*7573 YUKON LTD. and JEVCO INS.* **S-1-CV-2013-000040**

*et al*, 2018 NWTSC 47

# 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.

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**APPEARANCES:**

Mr. M. Armstrong: (By telephone) Mr. J. Vamplew: (By telephone)

Counsel for the Plaintiff

Counsel for the Defendant

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,
28. and I thank you for your very complete materials
29. because it made my job a lot easier.
30. The issues boil down to whether or not the
31. Defendant's refusal to answer certain questions
32. and produce certain documents on the basis that
33. information is not relevant to any matter in
34. issue in this action, is valid, and as well
35. whether the Defendant's claims of privilege over
36. certain documents are valid.
37. This action flows from a construction
38. project, at the Inuvik schools, that was
39. undertaken by Dowland Contracting Ltd. Dowland
40. Contracting Ltd. had a bond issued by the Jevco
41. Insurance Company to an amount of 20 million
42. dollars specifically dealing with the work that
43. was to be performed by the Plaintiff. There were
44. numerous other contracts, other bonds involved in
45. that project; and as well, Dowland was involved
46. in significant projects across the North for
47. which Jevco was also acting as essentially an
48. underwriter.
49. Dowland subcontracted certain structural
50. steel, open web steel joists, and decking work to
51. MMS in March of 2008 for a subcontract price of
52. approximately five million dollars. Thereafter,
53. that subcontract price was increased to over five
54. million dollars. Out of that sum, MMS claims
55. that it is owed a principal amount of
56. approximately a million dollars plus an
57. additional million dollars for extra labour and
58. materials as requested by Dowland.
59. Dowland went into receivership in May of
60. 2013 and went into a voluntary assignment of
61. bankruptcy in June of 2014. The claims against
62. Dowland remain unpaid on behalf of MMS.
63. The bond named Dowland as principal and the
64. Government of the NWT Department of Public Works
65. and Services as obligee. MMS was a claimant.
66. MMS gave notice of the claim under the bond
67. to the surety in March of 2013 and commenced this
68. action against the surety on March 21st, 2013.
69. The surety takes the position that all work
70. had been completed a fair amount of time prior to
71. the beginning of the action. They take the
72. position that the forfeiture clause, in the
73. contract, which required that notice be given to
74. the insurance company or the bond holder, the
75. surety, no later than 120 days after work had
76. ceased has not been met.
77. The Plaintiffs do not agree with this
78. assessment or this characterization of the
79. relationship between Dowland and MMS, and that
80. forms part of the basis for the action.
81. 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
82. not to the surety; so the question is what is the
83. prejudice to the surety if the claim is late or
84. not.
85. What the Plaintiff is arguing is that the
86. entire process of the winding down of Dowland's
87. obligations is something that has to be looked
88. at, because Jevco is claiming that they were, in
89. fact, prejudiced.
90. The Plaintiff is arguing that prejudice
91. cannot be proven, and they wish to dig into all
92. of those other contracts and everything else that
93. was going on during the winding down of the
94. company to assert an actual lack of prejudice.
95. The position of the Defendant is that this
96. presumption that the Plaintiff could or could not
97. show that certain steps would have been taken to
98. divert funds is not what the law is: that
99. basically all they have to show is that they have
100. been deprived of an opportunity to investigate.
101. This is substantial disagreement about what
102. the law is with respect to prejudice. This
103. disagreement, in my view, informed the
104. disagreement between the parties with respect to
105. whether or not certain questions could be
106. answered and documents released.
107. I am referring now to the prehearing brief
108. and book of authorities of the Respondents. In
109. paragraph 50, there are a number of subheadings
110. laying out Jevco's more specific responses to the
111. Plaintiff's claim: (as read)
112. A, that information about the performance bond between the
113. Defendants, Dowland and the Crown, is refused on the basis that the claim
114. of the Plaintiffs in no way impacted the obligations of the Defendants to
115. the Crown under the performance bond and is, therefore, not relevant.
116. That B, the information about all of their labour and material payment
117. bond claims in respect of the school and other projects is in no way
118. impacted by the obligations of the Defendants to other valid claimants
119. in the sense that the claim to the -- of the Plaintiffs and is, therefore,
120. not relevant.

And C, that all communications with

1. the indemnitors would not have an impact in showing whether the
2. Defendants were prejudiced. Information about the underwriting
3. process relating to Dowland, additional potential indemnities
4. arising from the indemnity agreement produced and explanations as to why
5. the additional indemnity agreements were not signed was refused on the
6. basis that the indemnity agreement was the only indemnity agreement
7. which relates to the insurance of the bond and additional details as to the
8. underwriting process and why the Defendants did not enter into other
9. additional indemnities is not relevant to the issue of whether
10. prejudice was suffered by the Defendants due to the late notice of
11. the Plaintiffs.

And finally, E, that information as

1. to whether ongoing financial reporting from Dowland's affiliates
2. and principals does not relate to the issue of whether prejudice was
3. suffered by the Defendants as a result of late notice of the
4. Plaintiffs under the bond.
5. The arguments put forward by Jevco may well
6. be compelling arguments at trial, but I take the
7. position that the refusal to supply what would
8. otherwise be relevant disclosure is premature.
9. The Applicants, the Plaintiff, make what is,
10. on its face, a valid argument. That argument, as
11. I have said, may not be successful at trial, but
12. they do have the right to fully flesh out that
13. argument and to have all of the information when
14. they do so. It is on this basis that I am going
15. to look at the various requests.
16. In other words, with respect to the two
17. issues that have been laid out, the issue of
18. whether or not the Defendant's refusal to answer
19. certain questions and produce certain documents
20. because the information is not valid. I do find
21. that the Plaintiff's requests were in fact bona
22. fide and that the refusal is not valid.
23. The refusal was not malicious. It was an
24. understandable response. But my view of the file
25. is that those issues, the issue of whether or not
26. Jevco was able to take any available steps during
27. the period of time of the winding down of the
28. company and the company's responsibilities to the
29. various contracts, is an argument that can be
30. made with respect to prejudice and because
31. prejudice is such a critical component of the
32. analysis that the Court will have to go through
33. in deciding what is eventually likely to be the
34. ultimate issue.
35. If it is found that MMS did, in fact, fall
36. afoul of the forfeiture clause with respect to
37. the 120 days, then the issue of prejudice is
38. going to be an extremely important issue. It is
39. only fair that MMS have a chance to make that
40. argument fully.
41. Looking at the documents that I have
42. reviewed with respect to privilege, I will go
43. through the list that I have been provided. I
44. will be ordering a transcript, but I will go very
45. slowly because you are going to need to make
46. reference to this in terms of what the next steps
47. are. I am not exactly sure when the transcript
48. is going to be ready.
49. With respect to document number 1, this is a
50. general status description of Dowland
51. Construction [sic] Ltd.'s obligations. There is
52. no indication it was sent to the Plaintiff, nor
53. is there any reason to assume it would have been.
54. It references multiple contractors, and I do not
55. believe that settlement privilege is made out, so
56. that document should go to MMS.
57. Documents number 2, 3, 4, 5, and 6, fall
58. under either the legal advice privilege or the
59. settlement privilege, and they should not be
60. disclosed.
61. Document number 7 is neither legal advice
62. nor directly related to settlement. It does not
63. look like it is seeking any kind of legal advice,
64. and the privilege is not made out.
65. With respect to document number 8, the
66. table, it is essentially just information with
67. respect to all of the outstanding obligations of
68. Dowland and ties in directly with the position of
69. the Plaintiff with respect to the steps that
70. Dowland -- or the steps that Jevco could have
71. taken with respect to prejudice and mitigation of
72. damages. It is, therefore, disclosable.
73. Number 9, this is not a document produced by
74. counsel, nor in anticipation of litigation.
75. Number 10, I agree with the characterization
76. by the Plaintiff. It does appear to be simply a
77. summary of facts rather than anything seeking or
78. providing legal advice.
79. Likewise, with number 11, I agree with the
80. position taken by the Plaintiff; this is not a
81. document whose primary purpose was litigation.
82. Twelve, no privilege attaches to this
83. document either.
84. Number 13, likewise, it simply was not
85. prepared for the dominant purpose of this
86. litigation.
87. With respect to document 14, this document
88. should not be disclosed. I understand the
89. Plaintiff's position that other counsel, with
90. respect to the file, were parties to this
91. communication, but they were not parties to the
92. entire communication; there is a back and forth
93. in the email stream that has nothing to do with
94. the other lawyers that were not involved. It was
95. strictly about the seeking and obtaining of legal
96. advice and is, therefore, privileged.
97. Likewise, legal advice privilege attaches to
98. document number 15.
99. Number 16, I agree that this is between
100. Dowland, GNWT, and not strictly between solicitor
101. and client. It is not subject to
102. solicitor-client privilege.
103. With respect to documents 19, 20, and 21,
104. again, I agree with the Plaintiff's position on
105. this. No solicitors were involved, and the
106. dominant purpose was not to assist with the
107. litigation.
108. With respect to document 22, no advice was
109. sought, and it is not specific to this
110. litigation.
111. Document 26, litigation privilege is made
112. 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

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| --- | --- | --- |
| 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 |

1. that were -- I hadn't -- I didn't compare it to
2. my list. Certain documents I -- my client
3. acknowledged are privileged, and --
4. THE COURT: I -- well --
5. MR. ARMSTRONG: -- we didn't make an issue
6. with that. I presume those are the ones that are
7. 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. |

# 12 -----------------------------------------------------

13 **CERTIFICATE OF TRANSCRIPT**

14

1. I, the undersigned, hereby certify that the foregoing pages are a complete and accurate
2. transcript of the proceedings produced and transcribed from audio recording to
3. the best of my skill and ability.

Dated at the City of Edmonton, Province of

1. Alberta, this 5th day of September, 2018.

Certified Pursuant to Rule 723

1. of the Rules of Court

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

21 Court Reporter

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