

Court of King's Bench of Alberta

**Citation: Crown Capital Partner Funding LP v RBee Aggregate Consulting Ltd, 2023
ABKB 724**

Date: 20231218
Docket: 2201 02948
Registry: Calgary

Between:

Crown Capital Partner Funding LP, by its manager Crown Private Credit Partners Inc.

Applicant

- and -

RBee Aggregate Consulting Ltd.

Respondent

**Reasons for Decision
of the
Honourable Justice B.E. Romaine**

I. Introduction

[1] This is an application by FTI Consulting Canada Inc in its capacity as Receiver of RBee Aggregate Consulting Ltd. for an order:

- a) declaring that certain unpaid invoices are due, owing and payable by RMC Construction Materials Ltd.;
- b) directing RMC to pay the Receiver the amount of \$4,485,480.64 plus interest for services rendered prior to the date of the receivership order; and
- c) costs of the application

[2] RMC submits that it has a valid set-off claim.

II. Facts and Positions of the Parties

[3] RBee Aggregate Consulting Ltd and RMC were parties to an aggregate supply agreement dated May 7, 2018 whereby RBee supplied RMC with washed and crushed aggregate gravel between 2018 and 2021 (the “Service Period”) for concrete production on a certain project.

[4] During the Service Period, RBee issued and RMC paid approximately 35 invoices. However, on March 11, 2022, the date the Receiver was appointed, the accounts receivable of RBee included \$4,485,480.64 plus accrued interest due from RMC relating to three outstanding invoices for product supplied during September, October and December, 2021.

[5] On March 15, 2022, almost five months after the last supply of product and just after the Receiver had been appointed, RMC informed the Receiver that it had recently become aware that RBee had under-supplied product over the course of the supply agreement. RMC refused to pay the outstanding invoices and informed the Receiver that it intended to assert a set-off claim.

[6] The Receiver attempted to resolve the dispute. However, the Receiver submits that between March 15, 2022 and October 28, 2022, the date this application was filed, RMC failed to provide the Receiver with sufficient information to support its set-off claim. The Receiver notes that RMC’s dispute does not relate specifically to the unpaid invoices (though RMC has now alleged that amounts relating to the December 2021 unpaid invoice are not properly owed in accordance with the supply agreement). Rather, the set-off claim relates to RBee’s supply of product throughout the duration of the Service Period.

[7] The Receiver submits that, to support the set-off claim, RMC has attempted to reconstruct the historical supply of aggregate to the project through information that was not intended for such purpose, is unreliable for such purpose, or which relates to the use of aggregate after risk of loss had transferred to RMC and that this evidence should not be accepted by this Court to the detriment of creditors of RBee’s estate.

[8] After a request from the Receiver for documentation, RMC provided the Receiver with a “reconciliation” it prepared (the “2021 Product Reconciliation”) that relied on: (a) information relating to a survey performed by AFDE, the prime contractor on the project, on October 31, 2021 which had engaged RMC to supply concrete, which had been completed by AFDA for other purposes, and (b) data recorded by RMC’s computerized batching system that RMC claims calculates the amount of aggregate used in the production of concrete. After reviewing the supply agreement and the 2021 Product Reconciliation and the batch records, the Receiver was of the view that there was not sufficient evidence to support RMC’s set-off claim. As a result, the Receiver remains of the view that the outstanding amounts are properly owing by RMC to RBee.

[9] During the Service Period, RBee was the only supplier of aggregate to the project.

[10] RMC submits that it was alerted to the alleged overbilling when it discovered that RBee had invoiced RMC for more product than was anticipated under the supply agreement. According to RMC, RBee and RMC had agreed that approximately 1,383,000 tonnes of aggregate (the minimum product indicated in the supply agreement) would be sufficient to satisfy the concrete production requirements of the project but that 1,761,480 tonnes of aggregate were actually invoiced by RBee.

[11] There is no dispute that there have been delays, design changes, and cost overruns in relation to the project. The supply agreement only contemplated supply of aggregate through 2020, but RBee supplied aggregate through to the end of the 2021 season, and concrete

production (with corresponding aggregate supply) is ongoing and expected to continue until the end of 2023 that in total exceeds that amount.

[12] The term “minimum production” is found in Schedule “D”, Scope of Work to the supply agreement. The schedule refers to “Production Requirements”, then to “[t]otal aggregate production... equals 1,383,000 tonnes”, and then lists “Minimum Production” for the years 2018 to 2020.

[13] With respect to the allegation of under-supply, the Receiver notes, and the evidence establishes, that the stockpile where RBee delivered its product was not surveyed by RMC, and RMC did not undertake any formal steps to monitor amounts of aggregate other than a visual inspection. RMC submits that the evidence of an AFDE officer is “overwhelming evidence” that the stockpile area was flat. This, however, is not entirely accurate. Scott Marshall of AFDE testified on cross-examination on his affidavit evidence that:

- a) he was not sure that a pre-site assessment report had been prepared before aggregate had been delivered to the stockpile and he was not aware that anything other than a visual inspection of the site as flat was done;
- b) the clearing of the site was done by BC Hydro and a subcontractor, not AFDE. What was done was cutting the trees, digging out the roots and removing the topsoil until “you get to the gravel”;
- c) he could confirm that, prior to AFDE receiving the site, a visual inspection was done, that “no piles of trees [were] left on the site, the area was not undulating and all that”; and
- d) “it was our job to make sure that the area was turned over flat levelled...so that’s what we did... we made sure that BC Hydro turned that area over to us in a manner we thought was adequate ... to go to work, and then we turned the area over to RMC.”

[14] Mr. Marshall also confirmed that there were no security guards or fencing around the stockpiles.

[15] The stockpile is accessible to anyone on the project site, and Mr. Marshall indicated that aggregate could be used for other purposes on the project site.

[16] The 2021 AFDE survey on which RMC relies was not performed for billing purposes, but for the primary purposes of confirming that there was sufficient aggregate in the stockpile to produce the required concrete for upcoming scheduled construction.

[17] AFDE also used the AFDE surveys to submit advance billings to the project owner, BC Hydro, for anticipated units of concrete to be placed on the project based on the amount of aggregate in the stockpile, which would later be reconciled with the final units of concrete that were actually placed. For the purposes of the advance billing, AFDE converted the measurement of the aggregate in the stockpile from meters cubed to metric tonnes using a pre-determined density factor (agreed between AFDE and BC Hydro). AFDE was not concerned with the accuracy of the density factors utilized for the advanced billings because the advanced billings would later be reconciled with the final units of concrete that were placed.

[18] The AFDE surveys are completed annually and are for AFDE’s internal use only. It is not clear how RMC obtained the survey.

[19] The Receiver submits that, since there was no survey of the topography of the stockpile site prior to the survey, and the AFDE survey was not completed for a purpose relevant to this claim, the accuracy of the survey information is in question.

[20] The batch records on which RMC relies indicate only how much product it consumed in its production facilities to make concrete, and do not account for the movement of aggregate from the stockpile to the production facilities, nor any wastage or use of aggregate for other purposes at the site. The aggregate was not weighed when it was removed from the stockpile, and the movement was not documented. Crucially under the supply agreement, RMC was responsible for the product once it was delivered to the stockpile, including risk of loss.

[21] The Receiver submits that there are additional issues relating to the density factor used in the AFDE survey. In the reconciliation provided by RMC to the Receiver on April 12, 2022, RMC used density factors that it advises were provided by AFDE to calculate the volume of products measured in the survey. RMC now uses different density factors that increase the amount of its set-off claim. RMC submits that these densities are from commissioned laboratory testing, which, however, was not done for purposes of this dispute. The majority of the aggregate tested was not from the stockpile, but from another RMC site. The Receiver submits that the density of aggregate is dependant on where it is located.

[22] RMC's affiant, Nicholas Burak, stated that when RMC learned that a new entity involving Bernie Reed, the former principal of RBee, had purchased the equipment previously owned by RBee on the project site, RMC engaged the new entity, A-1, to provide the remaining aggregate that was necessary to meet RMC's obligations to AFDE. After some confusion, RMC informed the Receiver that the company that it has engaged to provide the remaining aggregate to the project is 2128222 Alberta Ltd., operating as Paragon Custom Crushing. Both 212 Alberta and A-1 are owned by Mr. Reed. The new supply agreement with Paragon has the same economic terms as the previous one. Mr. Reed did not respond to the Receiver's request to comment on RMC's evidence.

III. Key Terms of the Supply Agreement and Invoices

[23] Certain key terms of the supply agreement relating to the dispute, set out in greater detail in Appendix A, are summarized as follows:

- a) The aggregate was to be delivered to RMC at a location on the project work site stipulated in the supply agreement (the "stockpile"), at which point the risk of loss transferred to RMC;
- b) each provision of aggregate was to be invoiced separately, and RMC was required to pay each invoice no later than 60 days from the date of the invoice;
- c) RMC had the right to verify the volume of products delivered by RBee, and a certification was to emanate from RMC or it designate within 60 days of delivery. RBee's entitlement to payment was based on such verification rights and the other terms of the supply agreement;
- d) unpaid amounts accrued interest at 12% per annum;

- e) the supply agreement superseded all prior agreements between the parties and could only be modified by written agreement; and
- f) RBee was required to deliver to RMC a performance bond to guarantee its performance under the supply agreement.

[24] RMC did not exercise its verification rights during the term of the supply agreement. RMC submits that the parties had always intended to complete a final verification of product delivered to the project upon completion of the project, as it says had been done on other projects on which the parties had worked. However, RMC's Chief Financial Officer confirmed that RMC had not worked with RBee prior to entering into the supply agreement, although it later entered into an agreement that is not site-specific.

[25] RBee provided a performance bond that is supported by an indemnity agreement with the corporation and its principal, Mr. Reed. RMC has not made a claim under the performance bond.

[26] The September 2021 unpaid invoice relates only to supply of product. The October 2021 invoice relates to both supply of product and hauling charges. The December 2021 invoice relates only to hauling charges.

[27] Hauling charges are not dealt with in the supply agreement. While RMC does not dispute that RBee performed hauling services, it submits that it did not receive sufficient substantiation and verification of the hauling charged by the December 2021 invoices. However, it appears that RMC invoiced AFDE for hauling on the project during a time that corresponds at least in part to the unpaid invoices.

IV. Issues

- a) Are the outstanding amounts due and payable?
- b) Does RMC have a valid claim that may be set-off against the outstanding amounts? If so, is RMC's claim barred in whole or in part by the *Limitations Act*?

V. Analysis

A. Are the outstanding amounts due and payable?

[28] The Receiver submits that, based on the books and records of RBee and the course of conduct of the parties prior to the appointment of the Receiver, the unpaid invoices were properly issued and the outstanding amounts are due and payable. The September and October 2021 unpaid invoices clearly relate to work performed by RBee pursuant to the supply agreement. The December 2021 unpaid invoice relates to haulage charges, and there is evidence that RMC had previously paid RBee for haulage services.

[29] RMC submits that RBee's entitlement to payment is based on the quantity of aggregate product actually delivered to the stockpile. While that may be generally correct, the supply agreement does not require RBee to prove delivery: it requires only that each provision of product be invoiced separately, that payments of the invoices "will be subject to verification" of volume of products and that a certification "will emanate from RMC within 60 days of delivery." RBee's entitlement to payment is based on such verification, which is contractually RMC's responsibility.

[30] RMC admits that until the fall of 2021, it paid RBee's invoices without engaging in the third party verification process. Its failure to protect itself with respect to the amount of product delivered in accordance with the procedure set out by the parties in the supply agreement does not impose a requirement on RBee to prove delivery other than through the issuance of invoices.

[31] The supply agreement is clear: verification of supply is required to be done within 60 days of delivery of the product. RMC's rights of verification have long since expired, and there is no reason to imply any right of verification outside of the terms of the agreement.

[32] RMC refers to the verification right as an "option". It is not an option: it is the manner in which RMC could have verified that the amount of aggregate billed in an invoice was in fact delivered. The supply agreement contains the full agreement between the parties, and that there are no other terms, conditions, representation or understandings other than incorporated in the agreement.

[33] RMC's evidence of the "expectations" of the parties does not aid it, as it is contrary to the parole evidence rule. The supply agreement places the onus of proof that the invoices do not represent the amount of aggregate on RMC.

[34] Where there is a written contract, the court must first interpret the words of the contract delivered according to their ordinary and natural sense in the context of the contract as a whole in light of the factual matrix existing at the time on contract was entered into. If the meaning of the words is unambiguous, the agreement of the parties is determined solely from the interpretation of the contract. It is only if the words of the contract bear more than one reasonable interpretation that the court will consider extrinsic evidence to assist it in determining the intentions of the parties: *Paradigm Holdings Ltd. v. Ngan & Siu Investments Co. Ltd.*, 2008 BCCA at para 17. Otherwise, subsequent conduct or evidence of the behavior of parties after the execution of the contract is not part of the actual matrix: *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at paras 41-42.

[35] As noted in *Paradigm Holdings Ltd.* at para 20, a buyer's failure to verify a material provision of a contract that was its responsibility to verify did not entitle it to vary the purchase price stipulated by contract. The Supreme Court has held that a customer's failure to verify its statements of account with a bank within the prescribed period of a contractual verification clause is a complete defence to any claims against the bank: *Arrow Transfer Co v Royal Bank*, [1972] SCR 845.

[36] RMC submits that the *Paradigm* case does not stand for the interpretation submitted by the Receiver. Its arguments in this respect failed to establish that the interpretation of the supply agreement proposed by the Receiver is commercially unreasonable.

[37] While it is true that the contract between the bank and its customers that is the subject of the decision in *Arrow Transfer* also included an express provision that if the customer did not provide notice of errors within a certain time, the bank would be free from all claims in respect of the account. However, the decision in the case does not make express reference to the additional words of the banking contract. The Court found at para 13 that:

The verification agreement in question in the present case is not ambiguous. It is a contract under which the customer undertakes a duty to the bank to disclose within a limited period, among other things, debits wrongly made. In the present case, the appellant received the statements and relevant vouchers. Having failed to

perform his contractual duty, the agreement made the statements conclusive evidence against him.

[38] Laskin, J, in a concurring opinion to that of the majority, also did not raise the additional words of the banking contract. He did, however, comment that the verification clause “modifies the liabilities of the bank to its customer that would otherwise arise out of the fact of their relationship”: para 28.

[39] I am satisfied that the words in the verification clause in this case modify the normal relationship between a buyer and seller. The fact that the agreement provides that the risk of loss passes to RMC upon delivery of the aggregate supports this interpretation.

[40] RMC’s evidence of the amount of aggregate supplied suffers from several weakness, including that:

- a) it comes from batch records that only account for the amount of aggregate used by RMC in its production of concrete at a different place on the project site and does not account for movement of aggregate to the batch plants or aggregate that may have been used for other purposes. As provided in the supply agreement, risk of loss passed to RMC on delivery; and
- b) the 2021 AFDE survey was not intended to measure aggregate delivered by RBee to the stockpile site, and it used a theoretical density factor to estimate the amount of aggregate that would be available for concrete production at the project in the future.

[41] The second affidavit of Jon Burak filed by RMC was filed contrary to the litigation scheduling order, was essentially case-splitting and in so far as Mr. Burak purported to testify as to “industry practice”, was expert evidence by a witness not qualified as an expert.

[42] Since the Receiver has no requirement to prove delivery beyond evidence of the outstanding invoices, it has no obligation to compel and produce evidence from RBee’s previous employees, and no adverse inference arises from the fact that it chose not to examine Mr. Reed, who is now supplying RMC under a new contract and a new company. Mr. Reed was equally available to RMC as an affiant but did not give evidence. At any rate, the Receiver’s powers and duties are set out and limited by the receivership order, which was issued pursuant to section 243 of the BIA.

[43] RMC’s argument that RBee invoiced RMC for amounts in excess of the amounts anticipated under the supply agreement is a misinterpretation of the agreement. The “minimum production” volumes set out in the agreement are just that, minimum volumes. RMC’s officer acknowledged in questioning that the key expectation underlying the supply agreement was that “RBee would supply enough aggregate to enable RMC to meet its concrete production obligations on the project”. RMC does not dispute that at least 1,730,044 tonnes of aggregate have been supplied to the project, which is roughly 125% of RMC’s initial estimate of required aggregate production. RMC has continued to purchase aggregate from the former principal of RBee in the 2023 season.

[44] I find that the Receiver has established on a balance of probabilities that the invoices are due and payable in accordance with the supplier agreement and that the invoiced haulage

services were provided, Therefore, the outstanding amounts, plus interest as set out in the supply agreement, are due and payable.

B. Does RMC have a valid set-off claim? If so, is it barred in whole or in part by the *Limitations Act*?

[45] RMC submits that RBee overbilled it by 504, 336 tonnes and \$7,106,857.50 worth of aggregate over the life of the project. RMC says that it discovered this at the end of the 2021 aggregate crushing season. It relies for this claim on the submission that it became apparent to RMC after receiving the October 2021 invoice that RBee had invoiced RMC for more product than had been anticipated by the parties under the supply agreement. RMC also says through hearsay evidence that it discovered that RBee had been invoicing RMC for greater quantities of aggregate than actually delivered on another project. RMC says that it notified Mr. Reed in December 2021 by telephone that it would be performing a verification with respect to the quantities claimed by RBee before paying the September and October 2021 invoices and that it relies on its batch records and the AFDE's survey as evidence of an alleged over supply.

[46] In explanation of the delay in asserting its claim, RMC says that, despite the fact that it had concerns about an over-supply of aggregate after it received the October 2021 invoice, it knew that it "would need to continue its production of concrete into 2022 because the Project Concrete work was not yet complete", and it was "incredibly focused" on this before the wind-down of the 2021 construction season.

[47] Despite its alleged concerns, RMC did not verify the October, November, and December 2021 invoices in accordance with the supply agreement. It instead performed a calculation to support its set-off claim from the batch records and the AFDE survey. The amount claimed by RMC by way of set-off is not broken-down by monthly invoices.

[48] For the reasons set out previously in this decision, the evidence relied upon by RMC for its set-off claim is fraught with issues. RMC has not established on a balance of probabilities that RBee invoiced RMC for more aggregate than it delivered. RMC's submission that the minimum amount of aggregate to be supplied was actually a maximum is incorrect, as previously described. Whether or not RBee had improperly invoiced RMC on a different project is irrelevant. The set-off claim is dismissed.

[49] Given this decision, it is not necessary to consider whether some or any of the claim is barred by the *Limitations Act*.

[50] It is also unnecessary to consider whether the language to the supply agreement precluded a set-off defence.

VI. Conclusion

[51] The Receiver is entitled to a direction that the unpaid invoices are due and payable by RMC, and RMC is directed to pay the Receiver \$4,485,480.64 plus interest in accordance with the supply agreement. RMC's claim for set-off is dismissed.

[52] If the parties are unable to agree on costs, they may make written submissions.

Dated at the City of Calgary, Alberta this 18th day of December, 2023.

B.E. Romaine
J.C.K.B.A.

Appearances:

Kelly J. Bourassa and Jessica MacKinnon
FTI Consulting Canada Inc., in its capacity as court appointed Receiver of RBee
Aggregate Consulting Ltd. (the "Receiver")

Chris Zelyas and Robert Gilroy
for RMC Construction Materials Ltd.

Appendix A

The supply agreement contains the following relevant terms:

- a) the effective date of the agreement was May 7, 2018, and the term continued for a minimum of 3 years and until written notice was provided by RMC to RBee that the contractual obligations of the parties were fully preformed and discharged, unless earlier terminated in accordance with the agreement: paragraph 1.

- b) paragraph 5 provides that:

Each provision of Products shall be invoiced separately. Subject to the terms of this Agreement, [RMC] shall pay each invoice no later than sixty (60) form the date of the invoice at the address set forth in such invoice. The invoice date shall be no earlier than the date of provision to [RMC's] delivery point: (as specified in the applicable Purchase Order)

...

All payments from [RMC] to [RBee] will be subject to third-party verification (the Verifications") of volume of Products, and a certification will emanate from [RMC] or its designates within sixty (60) days of delivery. [RBee's] entitlement to payment will be based on such verification, and subject to the terms of this Agreement;

- c) the agreement sets out certain conditions to payment in para 6 that do not include the provision of proof of delivery of product;
- d) paragraph 9 of the agreement provides that, unless otherwise agreed upon by the parties in writing and in advance, all products provided will be provided to RMC in stockpiles in the area east of the batch plant, as depicted on the map on the operational area attached as Schedule "C", at which time risk of loss shall pass to RMC"; (emphasis added)
- e) paragraph 26 stipulates that the agreement supersedes and terminates all prior agreements between the parties, contains the full agreement between the parties, and that there are no other terms and conditions, representations or understandings regarding the subject matter other than those incorporated by the agreement.
- f) paragraph 27 provides that the agreement may not be extended, supplemented or modified in any way except by a document in writing signed by both parties; and
- g) paragraph 29 provides that a waiver or failure by either party to claim a breach of the agreement shall not be construed as a waiver of any other provision or the waiver of the same provision at a subsequent time beyond the original breach;

- h) Schedule “D” scope of work provides that RBee will supply aggregate as detailed in another schedule of the agreement and sets out certain target production requirements. Total aggregate production, excepting road crush is said to equal 1,383,000 tonnes. A “minimum production” number for the years 2018-2020 is set out, with maximum payment for each of these minimums.