schutz J.A. **(concurring in the result)::**

15 I have had the benefit of reading the majority opinion. I agree with the outcome; it is correct.

16 I find myself unable to endorse, however, the dicta concerning the correct test for summary judgment, or the standard of proof required to be established for the moving party to succeed on an application for summary judgment. In particular, I decline to endorse paragraphs 2 and 3 (and related footnotes).

17 In my view, the proper test will have to be set when it is necessary to resolve the issue.

Appeal dismissed.

Footnotes

1 The summary judgment rules for the Canadian jurisdictions, England and Wales, Australia, New Zealand, Hong Kong and the United States are identified in *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432 (Alta. C.A.), nn. 68-73. See *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 7.3.

2 *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) , ¶10; [2008] 1 S.C.R. 372 (S.C.C.), 378 ("The summary judgment rule... prevents claims or defences that have no chance of success from proceeding to trial"); *Stoney Tribal Council v. Canadian Pacific Railway*, 2017 ABCA 432 (Alta. C.A.), ¶25 per Wakeling J.A. ("Of key importance is the existence of a disparity in the strength of the positions of the moving and nonmoving parties so marked that it is appropriate to resolve the dispute without resort to the full spectrum of the civil procedure process"); *Swain v. Hillman* (1999), [2001] 1 All E.R. 91 (Eng. & Wales C.A. (Civil)), 94 (C.A. 1999)("If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know that as soon as possible"); *Rich v. CGU Insurance Ltd.*, [2005] H.C.A. 16 (Australia H.C.), ¶18; (2005), 214 A.L.R. 370 (Australia H.C.), 375 per Gleason, C.J., McHugh & Gummow J.J. ("issues raised in proceedings are to be determined in a summary way only in the clearest of cases"); *Agar v. Hyde*, [2000] H.C.A. 41 (Australia H.C.), ¶57; (2000), 201 C.L.R. 552 (Australia H.C.), 576 per Gaudron, McHugh, Gummow & Hayne, JJ. ("The test... [is] a high degree of certainty about the ultimate outcome of the proceeding"); A. Zuckerman, Zuckerman on Civil Procedure: Principles of Practice 378 (3d ed. 2013)("English law has evolved a summary judgment procedure for enabling litigants with a clear and unanswerable case to obtain judgment without having to negotiate the normal procedural hurdles") & 1 W. Stevenson & J. Côté, Alberta Civil Procedure Handbook 2018, at 7.13 ("cases with no chance of success should be weeded out early").

3 *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.) , ¶2; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 61. See also; *Rotzang v. CIBC World Markets Inc.*, 2018 ABCA 153 (Alta. C.A.), ¶15 (the court adopted the test set out in *Composite Technologies Inc* .); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Alta. C.A.), ¶¶11 & 12 ("A party's position is without merit if the facts and the law make the moving party's position unassailable"); *776826 Alberta Ltd. v. Ostrowercha*, 2015 ABCA 49 (Alta. C.A.), ¶13; (2015), 593 A.R. 391 (Alta. C.A.) , 395 ("The question is whether.. the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily"); *P. (W.) v. Alberta*, 2014 ABCA 404 (Alta. C.A.), ¶26; (2014), 378 D.L.R. (4th) 629 (Alta. C.A.), 642 ("The question is whether... the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily"); *Access Mortgage Corp. (2004) Ltd. v. Arres Capital Inc.*, 2014 ABCA 280 (Alta. C.A.) , ¶¶45 & 46; (2014), 584 A.R. 68 (Alta. C.A.), 78 ("A party's position is without merit if the facts and the law make the moving party's position unassailable.... A party's position is unassailable if it is so compelling that the likelihood of success is very high"); *Can v. Calgary Police Service*, 2014 ABCA 322 (Alta. C.A.), ¶104; (2014), 315 C.C.C. (3d) 337 (Alta. C.A.), 388 per Wakeling J.A. ("summary judgment is appropriate if the moving party's position is so compelling that the likelihood of success is very high") & *O'Hanlon Paving Ltd. v. Serengetti Developments Ltd.*, 2013 ABQB 428 (Alta. Q.B.), ¶33; (2013), 18 B.L.R. (5th) 73 (Alta. Q.B.), 88 ("A litigant whose claim or defence is so weak that its chance of succeeding is very low cannot reasonably expect the state to make available all parts of a publicly funded judicial process").

4 *Shaw v. Deputy Commission of Taxation*, [2016] QCA 275 (Queensland S.C.) , ¶32 per Gotterson, J.A. ("great care must be exercised to ensure that under the guise of achieving expeditious finality, a party is not deprived of an opportunity for the trial of their case") & *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (U.S. Sup. Ct. 1970), 176 (1970) per Black J. ("The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trial in civil cases").

5 *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶71; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 134 ("summary judgment is an important procedure which could be invoked more often than it is. Its *proper* use expedites litigation, reduces costs for the litigants, frees up scarce judicial resources and ameliorates access to justice issues") (emphasis added).

6 E.g, *Mulholland v. Rensonnet*, 2018 ABCA 24 (Alta. C.A.) (the Court upheld a chambers judge's order dismissing a summary judgment application because the "three parties [were] all saying something different"); *Ghost Riders Farm Inc. v. Boyd Distributors Inc.*, 2016 ABCA 331 (Alta. C.A.), ¶23("Summary judgment is not appropriate when *vive voce* evidence is needed, where the judge is required to weigh evidence or make findings of credibility") & *Condominium Corp. No. 0321365 v. Cuthbert*, 2016 ABCA 46 (Alta. C.A.), ¶28; (2016), 612 A.R. 284 (Alta. C.A.), 289 ("Summary judgment is not possible if opposing parties' affidavits and evidence conflict on *material* facts because a chambers judge cannot weigh evidence or credibility on a summary judgment application") (emphasis in original). An adjudicator hearing a summary judgment application may conclude that the existence of a material fact is incontrovertible despite the fact that a party files an affidavit alleging the contrary. Documentary evidence may be conclusive. E.g., *Composite Technologies Inc. v. Shawcor Ltd.*, 2017 ABCA 160 (Alta. C.A.), ¶¶42 & 116; (2017), 100 C.P.C. (7th) 52 (Alta. C.A.), 72-73 & 95-96.

7 *Charles v. Young*, 2014 ABCA 200 (Alta. C.A.), ¶4; (2014), 577 A.R. 54 (Alta. C.A.) , 56 ("it was an error for the chambers judge to determine this matter simply on the basis of conflicting affidavits and documents that would support either party's position"); *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.), ¶24; (2006), 384 A.R. 251 (Alta. C.A.), 257 ("When a chambers... judge must necessarily assess the quality and weight of evidence to come to a decision, the failure of the case is not beyond doubt"); *Beier v. Proper Cat Construction Ltd.*, 2013 ABQB 351 (Alta. Q.B.), ¶68; (2013), 35 R.P.R. (5th) 105 (Alta. Q.B.), 132 ("the motions court may not make findings of credibility and resolve contested fact issues"); *Berscheid v. Federated Co-operatives et al*, 2018 MBCA 27 (Man. C.A.), ¶15 ("Despite Berscheid's claims with regard to the straightforward nature of this matter, the volume of materials attest to its complexity. To Berscheid, his lengthy affidavits speak for themselves. They do not") & *Esses v. Friedberg & Co.*, 2008 ONCA 646 (Ont. C.A.), ¶43; (2008), 241 O.A.C. 134 (Ont. C.A.), 142-43 ("Once having determined that... an issue [about any material fact] exists, it is not for the motion judge to resolve that issue, for that is the task of the trier of fact at trial").

8 2017 ABQB 644 (Alta. Q.B.), ¶¶28-30.

9 Id. ¶4. We relaxed the oral presentation time limits and allowed counsel the time they needed to lead us through the extensive record and highlight the parts that advanced their cases.

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