

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**7573 YUKON LTD. dba MOBILE MAINTENANCE
SERVICES and MOBILE MAINTENANCE SERVICES**

Plaintiff

- and -

**JEVCO INSURANCE COMPANY and
INTACT INSURANCE**

Defendants

Transcript of the Decision delivered by The Honourable
Justice A.M. Mahar, sitting in Yellowknife, in the
Northwest Territories, on the 12th day of July, 2018.

APPEARANCES:

Mr. M. Armstrong: Counsel for the Plaintiff
(By telephone)
Mr. J. Vamplew: Counsel for the Defendant
(By telephone)

1 THE COURT: Good afternoon, gentlemen.

2 MR. ARMSTRONG: Good afternoon, Your Honour.

3 THE COURT: So I will not be adjourning
4 this again. I have come to a decision. I have
5 not formally written it out. It is in multiple
6 pieces on the desk as I am speaking to you, so I
7 will be ordering a transcript of my comments
8 today. Hopefully, I will just be able to edit
9 that. If it looks like more is required, I will
10 be filing written reasons, but I will be giving a
11 decision today.

12 MR. ARMSTRONG: Okay.

13 THE COURT: This is a special chambers
14 application brought by Mobile Maintenance and
15 Mobile Maintenance Services, 7573 Yukon Ltd.,
16 essentially seeking that the Defendant answer
17 outstanding requests for information, as well as
18 the release of a number of documents on which
19 privilege has been claimed.

20 I have reviewed all of the documents, and I
21 will comment on them shortly. First, I think I
22 have to go through an analysis of the general
23 issue with respect to prejudice because that
24 informed the decision that I made with respect to
25 the documents.

26 I am going to be referring, at various
27 times, to both of your memoranda to the Court,

1 and I thank you for your very complete materials
2 because it made my job a lot easier.

3 The issues boil down to whether or not the
4 Defendant's refusal to answer certain questions
5 and produce certain documents on the basis that
6 information is not relevant to any matter in
7 issue in this action, is valid, and as well
8 whether the Defendant's claims of privilege over
9 certain documents are valid.

10 This action flows from a construction
11 project, at the Inuvik schools, that was
12 undertaken by Dowland Contracting Ltd. Dowland
13 Contracting Ltd. had a bond issued by the Jevco
14 Insurance Company to an amount of 20 million
15 dollars specifically dealing with the work that
16 was to be performed by the Plaintiff. There were
17 numerous other contracts, other bonds involved in
18 that project; and as well, Dowland was involved
19 in significant projects across the North for
20 which Jevco was also acting as essentially an
21 underwriter.

22 Dowland subcontracted certain structural
23 steel, open web steel joists, and decking work to
24 MMS in March of 2008 for a subcontract price of
25 approximately five million dollars. Thereafter,
26 that subcontract price was increased to over five
27 million dollars. Out of that sum, MMS claims

1 that it is owed a principal amount of
2 approximately a million dollars plus an
3 additional million dollars for extra labour and
4 materials as requested by Dowland.

5 Dowland went into receivership in May of
6 2013 and went into a voluntary assignment of
7 bankruptcy in June of 2014. The claims against
8 Dowland remain unpaid on behalf of MMS.

9 The bond named Dowland as principal and the
10 Government of the NWT Department of Public Works
11 and Services as obligee. MMS was a claimant.

12 MMS gave notice of the claim under the bond
13 to the surety in March of 2013 and commenced this
14 action against the surety on March 21st, 2013.

15 The surety takes the position that all work
16 had been completed a fair amount of time prior to
17 the beginning of the action. They take the
18 position that the forfeiture clause, in the
19 contract, which required that notice be given to
20 the insurance company or the bond holder, the
21 surety, no later than 120 days after work had
22 ceased has not been met.

23 The Plaintiffs do not agree with this
24 assessment or this characterization of the
25 relationship between Dowland and MMS, and that
26 forms part of the basis for the action.

27 The other basis for the action has to do

1 with the forfeiture itself and the validity of
2 that forfeiture. There is a requirement, in the
3 case law that, in order for such forfeitures to
4 be set aside, they be without prejudice to the
5 surety. In this case, to Jevco. That is really
6 the nub of this action; whether or not there was
7 prejudice to Jevco because of the timing of the
8 claim by MMS.

9 MMS takes the position that the surety,
10 Jevco's claim that it is prejudiced because it
11 would have intercepted and asked the GNWT to pay
12 the surety rather than to pay Dowland, is that
13 the money from the GNWT account was something
14 that was already essentially spoken for and it
15 could not simply intercept it and pay itself. It
16 still had to respect the contractual chain, and
17 all of the money would have eventually have had
18 to be paid out to the contractors anyway. It is
19 not clear that intercepting the money would have
20 saved the sureties from having to pay out the
21 bond; and not being able to recover, they wanted
22 to know what was not claimed and what was or was
23 not paid out. Any kind of analysis that was done
24 by the surety of the profitability of the Dowland
25 contracts, if it was a losing project, then every
26 cent coming from the GNWT would have to flow down
27 the chain past Dowland to its subcontractors and

1 not to the surety; so the question is what is the
2 prejudice to the surety if the claim is late or
3 not.

4 What the Plaintiff is arguing is that the
5 entire process of the winding down of Dowland's
6 obligations is something that has to be looked
7 at, because Jevco is claiming that they were, in
8 fact, prejudiced.

9 The Plaintiff is arguing that prejudice
10 cannot be proven, and they wish to dig into all
11 of those other contracts and everything else that
12 was going on during the winding down of the
13 company to assert an actual lack of prejudice.

14 The position of the Defendant is that this
15 presumption that the Plaintiff could or could not
16 show that certain steps would have been taken to
17 divert funds is not what the law is: that
18 basically all they have to show is that they have
19 been deprived of an opportunity to investigate.

20 This is substantial disagreement about what
21 the law is with respect to prejudice. This
22 disagreement, in my view, informed the
23 disagreement between the parties with respect to
24 whether or not certain questions could be
25 answered and documents released.

26 I am referring now to the prehearing brief
27 and book of authorities of the Respondents. In

1 paragraph 50, there are a number of subheadings
2 laying out Jevco's more specific responses to the
3 Plaintiff's claim: (as read)

4 A, that information about the
5 performance bond between the
6 Defendants, Dowland and the Crown, is
7 refused on the basis that the claim
8 of the Plaintiffs in no way impacted
9 the obligations of the Defendants to
10 the Crown under the performance bond
11 and is, therefore, not relevant.
12 That B, the information about all of
13 their labour and material payment
14 bond claims in respect of the school
15 and other projects is in no way
16 impacted by the obligations of the
17 Defendants to other valid claimants
18 in the sense that the claim to the --
19 of the Plaintiffs and is, therefore,
20 not relevant.

21 And C, that all communications with
22 the indemnitors would not have an
23 impact in showing whether the
24 Defendants were prejudiced.
25 Information about the underwriting
26 process relating to Dowland,
27 additional potential indemnities
arising from the indemnity agreement
produced and explanations as to why
the additional indemnity agreements
were not signed was refused on the
basis that the indemnity agreement
was the only indemnity agreement
which relates to the insurance of the
bond and additional details as to the
underwriting process and why the
Defendants did not enter into other
additional indemnities is not
relevant to the issue of whether
prejudice was suffered by the
Defendants due to the late notice of
the Plaintiffs.

And finally, E, that information as
to whether ongoing financial
reporting from Dowland's affiliates
and principals does not relate to the
issue of whether prejudice was
suffered by the Defendants as a
result of late notice of the
Plaintiffs under the bond.

1 The arguments put forward by Jevco may well
2 be compelling arguments at trial, but I take the
3 position that the refusal to supply what would
4 otherwise be relevant disclosure is premature.

5 The Applicants, the Plaintiff, make what is,
6 on its face, a valid argument. That argument, as
7 I have said, may not be successful at trial, but
8 they do have the right to fully flesh out that
9 argument and to have all of the information when
10 they do so. It is on this basis that I am going
11 to look at the various requests.

12 In other words, with respect to the two
13 issues that have been laid out, the issue of
14 whether or not the Defendant's refusal to answer
15 certain questions and produce certain documents
16 because the information is not valid. I do find
17 that the Plaintiff's requests were in fact bona
18 fide and that the refusal is not valid.

19 The refusal was not malicious. It was an
20 understandable response. But my view of the file
21 is that those issues, the issue of whether or not
22 Jevco was able to take any available steps during
23 the period of time of the winding down of the
24 company and the company's responsibilities to the
25 various contracts, is an argument that can be
26 made with respect to prejudice and because
27 prejudice is such a critical component of the

1 analysis that the Court will have to go through
2 in deciding what is eventually likely to be the
3 ultimate issue.

4 If it is found that MMS did, in fact, fall
5 afoul of the forfeiture clause with respect to
6 the 120 days, then the issue of prejudice is
7 going to be an extremely important issue. It is
8 only fair that MMS have a chance to make that
9 argument fully.

10 Looking at the documents that I have
11 reviewed with respect to privilege, I will go
12 through the list that I have been provided. I
13 will be ordering a transcript, but I will go very
14 slowly because you are going to need to make
15 reference to this in terms of what the next steps
16 are. I am not exactly sure when the transcript
17 is going to be ready.

18 With respect to document number 1, this is a
19 general status description of Dowland
20 Construction [sic] Ltd.'s obligations. There is
21 no indication it was sent to the Plaintiff, nor
22 is there any reason to assume it would have been.
23 It references multiple contractors, and I do not
24 believe that settlement privilege is made out, so
25 that document should go to MMS.

26 Documents number 2, 3, 4, 5, and 6, fall
27 under either the legal advice privilege or the

1 settlement privilege, and they should not be
2 disclosed.

3 Document number 7 is neither legal advice
4 nor directly related to settlement. It does not
5 look like it is seeking any kind of legal advice,
6 and the privilege is not made out.

7 With respect to document number 8, the
8 table, it is essentially just information with
9 respect to all of the outstanding obligations of
10 Dowland and ties in directly with the position of
11 the Plaintiff with respect to the steps that
12 Dowland -- or the steps that Jevco could have
13 taken with respect to prejudice and mitigation of
14 damages. It is, therefore, disclosable.

15 Number 9, this is not a document produced by
16 counsel, nor in anticipation of litigation.

17 Number 10, I agree with the characterization
18 by the Plaintiff. It does appear to be simply a
19 summary of facts rather than anything seeking or
20 providing legal advice.

21 Likewise, with number 11, I agree with the
22 position taken by the Plaintiff; this is not a
23 document whose primary purpose was litigation.

24 Twelve, no privilege attaches to this
25 document either.

26 Number 13, likewise, it simply was not
27 prepared for the dominant purpose of this

1 litigation.

2 With respect to document 14, this document
3 should not be disclosed. I understand the
4 Plaintiff's position that other counsel, with
5 respect to the file, were parties to this
6 communication, but they were not parties to the
7 entire communication; there is a back and forth
8 in the email stream that has nothing to do with
9 the other lawyers that were not involved. It was
10 strictly about the seeking and obtaining of legal
11 advice and is, therefore, privileged.

12 Likewise, legal advice privilege attaches to
13 document number 15.

14 Number 16, I agree that this is between
15 Dowland, GNWT, and not strictly between solicitor
16 and client. It is not subject to
17 solicitor-client privilege.

18 With respect to documents 19, 20, and 21,
19 again, I agree with the Plaintiff's position on
20 this. No solicitors were involved, and the
21 dominant purpose was not to assist with the
22 litigation.

23 With respect to document 22, no advice was
24 sought, and it is not specific to this
25 litigation.

26 Document 26, litigation privilege is made
27 out.

1 Document 27 is the provision of legal advice
2 specifically dealing with this litigation.

3 Document 28, I agree with the position of
4 the Plaintiff in this. It is simply a factual
5 summary and relates to matters other than the
6 immediate litigation. And the dominant purpose
7 test is not made out; likewise with document 29.

8 Documents 30 and 31 fall under the legal
9 advice privilege rubric and they are, therefore,
10 not to be disclosed.

11 Document 32, it is not clear to me that
12 privilege was waived. The document is
13 specifically seeking legal advice, and I do not
14 believe it should be disclosed.

15 Document 33, it is more or less a status
16 document with respect to the litigation
17 generally. It is relevant because of the
18 position that I took earlier that the way in
19 which the contracts that Dowland had engaged in
20 and were wound down could at least arguably have
21 an impact on the issue of prejudice; so I do not
22 see any privilege actually attaching to it.
23 There is no legal counsel involved.

24 The same comments apply to document 35 and
25 document 37. They should both be released.

26 With respect to the rest of the documents,
27 document 38, 39, 40, 41, 42, 43, and 44,

1 litigation privilege applies to all of these
2 documents and they need not be disclosed.

3 With respect to the requests for answers, a
4 number of these requests will be -- I am
5 assuming, and perhaps you can correct me if I am
6 wrong about this, but a number of these will be
7 subsumed by the rulings with respect to
8 privilege -- with respect to the documents or
9 have otherwise already been answered in terms of
10 the answers that are provided in the summaries.
11 To the extent that refusal was given on the basis
12 of relevance, all of those questions should be
13 answered.

14 I was going to ask you, Mr. Vamplew, the
15 Plaintiff was suggesting two weeks in an order
16 for production. Given that we are right in the
17 middle of the summer season, how long would you
18 suggest is a reasonable amount of time for those
19 requests to be complied with?

20 MR. VAMPLEW: Your Honour, one of the
21 challenges I have is I'm -- I'm literally leaving
22 today for a three-week holiday with my family as
23 soon as I'm off the phone with you. I -- I do
24 have my team here, junior lawyers, and paralegals
25 that will be working on this in my absence, so
26 I -- my understanding is that we have the bulk of
27 the information, if not all of it, already in our

1 possession; so it's just a question of packaging
2 it together and putting it in the right format
3 for Mr. Armstrong. But, even with that said, I
4 think two weeks will be challenging because I do
5 believe that there is a fairly large volume of
6 material.

7 My -- if I may, my preference would be to
8 ask for 30 days. I think that's achievable, and
9 I'll be back in my office by that time in order
10 to sort of do a final review of what we intend to
11 provide to Mr. Armstrong in compliance with your
12 orders today.

13 THE COURT: Mr. Armstrong, any issue with
14 that?

15 MR. ARMSTRONG: I have no issue with that. I
16 don't -- I don't want to interrupt Mr. Vamplew's
17 holiday unnecessarily, so 30 days is -- is
18 certainly fine.

19 THE COURT: All right. Mr. Vamplew, why
20 don't we say Monday the 13th of August by the end
21 of the day?

22 MR. VAMPLEW: Sure, that's fine.

23 THE COURT: Was my ruling clear enough
24 with respect to the production of an order,
25 Mr. Armstrong? What other clarification do you
26 need?

27 MR. ARMSTRONG: Yes, I think I had one

1 question. I didn't quite hear Your Honour with
2 respect to document 32.

3 THE COURT: Let me go back to that.

4 MR. ARMSTRONG: I -- I thought you said it was
5 disclosable, but I -- I was a little uncertain.

6 THE COURT: I do not think I did, but just
7 give me a moment. No, it is not disclosable.
8 Document 32 --

9 MR. ARMSTRONG: Okay.

10 THE COURT: -- it was not clear to me the
11 privilege had been waived, and it was
12 specifically seeking legal advice with respect to
13 this --

14 MR. ARMSTRONG: Okay.

15 THE COURT: -- action, so.

16 MR. ARMSTRONG: All right. Thank you.

17 MR. VAMPLEW: Okay.

18 THE COURT: No problem.

19 MR. ARMSTRONG: And I presume -- the -- the
20 missing documents, in the sequence, are the ones
21 that were -- I hadn't -- I didn't compare it to
22 my list. Certain documents I -- my client
23 acknowledged are privileged, and --

24 THE COURT: I -- well --

25 MR. ARMSTRONG: -- we didn't make an issue
26 with that. I presume those are the ones that are
27 not part of your analysis like --

1 THE COURT: To the --
2 MR. ARMSTRONG: -- document 17 and 18, for
3 instance.
4 THE COURT: To the best of my ability,
5 yes.
6 MR. ARMSTRONG: Okay.
7 THE COURT: That was the --
8 MR. VAMPLEW: I --
9 THE COURT: That was my intention, in any
10 event.
11 MR. ARMSTRONG: Okay.
12 MR. VAMPLEW: I was -- I was tracking along,
13 Your Honour, with my supplemental submission, and
14 those are -- that's my understanding of what
15 you've just said. If I may, I -- I seem to have
16 not made a note of what your ruling was with
17 respect to documents 25 and 37.
18 THE COURT: Okay. Let me take -- let me
19 double-check that; 25 and 37. Document 25 is
20 disclosable, as is document 37.
21 MR. VAMPLEW: Thank you.
22 MR. ARMSTRONG: Okay. Thank you, Your Honour,
23 I am -- I'm -- I'm happy to prepare the order on
24 this --
25 THE COURT: All right.
26 MR. ARMSTRONG: -- and pass it by my friend
27 for his review.

1 THE COURT: On the issue of costs, I
2 certainly would not do anything going beyond
3 party-party costs. I think, Mr. Armstrong, you
4 were successful in the motion. Costs will be to
5 the Plaintiff on a party-party basis.

6 And, in terms of timing of that,
7 Mr. Vamplew, I will give you an opportunity to
8 respond to that. Mr. Armstrong is asking that
9 the costs flow basically from the first instance
10 back in 2016. What do you say about that?

11 MR. VAMPLEW: I -- I don't have any
12 submissions on cost, Your Honour, so that's fine.

13 THE COURT: All right. Well, just --
14 again, it is party-party basis. We will make it
15 from the -- from the date requested in your -- in
16 your materials, Mr. Armstrong.

17 MR. ARMSTRONG: And is that payable upon
18 taxation or assessment?

19 THE COURT: Sure.

20 MR. ARMSTRONG: Okay.

21 THE COURT: Yes, that sounds good.

22 MR. ARMSTRONG: Okay.

23 THE COURT: Well, thank you, gentlemen.

24 Anything else that you need at this point in
25 time?

26 MR. ARMSTRONG: I -- I think that covers it,
27 Your Honour. Thank you.

1 THE COURT: Thank you. I want to thank
2 you both.
3 MR. VAMPLEW: I agree. Thank you very much.
4 MR. ARMSTRONG: Okay.
5 THE COURT: Have a great summer, both of
6 you.
7 MR. ARMSTRONG: Thank you.
8 MR. VAMPLEW: Thank you.
9 THE COURT: Thank you.
10 MR. ARMSTRONG: You too.
11 THE COURT: Thanks.

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13 **CERTIFICATE OF TRANSCRIPT**

14

15 I, the undersigned, hereby certify that the
16 foregoing pages are a complete and accurate
17 transcript of the proceedings produced and
18 transcribed from audio recording to
19 the best of my skill and ability.
20 Dated at the City of Edmonton, Province of
21 Alberta, this 5th day of September, 2018.
22 Certified Pursuant to Rule 723
23 of the Rules of Court

Janet Belma

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Janet Belma, CSR(A), B.Ed.
Court Reporter

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