Date: 1998 07 17
Docket: CV 07199

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

IGLOO SPECIALTIES LTD.

Plaintiff

- and -

ROYAL OAK MINES INC.

Defendant

Application for summary judgment and alternative relief.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories on June 26, 1998

Reasons filed: July 17, 1998

Counsel for the Plaintiff: Steven Cooper

Counsel for the Defendant: Charles Thompson

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

IGLOO SPECIALTIES LTD.

Plaintiff

- and -

ROYAL OAK MINES INC.

Defendant

REASONS FOR JUDGMENT

[1] This is an application by the Plaintiff for summary judgment and other alternative relief.

[2] The dispute between the parties arises out of a commercial relationship. Over a number of years, the Plaintiff and the Defendant had an arrangement whereby the Plaintiff supplied to the Defendant at its mine sites in the Northwest Territories gas products and cylinders for the transportation and storage of same. In the normal course, the cylinders were returned to the Plaintiff after use and the Plaintiff accounted for the cylinders to its own supplier.

[3] The Statement of Claim, filed July 16, 1997, claims amounts owing for the sale of the gas products and for cylinders which were not returned, as well as pre-judgment interest. I was advised by counsel that the claim for sale of products has been resolved. Counsel also agree that the claim for pre-judgment interest is a matter which will have to go to trial.

[4] The claim for cylinders not returned has two aspects to it: a claim for the replacement value of cylinders that have not been returned at all and a claim for a demurrage (rental) fee for the period of time that each cylinder was in the possession of the Defendant.

[5] The Statement of Defence admits that the Defendant agreed to pay a demurrage fee for the period of time that each gas cylinder was in its possession. Other than the standard statement that the allegations in the Statement of Claim are denied, the Statement of Defence says the following, in paragraphs 6 and 7:

> 6. The Defendant states that it has paid all amounts owing for demurrage for the cylinders. In the alternative, the Defendant states that the amount claimed by the Plaintiff for demurrage is excessive.
>
> 7. The Defendant denies that it owes any amount for cylinders which have not been returned to the Plaintiff. The Defendant states that it has returned all cylinders supplied by the Plaintiff, or will be returning such cylinders.

The Plaintiff claims that the amount now owing, inclusive of the disputed interest, exceeds $400,000.00.

[6] As I understand the issues, they come down to how many cylinders were shipped by the Plaintiff to the Defendant, how long they were in the Defendant's possession and therefore subject to demurrage charges and how many cylinders were not returned to the Plaintiff, for which the Plaintiff is now out the amount it must pay its own suppliers. Although the Defendant's affidavit material states that a written agreement which was apparently in place governing the parties' arrangement for some period of time did not include any provision that the Defendant would pay for any cylinders not returned, there is no suggestion that the Defendant was of the understanding that it was not necessary to return the cylinders or that it would not have to pay for those not returned.

[7] With respect to applications for summary judgment, the relevant Rules of Court provide as follows:

> 174. (1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.
>
> . . .
>
> 176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere

allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(3) Where the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

[8] The essential question on an application for summary judgment is whether there is a genuine issue for trial. The principles that are applicable are those adopted by Vertes J. in 923087 N.W.T. Ltd. v. Anderson Mills Ltd., [1997] N.W.T.R. 212 (S.C.):

> The principles to be applied on motions for summary judgment were succinctly summarized, with respect to the Ontario Rules, by Kiteley J. in *Steer v Merklinger* (1996), 25 O.R. (3d) 812 (Ont. Gen. Div.), appeal dismissed at (1996), 30 O.R. (3d) 417 (Ont. C.A.). They are equally applicable to motions under our Part XII. Her summary was as follows (at page 821):
>
> > The objective of the rule is to screen out claims that, based on the evidence provided, ought not, in the court's view, proceed to trial because they cannot withstand a "good hard look".
> >
> > The moving party has the burden of establishing that there is no genuine issue for trial. The responding party also bears an evidentiary burden to put evidence before the court showing the existence of issues requiring a trial ...
> >
> > The court must look at the overall credibility of the respondent's pleading and determine whether it has a "ring of truth" about it that justifies consideration by a trier of fact.
> >
> > Where there are significant facts in dispute, the case should likely be sent to trial. However, this does not follow as a matter of course. If the evidence satisfies the court that there is no issue of fact that requires a trial for its resolution, the ... test has been satisfied. It must, however, be clear that a trial is unnecessary ...
> >
> > The same principle applies to issues of credibility. In taking a hard look at the merits of the case, the court must decide if "any conflict [in credibility] is more apparent than real, i.e. whether there is really an issue of credibility that must be resolved in order to adjudicate on the merits" ...

[9] Affidavits were filed on behalf of both parties. Neither party has cross-examined on the affidavits of the other.

[10] The Plaintiff's vice-president, Ms. Stewart, deposes in her affidavits that there has been a careful survey made of the records of the Plaintiff, which show 622 cylinders still in the possession of the Defendant. The amounts claimed for those 622 cylinders are for demurrage and for loss of use because they have not been returned.

[11] Ms. Stewart says that the Defendant's records are not reliable as they do not exist for some periods of time and for others they are approximations based on physical counts of cylinders in the Defendant's possession. There appears to be some merit to this observation when one looks at the Defendant's documents filed with one of the affidavits. Ms. Stewart refers to continuing problems encountered with non-payment by the Defendant of its ongoing account. She also states that the Defendant was in arrears over several years of the relationship but that cylinders were constantly being forwarded to the Defendant and returned to the Plaintiff and it was impossible to determine how many were lost or would never be returned until the relationship ended.

[12] The Plaintiff's general manager, Mr. Therrien, deposes in his affidavit that throughout the time the parties had this arrangement, there was never any significant dispute as to amounts owing until the Plaintiff commenced this action. Mr. Therrien deposes that the Plaintiff's records are, in his experience, reliable as to the number of cylinders delivered to the Defendant and their location.

[13] Both Ms. Stewart and Mr. Therrien depose to having had many difficulties dealing with the accounting personnel of the Defendant and say that confusion was often encountered.

[14] Mr. Therrien deposes that there was an occasion when an adjustment was made as a "goodwill gesture" to the Defendant as a major customer, apparently after a count of cylinders had been done at the Defendant's Giant Yellowknife Mine. An adjustment of 100 cylinders was made in the Defendant's favour. Mr. Therrien deposes that subsequent to that the cylinders were located at the Defendant's Colomac Mine and therefore the Plaintiff's original pre-adjustment count was confirmed as correct.

[15] Mr. Dunphy, the Plaintiff's purchasing manager, tells in his affidavit of an incident similar to that related by Mr. Therrien. He says that the number of cylinders was 84 and the adjustment made was $25,500.00.

[16] There is no clear statement in the affidavits that Mr. Therrien and Mr. Dunphy are speaking of the same incident but I infer that they are because Mr. Therrien prefaces his description of it by saying that "in one instance" the cylinder count was adjusted. While the incident does indicate some confusion on the part of the Defendant about the number of cylinders in its possession and where they were located, it also reflects an inconsistency as between Mr. Therrien and Mr. Dunphy as to the number of cylinders involved.

[17] In response to the Plaintiff's evidence, the Defendant's affidavits include one sworn by its purchasing superintendent, Archie Stewart. He acknowledges that there have been problems and confusion on the Defendant's part with respect to the Plaintiff's account, but says that the Plaintiff's records have also been a problem and that there were numerous times when the Plaintiff sent the Defendant invoices that had already been paid. He refers to some specific instances in the documents provided by the Plaintiffs where discrepancies appear in the records of cylinders delivered to the Defendant. In one instance he refers to an internal memorandum by an employee of the Plaintiff from which it appears that the number of cylinders in the possession of the Defendant according to the Plaintiff's records exceeded the number of cylinders for which the Plaintiff was being billed by its supplier.

[18] Archie Stewart states that the Defendant owes nothing for cylinders and that according to the Defendant's records in the end may have returned more cylinders than were actually supplied by the Plaintiff. He admits that some demurrage is owing but says that the problem lies in calculating it because the records are not clear as to the length of time for which the cylinders were in the Defendant's possession.

[19] The affidavit of Mr. Henry, the Defendant's manager of administration, states that the Plaintiff has not provided any documents which set out a record of payments made by the Defendant nor any periodic statements of account. That in itself does not raise a triable issue in my view, but he goes on to say that he has reviewed the documents provided by the Plaintiff and that they are confusing and contradictory and do not substantiate the number of cylinders the Plaintiff claims the Defendant failed to return. The Plaintiff's documents, he says, consist almost entirely of cylinder record

cards, on which a running balance of cylinders supplied to, returned by and in the possession of the Defendant is kept. Those records do not, he says, appear to correspond to individual invoices and return slips for cylinders supplied and returned. The latter records, supplied by the Plaintiff, indicate, according to Mr. Henry, that the number of cylinders the Defendant has not returned is several hundred less than what the Plaintiff now claims. In addition, although he admits that the Defendant's records are not complete, the records it does have reveal different figures from those of the Plaintiff.

[20] It is obvious that record-keeping is a major issue in this case, no doubt in part because of the constant flow of cylinders from the Plaintiff to the Defendant and back again over a period of several years. At least some of the problems seem to have arisen because of failure on the part of the Defendant to keep records when it transferred cylinders between its Yellowknife and Colomac mines and to notify the Plaintiff of such transfers. However, at this stage of the proceedings, I am not assessing who is responsible for the problems; I am simply considering whether there is a triable issue.

[21] The Plaintiff argues that it has reason to believe its records are correct and they should be accepted and that the Defendant is simply trying to delay this matter. The Plaintiff offers as evidence of this certain incidents referred to in its affidavit material.

[22] One incident is described in Ms. Stewart's affidavit. She says that shortly after the Statement of Claim was filed, the Defendant offered a payment of $90,809.00 and the return of some cylinders in exchange for an extension of time to file a Statement of Defence. I agree that the figure of $90,809.00 seems an odd figure to be merely an attempt at settlement of the claim, as indicated in the Defendant's affidavit material. But it is not clear to me what that figure was based upon. Ms. Stewart's affidavit seems to refer to that figure as the amount outstanding which was acknowledged by the Defendant to be owing, but as representing "the majority of our claim for product". However counsel indicated to me at the beginning of the application that the claim for product has been resolved. So it is not clear how any agreement by the Defendant, whatever its intentions may have been in offering the sum in question, affects the remainder of the claim.

[23] There is also reference in the affidavits to meetings held between the parties at which the amounts alleged to be owing were discussed. The parties differ as to

whether the Defendant agreed to pay the amount claimed by the Plaintiff or to pay only if satisfied that the Plaintiff's documentation of that amount was accurate.

[24] The affidavits also refer to a telephone call which the Defendant's Archie Stewart is said to have made to the Plaintiff's supplier in an attempt to get a good deal on the purchase of cylinders which the Defendant would then return to the Plaintiff to replace those which had been lost. Mr. Stewart admits having a conversation with the supplier but denies trying to purchase cylinders and says he was only investigating whether the amount the Plaintiff wanted for cylinders not returned was reasonable.

[25] Counsel for the Plaintiff argues that I should assess these incidents, and indeed the entire case, and determine any credibility issues from the affidavit material. Generally speaking, a court should not make findings of credibility on the basis of affidavits. However counsel for the Plaintiff suggests that it was up to the Defendant to cross-examine on the Plaintiff's affidavits if it wanted to contest the Plaintiff's version of events.

[26] I am not aware of any rule that the only way to raise an issue about what is stated in an affidavit is to cross-examine on it. Cross-examination may not resolve issues of credibility in any event since the trier of fact may still be left with two contradictory stories and be unable to assess credibility except by hearing the witnesses. On the other hand, there may be cases where cross-examination is determinative, for example if admissions are made by the person being cross-examined.

[27] In this case, the Defendant has put forward, by way of affidavit evidence, different versions of the incidents relied upon by the Plaintiff. Contradiction by other evidence is a valid way of showing that there is an issue, whether of credibility or on the facts. This is reflected in the comments of Master Funduk in *Montreal Trust Co. of Canada v. Sagars Investments Inc. et al.* (1995), 167 A.R. 290 at 294, where he was dealing with an application for summary judgment in an action on a guarantee:

> The amount owing is a question of fact so there must be evidence to show a triable issue as to amount. It is not enough for a defendant to just plead that there is no debt "as alleged or at all and put the plaintiff to the strict proof thereof" and say that that discloses a triable issue. The plaintiff's evidence must be impeached or contradicted. The first is done by a cross-examination (there was none) and the second is done by contrary evidence (there is none). ...
>
> *[words in parentheses form part of the quote]*

[28] It should also be noted that Rule 176(1), quoted above, requires only "affidavit material or other evidence" in response to a summary judgment application. It does not require cross-examination on the applicant's affidavit material.

[29] While it is arguable, for example, that the witness who swore the affidavit on behalf of the Plaintiff's supplier about the telephone call is more likely to be unbiased because he is not an employee of either of the parties, that is only one consideration when it comes to credibility.

[30] I do not find the failure to cross-examine determinative in this case. Either party could have cross-examined to obtain admissions or other evidence from the other party.

[31] Counsel for the Plaintiff relied to a great extent on the case of *Barrowman v. Ranchland Asphalt Services Ltd.* (1981), 21 C.P.C. 12 (Alta. Q.B.). In that case, the plaintiff sued on a promissory note. The statement of defence simply denied the plaintiff's allegations but did not expressly deny that the defendant made the note. The plaintiff applied for summary judgment and was cross-examined by the defendant. In that cross-examination, the plaintiff was unable to say that he had seen the defendant sign the note. No other defences were put to the plaintiff and on the summary judgment application the defendant argued that the statement of defence raised the triable issue of whether the note was signed by the defendant.

[32] Summary judgment was granted in that case. Master Funduk held that the failure to raise the allegation in the statement of defence that the note was not made by the defendant relieved the plaintiff from having to prove the making of the note in an application for summary judgment. He held further that failure to cross-examine the plaintiff on any other defence led to the conclusion that there were no other triable issues.

[33] In *Barrowman*, there was no affidavit by the defendant denying the making of the note. My review of the case indicates that the Alberta Rule (then Rule 124) requiring that in an action on a promissory note the statement of defence raise some issue of fact such as the making of the note, and the fact that there was no evidence that the defendant had not made the note, were determinative of the granting of summary judgment. Master Funduk specifically drew an adverse inference against the defendant

for failure to bring forward evidence that he had not made the note (at p. 24 of the case).

[34] In my view, *Barrowman* is clearly distinguishable from the case at bar. In this case, the Defendant has put evidence before the court. That evidence is that neither its own records, such as they are, nor the Plaintiff's own records substantiate the Plaintiff's claim. That contradicts the Plaintiff's evidence that its records are accurate. A genuine triable issue as to what, if anything, is owing to the Plaintiff has therefore been raised. It is true that the trial itself may not involve more than an accounting but that is the very issue. It is not for me on this application to review the extensive documentation and decide whether the Plaintiff's records are accurate or whether they substantiate a lesser amount than what is claimed or whether the Defendant's documents contradict the Plaintiff's. That is what the parties will have to address at trial.

[35] The Defendant does not say merely that there may be inaccuracies in the documents. The Defendant says that the Plaintiff's documents, which it has reviewed, are themselves inconsistent and further are inconsistent with the Defendant's documents. This is quite different from the case of *Blackville Lumber Inc. v. Henderson Lumber Co. Ltd.* (1992), 11 C.P.C. (3d) 252 (N.B.Q.B.) (not cited by counsel). In that case, the defendant filed affidavit evidence saying that it did not know what the claim was about, that it did not possess any documents relating to the claim and that it was putting the plaintiff to the strict proof of the claim. The defendant had not requested to see any of the documents which the plaintiff had presented in support of its claim. The application for summary judgment was granted.

[36] Counsel for the Plaintiff also argued that the Statement of Defence does not adequately plead what the Defendant now raises as the issues. In that regard, he relied on what Master Funduk said in *Barrowman* about the failure in that case to plead in the statement of defence that the defendant had not made the promissory note. In my view, however, what is set out in paragraphs 6 and 7 of the Statement of Defence, quoted above, is adequate and may be read to include the claim that the defendant owes less demurrage than what is claimed by the Plaintiff and has returned all cylinders in its possession or would do so. The affidavit material makes it clear that cylinders continued to be returned after this action was commenced and until fairly recently.

[37] The only matter that is not pleaded in the Statement of Defence and which the Defendant now relies upon is a set-off for the value of gas left in cylinders which have been returned.

[38] However, in deciding that there is a triable issue, I have not taken into account the issue of the gas. It is not necessary that I find a triable issue on each point raised by the Defendant, only that there is at least one triable issue: *Fernwood Construction of Canada Ltd. v. Century 21 Birch Realty Ltd. and Brown* (1982), 48 A.R. 147 (Alta. Q.B.).

[39] This is not a case where it would make sense to order judgment with an accounting. The Defendant disputes whether any amount is owed for cylinders not returned. It agrees that some amount is owed for demurrage but there is no way of knowing what that is without knowing how long the cylinders were in the possession of the Defendant. I cannot determine, from the affidavit material filed by either the Plaintiff or the Defendant, minimum times during which the Defendant had the cylinders or minimum amounts owing.

[40] Accordingly, the application for summary judgment is dismissed.

[41] The Plaintiff argued that if summary judgment was not granted, a Mareva injunction should issue. In submissions, counsel for the Plaintiff indicated that he would be content with an injunction that would prevent the Defendant from transferring or disposing of (but not encumbering) any of its assets located in the Northwest Territories of a value in excess of $5000.00.

[42] In support of its application, the Defendant has filed very detailed affidavits of two independent analysts who refer to evidence and their opinions that the Defendant is in very poor financial shape and is concentrating its financial resources on an expensive and difficult copper mine project in British Columbia. The concern expressed is that the Defendant will close its remaining operating mine in the Northwest Territories and sell the assets and put the proceeds into the British Columbia project or will transfer the assets to that project. A number of difficulties faced by the Defendant at the British Columbia project and elsewhere are highlighted in the material, including various lawsuits filed against the Defendant by its suppliers. The Plaintiff is concerned that by the time it obtains any judgment against the Defendant, there will be

no assets in the Northwest Territories against which it will be able to execute that judgment.

[43] In response, the Defendant has filed the affidavit of its chief operating officer. He acknowledges that the Defendant has experienced financial difficulties as a result of the British Columbia project but says that financing is being arranged and that the project is expected to be in operation for many years. He says the Defendant has no present intention of selling or closing its mine in the Northwest Territories and does not anticipate sale for the foreseeable future. The mine is pledged as security to the Defendant's creditors.

[44] What has become known as the Mareva injunction was described by the Supreme Court of Canada as an "extraordinary intervention" in its decision in *Aetna Financial Services Limited v. Feigelman et al.*, [1985] 1 S.C.R. 2. The general rule is that a plaintiff must first obtain his judgment like other creditors of the defendant, and then proceed to enforce it. As was said in *Barclay-Johnson v. Yuill*, [1980] 3 All E.R. 190:

> The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to a claimant to paralyse the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.

[45] The Mareva injunction was developed as an exception or sub-rule to this general rule as a result of certain maritime cases in which the defendants, often charterers of ships, were beyond the court's jurisdiction or nowhere to be found, but had assets inside the jurisdiction which the shipowners sought to restrain as security for the hire of the ship.

[46] In *Aetna*, Estey J. said that there is:

> ... a profound unfairness in a rule which sees one's assets tied up indefinitely pending trial of an action which may not succeed, and even if it does succeed, which may result in an award of far less than the caged assets. The harshness of such an exception to the general rule is even less acceptable where the defendant is a resident within the jurisdiction of the court and the assets in question are not being disposed

> of or moved out of the country or put beyond the reach of the courts of the country. ...

[47] This is not a case where the assets which the Plaintiff seeks to restrain by injunction are assets which are the subject matter of the action and it is sought to preserve them as was the case in *McLellan v. Parent*, [1992] N.W.T.R. 226 (S.C.).

[48] There is no suggestion in this case that the Defendant may remove assets to outside Canada, only that it may remove assets from the Northwest Territories to other provinces within Canada, more particularly to British Columbia. In such circumstances, Estey J., speaking for the Court in *Aetna*, said that a Mareva injunction should not be granted because a plaintiff who has a judgment can pursue assets in most provinces in Canada through reciprocal enforcement legislation. The Northwest Territories does have arrangements for reciprocal enforcement of judgments in British Columbia: see the *Reciprocating Jurisdictions Designation Order*, R.R.N.W.T. 1990, c. R - 1.

[49] The affidavit material does indicate that the Defendant has financial problems and that there is cause for concern about its financial future. It does not, however, provide a basis upon which to find that the Defendant has shown an intention to default on its obligations or to defraud its creditors by a transfer of its assets beyond the reach of the creditors or the courts of this country, considerations referred to in the *Aetna* case.

[50] Financial difficulty alone is not a sufficient basis for ordering a Mareva injunction: *Marine Atlantic Inc. v. Blyth et al.* (1993), 113 D.L.R. (4th) 501 (Fed. C.A.).

[51] Unfortunately, the Plaintiff in this case is in a position where it has to "get in line" with other creditors to whom money is also owing or alleged to be owing.

[52] Because the concern is really the financial situation of the Defendant and because of the availability of reciprocal enforcement legislation, I am not convinced that this is a proper case for the granting of a Mareva injunction and accordingly that aspect of the Plaintiff's application is dismissed.

[53] A further alternative put forward by the Plaintiff was that I consider imposing conditions on this litigation similar to those imposed in *Mr. Submarine Ltd. v. Aristotelis Holdings Ltd.* (1993), 102 D.L.R. (4th) 764 (Alta. C.A.). That was an appeal from a summary judgment. The Court of Appeal referred to "some very strong evidence pointing to the correctness" of the decision granting summary judgment and called the defendant's case "doubtful and worrisome". It gave the defendant leave to defend the action on various strict terms.

[54] I cannot characterize the Defendant's case as it was presented to me on this application as "doubtful and worrisome". On the other hand, it is likely not the strongest of cases when one considers that it is missing many records. Clearly the Defendant owes something for demurrage; it admits that. I have, however, no way of assessing what that may amount to on the material before me.

[55] At the same time, there is no reason to think that the documents in the possession of either party are going to get any better or that any further documents will be located. The issues do not appear to be complicated and there is no reason why this action should not proceed promptly.

[56] For some reason, however, the Defendant had not filed a Statement as to Documents as at the date this application was heard, which was almost a year after the action was commenced. Counsel for the Defendant also acknowledged that all the Defendant's documents relevant to this matter had not been disclosed to the Plaintiff or its counsel, despite the fact that some of the correspondence filed indicates that a full exchange of documents was being sought and discussed. This does suggest that the Defendant is not responding to this action as quickly as it might.

[57] In all the circumstances, pursuant to Rule 179, I am prepared to impose some terms as to the timing of steps to be taken in this action. Both counsel asked to have input into any deadlines I might impose and I will give them the opportunity to do so. Counsel may either arrange to speak to the matter in Chambers or they may file written submissions. They are to contact the clerk within 30 days to arrange a date or they may file the submissions within 30 days. In either case, the 30 days will run from the date these Reasons for Judgment are filed.

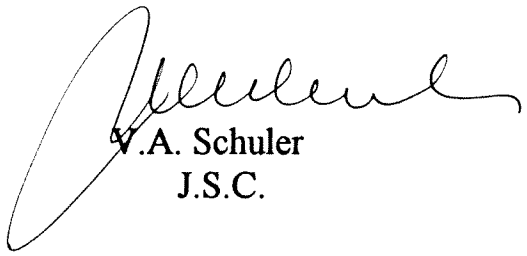
[58] The Defendant submitted that if the applications for summary judgment and an injunction were dismissed, it should be granted solicitor client costs. Counsel relies in part on Rule 180, which provides as follows:

> 180. (1) Subject to subrule (2), where the applicant obtains no relief on an application for summary judgment, the Court may fix the respondant's costs on the application to pay the costs forthwith.
>
> (2) The Court may decline to fix and order costs under subrule (1) where it is satisfied that the making of an application, although unsuccessful, was nevertheless reasonable.

[59] The Rule is clearly discretionary. Although the application for summary judgment was unsuccessful, it was a reasonable one in that the Defendant does admit that it owes some monies to the Plaintiff. I see no justification for costs on a solicitor client basis.

[60] The Plaintiff has obtained some relief in terms of my ruling that I will place time constraints on the proceedings. As the Defendant was successful on the main aspects of this application, it will have its costs in any event of the cause on a party party basis but reduced by one quarter of the total of those costs.

[61] In summary, therefore, the application for summary judgment is dismissed, as is the application for a Mareva injunction. I will hear counsel on time constraints to be placed on the proceedings as set out above. Costs will also be as set out above.



V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 17th day of July, 1998

Counsel for the Plaintiff: Steven Cooper

Counsel for the Defendant: Charles Thompson

CV 07346

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