SUPREME COURT OF NOVA SCOTIA

Citation: Homburg v. Stichting Autoriteit Financiele Markten
2015 NSSC 270

Date: 20150924
Docket: Hfx. No. 438492
Registry: Halifax

Between:

Richard Homburg, Homburg Bondclaim Limited and
Homburg Shareclaim Limited

Plaintiffs

v.

Stichting Autoriteit Financiele Markten, De Nederlandsche Bank N.V., Belastingdienst, Theodor Kockelkoren, Marcus E. Wagemakers and the Government of the Kingdom of the Netherlands

Defendants

Decision

Judge:	The Honourable Justice Jamie Campbell
Heard:	September 16, 2015 in Halifax, Nova Scotia
Written Decision:	September 24, 2015
Counsel:	Ian Blue, Q.C. and Blair Mitchell for the Plaintiffs Daniela Bassan for Homburg Invest Inc. and James F. Miles Sheila Block for the Defendants

Campbell, J.

[1] The two motions before the court are preliminary to a jurisdictional motion scheduled to be heard on November17 and 18, 2015. The Plaintiffs are seeking an order under Civil Procedure Rule 18.12 for discovery of two non-parties, Michael P. Arnold, C.A. and James F. Miles.

Nature of the Motions

[2] The matter coming up in November is a motion by the Defendants for an order declaring that the Supreme Court of Nova Scotia does not have jurisdiction to hear the Plaintiffs' case. That case is a series of claims against the Government of the Kingdom of the Netherlands, two agencies of the Dutch government, Stichting Autoriteit Financiel Markten and De Nederlandsche Bank N.V., and individual officers of those agencies (referred to collectively as the "Dutch authorities"). The Plaintiffs are Richard Homburg and the assignees of the rights of action of Homburg Invest Inc. That company began doing business in the Netherlands and was subject to regulation by the Dutch authorities. The Dutch authorities engaged in supervision of Homburg Invest Inc. They required the provision of information. They required the removal of Richard Homburg as a policy maker. They required the appointment of two directors or officers who were

residents of the Netherlands. They ordered Homburg Invest Inc. to submit a "plan of control" and indicated the potential appointment of a silent monitor. They levied a fine against Mr. Homburg and eventually revoked the licence of Homburg Invest Inc. to sell securities in the Netherlands.

[3] Very generally, the claim asserts that the Dutch authorities misused their powers by among other things, attempting to exert jurisdiction over a Canadian company. It says that they committed the torts of misfeasance in public office, unlawful means and conspiracy.

[4] In the motion scheduled for November, the Defendants will argue that the courts in Nova Scotia do not have jurisdiction under the *State Immunity Act*, R.S.C. 1985, c. S-18, and that in any event Nova Scotia is not the *forum conveniens* where the matter should be heard. They will say that any oversight of Dutch regulators and Dutch tax authorities is to be carried out by the Dutch courts.

[5] The Plaintiffs will argue that the Defendants' conduct was "commercial activity" and as such would come within that exception in the *State Immunity Act*. They will assert that the Defendants attempted to impose requirements on a Canadian company that were inconsistent with Canadian law.

[6] The Defendants say that there is nothing in the claim or any evidence to suggest that what they did could amount to carrying on "commercial activity". It was regulation.

[7] The Plaintiffs, in the motions now before the court, are asserting that Mr. Arnold and Mr. Miles have information that is required to enable them to respond to the jurisdictional motion in November. They argue that through discovery and disclosure of documents they can obtain information to establish an evidentiary record to enable the court to determine whether the Defendants engaged in commercial activity.

Issue

[8] The issue is whether the order for discovery should be made.

The Rules

[9] Rule 18.12 allows a judge to grant an order requiring a witness or a custodian of documents to submit to discovery examination. Rule 18.12(2) provides that an order can be made before the proceeding has started if certain conditions are met. Here, the proceeding has been started. That Rule just does not apply.

[10] Under Rule 18.12(3) an order for discovery can be made during the proceeding if the person to be discovered is outside the Province and a subpoena cannot be enforced and the proceeding cannot be determined justly without the discovery. Both of those conditions have to be present. Mr. Miles lives in Dartmouth, Nova Scotia. A subpoena could be enforced. Mr. Arnold lives in Prince Edward Island. There is nothing to indicate that a Nova Scotia subpoena would not be enforceable in that province. On that basis alone the motion requesting an order under Rule 18.12 could be dismissed.

[11] The Rule cited by the Plaintiffs, Rule 18.12, does not deal specifically with non-party discovery. It does make clear though that an order should be made only if the proceeding "cannot be determined justly" without discovery. The parties have agreed, that is the test to be applied.

[12] Rule 18.12(3) should be interpreted in light of the Rules that apply more generally to the discovery of witnesses. Parties are encouraged to carry on litigation in a way that is fair, expedient and cost effective. Before non-parties are dragged unwillingly into the process, the parties themselves should complete disclosure and have discovery examination of their internal representatives. When that has been done the parties and the court should have a much better

understanding of kind and scope of information that might be required from non-parties and who those non-parties might be. Non-parties are not the place to start.

[13] Rule 18.04 sets out the requirements for a party seeking to obtain a discovery subpoena to discover representatives of the other party. Rule 18.05 sets out the requirements for the issuance of a subpoena to a non-party after the close of the pleadings. In both situations the moving party has to establish that the discovery subpoena would promote the just, speedy and inexpensive resolution of the proceeding. The party has to show that it is in compliance with its own disclosure obligations and has to provide a concise statement of the grounds for its belief that a discovery subpoena is required instead of, or in addition to, an interview or discovery by agreement. For discovery of non-parties there is an additional requirement regarding undertakings to pay expenses.

[14] The Rules provide for an orderly process. If discovery is required to preserve evidence even before the proceeding has started an order for discovery can be made. Once the proceeding has started, parties are obliged to complete disclosure before undertaking discovery examinations. That encourages a more expeditious process in which discovery is undertaken with some sense of the evidentiary context. Non-parties can be compelled to become involved to complete the evidence.

[15] That approach should inform the interpretation of Rule 18.12. The discovery rules as a whole establish an approach to the process that should be followed in their interpretation. Part of that approach is to encourage parties to deal with litigation internally before involving strangers to the dispute. It is a fair, expedient and cost effective approach. The interpretation of Rule 18.12, and the issue of whether a proceeding can or cannot be determined justly without discovery of a third party, should be informed and guided by that approach as well.

Evidence Required for Just Determination of the Jurisdictional Motion

[16] The Plaintiffs are seeking discovery under Rule 18.12 of non-parties after the proceeding has been commenced and before a defence has been filed. The issue of jurisdiction is being resolved. The matter is at its most preliminary stage. As the Plaintiffs note, the purpose of the discovery at this stage is to deal with the jurisdictional motion. Mr. Blue as counsel for the Plaintiffs has noted that the jurisdictional motion is analogous to a motion for summary judgment in the sense that if granted it would terminate the litigation.

[17] The situation here is of course somewhat different. The jurisdictional motion will require the Plaintiffs to put their case forward as to why the actions of the Dutch authorities were "commercial". It is not whether the actions of a foreign

regulator affect the commercial activity of the regulated entity. The issue is whether the foreign state is engaged in a commercial enterprise. That is determined by considering the nature of the activity, having regard to both the nature of the actions of the foreign state and the purpose of those actions. The court considers the alleged commercial nature of the activity within the context of the proceeding itself.

[18] The Plaintiffs do not have to put their best foot forward or for that matter put any foot forward on the merits of the claims themselves. They do not have to provide any evidence of the torts as alleged.

[19] That said, they cannot simply plead facts constituting a cause of action and plead that those facts are commercial activity.[1] The Plaintiffs will have to show an evidentiary record to support the assertion that the Defendants have engaged in commercial activities and that the action relates to those activities.[2]

[20] The Plaintiffs have noted specifically that they "believe that they can obtain evidence that supports the allegations in the Statement of Claim but want to supplement the evidence they have." That reference is contained in the Plaintiffs'

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[1] *Schreiber v. Canada (Attorney General*), 2002 SCC 62

[2] *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40

brief. They go on to say that, "The Plaintiffs want the judge hearing the November 17-18, 2015 jurisdictional motion to have the best evidence before her with which to decide the important question of whether the Court should accept or decline jurisdiction in this case" (emphasis added).

[21] The test is not whether discovery will provide the best or most complete evidence. Mr. Blue has admitted that the comment contained in the brief of his co-counsel, Mr. Mitchell, is "a bit of an over statement". He says that discovery is necessary here and that the jurisdictional motion cannot be justly determined without the requested discovery.

[22] The kinds of information that the Plaintiffs have indicated they are seeking from both Mr. Miles and Mr. Arnold goes to the merits of the main action. The Plaintiffs are seeking evidence about the communications and discussions between the Dutch regulatory authorities and Homburg Invest Inc. which is now 1810040 Alberta Limited and a non-party to the proceedings. The information does not address the issue of whether the action of the Defendants was "commercial activity". It relates to the regulatory relationship between the Dutch authorities and Homburg Invest Inc. It relates to internal issues between Homburg Invest Inc. executives and the Board of the company. There has been nothing provided to this point to indicate that it would be reasonable to believe that either person has

evidence that would suggest that the Dutch authorities were undertaking commercial activity. It is, however, possible that examination of representatives of the Defendants will point toward how either Mr. Arnold or Mr. Miles might have evidence that relates to or helps to establish the commercial nature of the activities.

Conclusion

[23] The Plaintiffs are seeking an order under Rule 18.12(3). That Rule does not apply here. The rule only applies if the person in respect of whom the order is sought is outside the province and a subpoena cannot be enforced. One witness is within Nova Scotia. The other is in Prince Edward Island. There has been nothing brought forward to indicate that a discovery subpoena would not be enforced there.

[24] Furthermore, the Plaintiffs are seeking discovery of non-parties to respond to a preliminary motion which will determine whether Nova Scotia even has jurisdiction to hear the main matter. They are doing that before they have even completed disclosure and undertaken discovery of the parties to the litigation. They have not established that the information sought in that discovery would address the issue of jurisdiction.

[25] If Rule 18.12 applied, the motion would be premature. It cannot be concluded that the discovery of the non-parties is necessary to the just determination of the jurisdictional matter. That may be possible when party disclosure and discoveries have been completed, specific gaps in the information as it pertains to the jurisdictional issue are identified and some reasonable grounds are put forward to indicate that either Mr. Arnold or Mr. Miles might be able to fill in those gaps.

[26] The motion is dismissed with costs.

J.