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Citywide Lawn Care Ltd. v. **London** Condo Corp. No. 33

PLAINTIFF(S): **CITYWIDE LAWN CARE** LTD., DEFENDANT(S): **LONDON** CONDO CORP # 33

Ontario Superior Court of Justice

Searle D.J.

Heard: July 25, 2005
Judgment: July 29, 2005
Docket: London 1589/01

Counsel: No one for Plaintiff

Michael J. Lamb for Defendant

Subject: Contracts

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Incomplete performance — Substantial performance.

Contracts --- Performance or breach — Breach — Fundamental breach — What constitutes.

Contracts --- Discharge — Cancellation — Exercise of right of termination — Notice.

Cases considered by *Searle D.J.*:

> *Syncrude Canada Ltd. v. Hunter Engineering Co.* (1989), (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* [1989] 3 W.W.R. 385, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 57 D.L.R. (4th) 321, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 35 B.C.L.R. (2d) 145, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* 92 N.R. 1, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.)* [1989] 1 S.C.R. 426, 1989 CarswellBC 37, 1989 CarswellBC 703 (S.C.C.) — followed

***Searle D.J.*:**

1 This matter was partially tried in 2001 by a Deputy Judge who has since retired and after two false starts was tried July 25, 2005.

2 The plaintiff is a lawn care company which does work of that nature in the summer and snow work in the winter. It's principal is Leroy Ford who was its only witness. The defendant is a condominium corporation with several score units

of linked housing in the city of London in the county of Middlesex.

3 The parties entered into a contract on September 20, 2000 for the period October 01, 2000 to September 30, 2001. Either party was at liberty to terminate with "sixty days written notice." Citywide was to provide enumerated maintenance of the grounds spring to fall. During the winter it was to snowplow under agreed-upon conditions, salt and sand "on a call-out basis" and be paid a flat monthly fee of $1,817.00 for each month of the contract. In addition there would be a minimum of $60.00 per hour for each front-end loader and trucking unit supplied by Citywide if the condo manager determined snow was required to be re-located in addition to being plowed. Authorization of such additional work was to be done by the condominium manager by fax.

4 Reading the contract one would expect that Citywide would have responsibility for all snow work, subject only to authorization by the manager for the relocation work. That quickly turned out not to be the case. Citywide had only light equipment consisting of one or more pickup trucks fitted with plow blade and a relatively small tractor known as a Bobcat which could be fitted with a plow blade or a bucket. With the bucket it was a small front-end loader. Instead of Citywide subcontracting for heavier equipment the condominium president John McHale would step in and place such orders with a company called Fisher landscaping which had at least a large and powerful front-end loader and at least one tandem dump truck. The president had a relationship with Fisher.

5 The president of the condominium corporation gave to the president of Citywide on January 09, 2001 oral notice that it was terminating the contract. He then sent by registered mail to Citywide a letter dated January 09, posted January 24 and received on or about February 01. It reads:

> It is with regret that as of January 9th, 2001 London Condominium Corporation #33 will be terminating your service.
>
> The Board of Directors finds that you have not provided services in a manner that meets our requirements. There have been many attempts to inform you and your staff of the procedures to be used in the complex at 700 Osgoode Drive. The lack of adherence to these procedures has left us no other choice but to terminate your service.

6 Snow work seems to have gone uneventfully before January 05 although there were discussions involving Citywide, the condominium president and sometimes a board member named Salvatore Cannata about placement of snow and other details. Although the filed records leave it open to interpretation it appears that Citywide did snow relocation with its Bobcat on December 20, 22 and 31. Fisher attended for an unknown amount of snow relocation work December 28 and presumably billed the condominium directly, there being no such charge in Citywide's filed invoices. According to Leroy Ford Citywide attended the property fifteen times for fifteen snowfalls with its equipment and the president rode in one or another of those vehicles ten times while work was being done. This was the only contract of Citywide in which the customer rode in the vehicle.

7 Mr. Ford testified Citywide plowed on January 2 and 3 and returned on January 04 and did a "clean-up." The clean-up was not further described but on the overall evidence the court has some confidence it involved pushing snow to or toward established storage areas such as green areas in the development.

8 On January 05 there was what seems by photographs and the evidence of witnesses a heavy snowfall. Mr. Ford says he called his major contract customers to see if they wanted snow relocation work in addition to the plowing which was obviously required but got no call back from the defendant.

9 Mr. Cannata was the defendant's only witness. He is unlikely now to have a detailed independent recollection of the dates and times of events 4.5 years ago but had access to the president's notes which the court does not know were made at the time or prepared for trial or both. It is Mr. Cannata's testimony is that Citywide's equipment did not appear until January 07.

10 Mr. Ford did not say when his equipment was first on site after the January 05 fall but did testify it was there plowing and he and an employee "went back" January 07 where they were met by the president who said there had been a call from Canada Post which threatened to not deliver mail unless snow conditions on the property were improved. The Citywide employee made a comment about government workers and that vexed the president who then asked when Citywide could get back and do loader work. Mr. Ford said not for about a week and the president became more upset.

11 It was probably on January 09 the president told Mr. Ford the board of the condo was terminating the contract and called for help from Fisher and a contractor named Summers who formerly had the contract at this development. They both appeared January 10 with heavy equipment and spent much of the day cutting established banks and re-locating snow. The owner of Summers was there for nine hours and the Fisher equipment for an hour or two less. The tandem dump truck carried fifteen loads of snow to other parts of the development for storage. Summers returned late that night and laid down 2.5 tonnes of salt on the roadways and left with the president a small tractor to break up the salted base of ice and packed snow. The cost for Summers for that day is not known to the court but the Fisher bill is $1,440.00 plus GST.

12 A letter dated August 27, 2001 from the owner of Summers described what he found when he arrived on January 10: due to plowed snow the roadways were two to four meters narrower than they should have been and had a base of ice and packed snow four to eight centimeters deep. Photographs taken somewhere in the period January 07 to 09 substantially confirm the Summers evidence and also show that sidewalks were deeply covered with plowed, sloped and packed snow. Mr. Cannata explained that what is also seen in the pictures are instances of snow being plowed or lightly relocated to storage area mounds so close to the roadways and sidewalks that the snow which fell January 05 could not be plowed entirely off the roads and sidewalks.

13 When asked by the court why the president or manager did not call in Fisher sooner after the January 05 snowfall to re-locate the offending snow Mr. Cannata said that could not be done until the property was plowed on January 07.

14 Mr. Cannata testified the board was so concerned with mail delivery, potential liability for harm from dangerous conditions and breaching its statutory obligations to the members that it decided to terminate the Citywide contract. It used Summers the rest of the winter on a "call out" arrangement.

15 Counsel for the defendant contends that in the wake of the January 05 snowfall on top of pre-existing issues there was a breach of the contract so fundamental that the defendant was excused from the contract. The court has looked for direction to the case of *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426, [1989] S.C.J. No. 23 (S.C.C.) where the headnote reads in part:

> A fundamental breach occurs where the event resulting from the failure of one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit that the parties intended should obtain from the contract. Fundamental breach represents an exception to the rule that the contract continues to subsist and that damages be paid for the unperformed obligations of both parties.

16 In the view of this court there were no serious problems before January 05. This was Citywide's first season on this property and there were periodic discussions about how to plow and re-locate and about salting. The president rode on most of the attendances. The president assumed the responsibility for deciding when Fisher should be called in to do heavy re-location work and made those calls. He also implicitly authorized the lesser additional bucket work by Citywide's Bobcat.

17 There is no doubt the January 05 snowfall exceeded the capacity of Citywide which was trying to perform many other similar contracts with its light equipment. It was probably tardy getting to the development's site after the Jan-

uary 05 fall and even then did not have the equipment or time to deal within a reasonable time with the raggedness, especially the need to move large quantities of plowed snow further onto the storage area to give access for the plowing and dumping of fresh snow. Fisher was required for that heavy work.

18 In the opinion of this court guided by the dictates of the Supreme Court of Canada any breaches by Citywide did not deprive the condominium corporation "of substantially the whole benefit" of the contract and thereby give the defendant the option to "put an end to all unperformed primary obligations" of both parties. Rather the remedy is damages: in the case at bar the failure to appear promptly after the January 05 fall and the failure to deal with the accumulating ice and packed snow base come quickly to mind.

19 There is no defendant's claim for damages but with the support of the legislation which directs this court that will not be a problem.

20 Citywide has been paid through the end of December of 2000 and the work it did in January of 2001 is in the nature of work covered by the monthly fee which is $1,944.19 including GST. It did no work after January 07. It invokes the contractual requirement for 60 days notice of termination. The court finds the written notice was mailed January 24 and received at the end of January or no later than February 01. Citywide seeks the monthly fee and GST for January, February and March of 2001 in the sum of $5,823.18 which is very close to the court's calculation.

21 Citywide stopped performing services on the strength of an oral termination ostensibly made January 09. It's overhead and the overhead of others in this business is surely largely variable rather than fixed. In consideration of this and in consideration of the damages to which the defendant would probably have been entitled if it had chosen to plead damages as an alternative to fundamental breach the court finds justice is served if the plaintiff is awarded $3,888.38 representing two months of fees.

22 The plaintiff seeks prejudgment interest at a contractual rate. The contract itself is silent as to interest and the court cannot find a course of dealing. The plaintiff is entitled to prejudgment interest on $3,888.18 from the intermediate date of February 01, 2001. The clerk is asked to make that calculation and add it to the judgment.

23 The plaintiff shall have its costs fixed at $150.00 for entry and listing fees.

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