NOVA SCOTIA COURT OF APPEAL

Citation: ***Sable Mary Seismic Inc. v. Geophysical Service Inc.***, 2008 NSCA 83

Date: 20080930
Docket: CA 295491
Registry: Halifax

Between:

Sable Mary Seismic Incorporated and Matthew Kimball

Appellants

v.

Geophysical Service Incorporated

Respondent

Judge(s):	MacDonald, C.J.N.S.; Roscoe & Hamilton, JJ.A.
Appeal Heard:	September 26, 2008, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of the Court
Counsel:	Derrick J. Kimball, for the appellant, Sable Mary Seismic Inc. Nash T. Brogan, for the appellant, Matthew Kimball Colin D. Piercey & Karen Bennett-Clayton, for the respondent, Geophysical Service Incorporated

By the Court:

[1] Following the hearing of this appeal we indicated the appeal was dismissed with reasons to follow. These are our reasons.

[2] The appellants sought to have us overturn Warner, J.'s, decision striking their Notice of Trial With a Jury. The relevant facts are set out in the judge's decision reported at 2008 NSSC 79, [2008] N.S.J. No. 96.

[3] Having reviewed the record, read the facta, heard counsel and considered the applicable standard of review we are satisfied leave, required pursuant to s.40 of the **Judicature Act**, R.S.N.S. 1989, c. 240, should be granted but the appeal should be dismissed.

[4] The applicable principles to be applied by this Court when reviewing a discretionary decision striking a jury notice were set out in **Begg v. Halifax (County)**, 159 N.S.R. (2d) 394:

> [7] . . . The principles applicable to a motion to strike a jury notice were reviewed by this Court in **Zinck v. Allen** (1970), 1 N.S.R. (2d) 654 (C.A.), where Cooper, J.A., stated at p. 667:
>
> > "It is apparent ... that a Court of Appeal may inquire into the question as to whether or not the discretion has been exercised upon proper grounds. If, as a result, the Court is satisfied that the discretion has been exercised judicially, then there is no jurisdiction to review the exercise of the discretion even if the Court on appeal should be of opinion that it was exercised mistakenly ... "

[5] It is clear from his decision that the judge exercised his discretion judicially. He reviewed the pleadings, the evidence before him, the positions of the parties and the relevant law in great detail in reaching his decision. It is implicit in his decision that he was satisfied there were complex issues of mixed fact and law that needed to be determined in the claims between the parties and that a prolonged examination of complex documents and accounts would be required by the trier of fact, with 75 volumes of documents contained in the lists of documents plus additional documents produced as a result of notices for production and discoveries. This is evident in ¶ 105 of his decision:

> [105] Credibility, an important element of the first aspect of A.1, is an appropriate issue for a jury. Prolonged examination of huge volumes of documents and financial documents, the second aspect of A.1, is a matter of concern. The court does not take issue with the defendants' position that Geophysical's forensic accounting report is not so complex as to overwhelm a jury; however, to date, there was been no agreement between the parties with respect to the boxes of production demanded and produced by the parties that are likely to be presented at the trial. **The volume and nature of the documents and financial information, as described in the affidavit and supplementary affidavit filed with this application, is overwhelming.** Unless there were an agreement, which has not yet occurred, the presentation of any significant portion of those documents would unreasonably prolong and complicate a judge alone trial, and to a much greater extent, a jury trial. (Emphasis added)

[6] The judge found the respondent's claim was dependent on the determination and interpretation of the contract, which he characterized as a complex mix of fact and law:

> [25] While the parties disagree as to whether the "letter agreements" contained the whole agreement, the [Respondent's] claim will depend on the determination and interpretation of the contract - a complex issue of mixed fact and law. While the parties disagree as to whether an agreement to profit share existed, the only affidavit evidence before this court confirms that even Kimball acknowledges that the terms of the agreement were never concluded, resulting in the relief claimed (reasonable compensation based on *quantum meruit*) being an equitable remedy not conveniently separable from the factual issue (whether there was an agreement to profit share). . . .

[7] He also found the appellant's counter-claim for profit sharing was primarily an issue of law, or at best, a complex issue of mixed law and fact:

> [110] Whether these conversations, taken together with the "letter agreements", constitute a legal agreement . . . , in the absence of any agreement as to the terms for profit sharing, is primarily an issue at law, or at best, a complex issue of mixed law and fact. It is difficult to project any role for a jury in respect of this issue. I do not see how or what questions could properly be put to the jury that would not also involve the assessment of the law.

[8] These findings alone are sufficient to support the judge's decision to strike the jury notice: **Lintaman v. Goodman**, (1983), 61 N.S.R. (2d) 444; [1983] N.S.J.

No. 37, ¶ 4; **Barrow v. Keating (No 2)**, (1985), 68 N.S.R. (2d) 289; [1985] N.S.J. No. 116, ¶ 15-16 and **A.D. Smith Lumber Ltd. v. General Homes Systems Ltd.**, (1986), 72 N.S.R. (2d) 333; [1986] N.S. J. No. 26, ¶ 17.

[9] The judge also found that the trier of fact would need to make a prolonged examination of many documents:

> [9] Based on the disclosure and documents demanded and produced to date, all of which are set out with the Affidavits filed with this application, the calculation of the amounts charged by Kimball to Geophysical versus the amounts which Geophysical alleges should have been charged under the contract, leads this Court to conclude that, in the absence of an agreement at this time as to what and how many of the many volumes of documents and financial records produced will be tendered and subject to examination and argument, a jury will likely become bogged down with a prolonged examination of documents and accounts at the trial. At present the parties have not agreed that the expert report of Geophysical (or of Kimball if they obtain one) or the factual foundation of the reports will be admitted or accepted. The suggestion of counsel for Kimball that the admission of the report and documents may be agreed to before trial is speculative and no basis upon which to assess this application.
>
> . . .
>
> [116] In summary,
>
> (a) the legal issues of fact . . . are relatively small parts of the case in terms of all the evidence. The trial will involve prolonged examination of many documents and financial records of little relevance to the legal issues of fact.

[10] In reaching these specific conclusions, which were based on the evidence before him, the judge has not applied any wrong principles of law and no injustice will result from his decision. However, in dismissing the appeal we want to be clear that we are making no comment on the judge's reasoning and conclusions to the effect that equitable issues of law, fact and remedy are not matters properly or historically for determination by juries (¶ 116 (c)) or on his reasoning that **Civil Procedure Rule** 1.03, providing for the just, speedy and inexpensive determination of every proceeding, militates generally against jury trials (¶ 80-82, 106, 117).

[11] By consent of the parties costs of the appeal will be in the cause.

MacDonald, C.J.N.S.

Roscoe, J.A.

Hamilton, J. A.