Date: 19990108 Docket: C.A. 151066

NOVA SCOTIA COURT OF APPEAL

Cite as: Jones Power Co. Ltd. v. Mitsui & Co. (Point Aconi) Ltd., 1999 NSCA 39

Glube, C.J.N.S.; Freeman and Flinn, JJ.A.

BETWEEN:

JONES POWER CO. LIMITED and J.A. JONES CONSTRUCTION Appellants	)	George MacDonald, Q.C. and Michelle C. Awad for the appellants
- and -	)	
MITSUI & CO. (POINT ACONI) LTD. Respondent	)	David A. Miller, Q.C., Robert G. Grant, Q.C. and T. Arthur Barry for the respondent
- and -	)	
SARGENT & LUNDY Third Party	)	No one appeared on behalf of Sargent & Lundy
	)	Appeal Heard: December 1, 1998
BETWEEN:	)	
	)	Judgment Delivered: January 8, 1999
JONES POWER CO. LIMITED Appellant	)	
- and -	)	
MITSUI & CO. (POINT ACONI) LIMITED and SARGENT & LUNDY Respondents	)	

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Glube, C.J.N.S. and Freeman, J.A. concurring.

FLINN, J.A.:

Background:

The question that arises in this appeal is whether this Court should interfere with an interlocutory discretionary order of Justice Richard, of the Supreme Court of Nova Scotia, acting, with the consent of the parties, as case management judge. The order in question is to sever one of many issues between the parties, and to have that one issue tried separately before the trial of the main action. That issue is whether a Memorandum of Understanding, entered into between the parties on July 28th, 1992, is a valid and binding contract.

This litigation arises out of the construction of the Thermal Electrical Generating Station at Point Aconi, Nova Scotia. The respondent (Mitsui) entered into an agreement with the Nova Scotia Power Corporation to design and build this power plant. Mitsui then contracted with the appellant, Jones Power Company Ltd. (JPC) whereby JPC would act as construction manager for the project, and to carry out certain construction work. The contract price for JPC's services is in excess of $100 million dollars. The appellant, J.A. Jones Construction Limited (JPC's parent company), guaranteed the contractual obligations of JPC to Mitsui. Mitsui also contracted with the third party, Sargent & Lundy (SL), whereby SL would provide design and project management services for the project.

During 1991 and 1992 disputes arose between Mitsui and JPC which the parties were unable to resolve. The dispute concerned compensation for work done,

and the proper definition of the scope of the work to be done. By the spring of 1992 the claims for additional compensation by JPC had reached several millions of dollars. In an effort to get the project back on track and settle differences, and following intense discussions and negotiations among the senior executives of the parties, a meeting was held at the SL offices in Chicago on the 28th of July, 1992. At this meeting a Memorandum of Understanding (MOU) was executed by JPC and Mitsui. Mitsui takes the position, in this litigation, that the MOU fixed the total compensation for JPC at $118 million dollars, subject to adjustment only in accordance with the terms of the MOU; that JPC would achieve the completion date between July 1st and July 15th, 1993; and that the MOU constituted a valid and legally binding agreement between JPC and Mitsui. JPC's position, with respect to the MOU, is that it repudiated the MOU the day following its execution, on July 29th, 1992; that the MOU did not have, and was not intended to have, legal effect; that the MOU was too vague and uncertain to be capable of constituting a legally binding agreement; and that the MOU was nothing more than an agreement to agree.

Discussions continued between the parties. On November 5th, 1992, the parties agreed to get the project finished, and to deal with their differences following completion. Neither party waived its rights, and Mitsui provided funding to complete the project.

The disputes were not resolved, and Mitsui commenced an action against JPC in 1994. JPC commenced a separate action against Mitsui on October 11th, 1994.

This brief overview masks the magnitude of these proceedings, which the case management judge described as follows:

> There is no question that these actions are somewhat unique, having regard to their complexity and the monetary amounts being claimed by the respective parties. The actions are, arguably the most complex and involve the most money in the history of civil litigation in this province. The following enumeration should provide some appreciation of the complexity and magnitude of these combined cases:
>
> 1. Mitsui's claim against JPC is in excess of $54 million while the JPC claim against Mitsui is estimated at over $44 million.
>
> 2. The contract involves the construction of a "state of the art" Thermal Generating Plant. This is very complex construction involving intricate planning and design.
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> 3. Since the start of the actions there has been over 156 days of Discovery examination of more than 38 witnesses.
>
> 4. During discovery there were over 2500 documents introduced. When asked at the hearing how many individual documents such as Change Orders, Extra Work Orders and Bills of Quantity would require rulings at trial, counsel for Mitsui demurred and could only indicate that there was "an enormous number".
>
> 5. There are nine expert reports comprising about 18 volumes (including rebuttals). Unfortunately, the experts reports appear to have the effect of widening the gap between the respective positions of the parties. I made this observation during a case management conference and it was not challenged.
>
> 6. The very complexity of the actions has prompted me to suggest that at least two experts will be required to assist the court - one engineer and one accountant. As well, the appointment of a Referee under the Civil Procedure Rules has been discussed. The Referee would review the enormous number of relevant documents and report to the court.

Facts:

The circumstances leading up to the application which is the subject of this appeal, and the respective positions of the parties on that application, are described by the case management judge as follows:

> These cases were assigned to a case management judge at the request of the parties. Gruchy, J accepted the assignment and the first Case

Management Meeting was convened on 16 December, 1994. Five case management meetings were conducted by Gruchy. J up to 24 July, 1997 at which time the parties were advised that I had been assigned as the trial judge. At that time I assumed the role of Case Management Judge. Gruchy, J agreed to hold himself available for any controversial matters which the parties felt ought be heard by a judge other than the trial judge. During the course of his role as Case Management Judge, Gruchy, J monitored the discovery schedules of the parties as well as the timing for the filing of expert's reports and other matters aimed at expediting the process.

Although expert reports were scheduled to be delivered by 12 December, 1997 this deadline was unattainable due to several factors, the most significant of which was the dismissal of the principal Mitsui expert following the disclosure that he was a fraud. Mitsui was forced to retain and instruct another expert. As a result of this unfortunate incident the trial, which had been set to start in early May, 1998 was adjourned to mid September, 1998.

I convened my first Case Management Conference on 20 October, 1997. Among other things, I raised the prospect of having the issue of the MOU dealt with prior to trial. At that time, counsel for both Mitsui and JPC suggested that there would be little or now (sic) saving of time and other resources since the MOU would require considerable evidence. During the ensuing months I encouraged counsel to consider compartmentalizing or "putting a fence around" certain of the evidence so that volumes of documents could be considered using common criteria of review. I also suggested that certain questions of law, such as findings of negligence against SL and the legal consequences of the MOU could be heard without the necessity of hearing the lengthy evidence on the facts and ruling on the enormous number of construction documents. Generally, counsel indicated that these strategies were either impractical or would not result in noticeable saving of time and resources.

In mid February, 1998 a rather complex application was made by counsel for SL respecting the resolution of certain legal issues prior to trial. This application was unsuccessful.

. . . . .

. . . Following the hearing on 30 June [on an application to have an expert's report of JPC declared inadmissible] I became increasingly concerned that the sheer magnitude and complexity of this case was rendering it almost untriable. By this statement I in no way intend to impugn the performance and efforts of counsel in the conduct of this litigation. Counsel for all three parties are experienced, competent and professional. This is evident from the manner in which they have brought the case along and how they have conducted themselves in the best interests of their respective clients. The record clearly shows that trial preparation has been lengthy, complex, exhaustive, and indeed at times exhausting.

At a Case Management Meeting on 10 August, 1998 I indicated to counsel that I was more concerned about the parties being fully prepared for trial than I was about the actual commencement of the trial. At that time I said that I was considering engaging one or more experts to assist the court and

that I also was considering the appointment of a Referee pursuant to the CP Rules to hear and report upon much of the documentary evidence. I also asked counsel to consider separating some legal issues to be resolved in advance of the trial. In response to this last point, counsel for Mitsui, in a letter dated 13 August raised the question of whether it would be possible to sever the MOU issue. This is the first time that any counsel raised the possibility of a severance of issues. At my first Case Management Meeting this suggestion was not considered practical. In the intervening year there has been numerous court applications, the filing of expert's reports and rebuttal reports and the obvious difficulty in proceeding with trial preparation. Presumably, these intervening factors, combined with my prompting, caused counsel to re-visit the issue of severance. Counsel also indicated that it would be impossible to meet the November trial date because of the short time available for review of the revised Revay Stanley Report.

Severance of the MOU

A further Case Management Meeting was convened on 27 August, 1998. At this conference I requested counsel to use their best efforts in trying to agree on any legal issues which could be tried separately, and in advance of , the main trial. Negotiations did not result in any agreement and counsel for Mitsui made this application for a severance of the MOU issue. In the meantime, a further expert's rebuttal report (an accounting review by Grant Thornton) was filed by counsel for JPC. A brief review of this report re-enforced my view that the respective expert's seem to be exacerbating the dispute rather than uncovering some common ground.

This application was heard on 2 October, 1998. Rather voluminous briefs and supporting documentation were filed prior to the application. Oral argument lasted the entire day. Counsel for Mitsui raised several compelling arguments. These may be summarized as follows:

1. The MOU evidence is discrete and would not require repetition in later hearings.

2. Validity of the MOU centres upon legal interpretation and its legal impact will not turn upon the credibility of witnesses.

3. Determination of the MOU issue will not require technical or expert evidence.

4. If the MOU is found to be legally binding it will, in the view of Mitsui settle the basis for compensation for JPC. Determination of the validity of the MOU, if it does not promote settlement, will substantially narrow the issues and permit a keener focus at trial. It will reduce trial time and costs to the parties.

5. Litigation of the MOU will mitigate prejudice to Mitsui resulting from the current status of the Revay Stanley Report and the late provision of alleged design deficiencies.

Counsel for Mitsui expressed a certain frustration with the present status of the litigation describing it as a "quagmire".

Counsel for JPC also raised numerous and compelling arguments against severance of the MOU issue which I summarize as follows:

1. Case preparation has been conducted on the understanding the entire "proceedings" would go to trial. Severance of the MOU at this time would be extremely prejudicial to JPC.

2. The MOU was superseded by an agreement dated 5 November, 1992 which provided for the determination of the final Contract Price by agreement, or failing that, by litigation or binding arbitration.

3. Resolution of the MOU would not result in substantial savings of time and expense since there remain many substantive issues to be litigated. The MOU was just one step in the process.

4. The MOU will not put an end to these proceedings - it is not dispositive of all outstanding matters and will not result in saving of time or expense.

5. If determination of the MOU issue is severed it will require further discoveries and further instruction of expert witnesses.

Counsel for JPC urged that the severance would cause further delay in the litigation and would not shorten anything.

Decision of the Case Management Judge:

The case management judge granted the application to have the issue as to the legal validity of the MOU severed and determined prior to the trial. The reasons of the case management judge are as follows:

> There is no question that this case, involving as it does, a complex factual background, huge monetary considerations, and enormous documentation is both extraordinary and exceptional. At this point in the litigation process a "log jam" of significant proportions has developed which is impeding the process and adding uncertainty to the commencement and duration of the trial. ... Mitsui has maintained throughout that it relies on the MOU for its full force and effect. Counsel for Mitsui urges that a finding that the MOU is legally binding would settle much of the outstanding dispute between the parties. This is what the MOU was supposed to do. Mitsui also suggests that hearing of the MOU issue would not mean any repetition of evidence since the issue is disparate and would not require further elaboration at any subsequent trial.
>
> I am not convinced that a separate trial of the MOU would result in serious prejudice to JPC. All witnesses have been subject to extensive discovery, on all issues including the MOU. I cannot agree that extensive

> further instruction of experts would be necessary to assist in the resolution of what is clearly a legal issue. The only prejudice would appear to be that JPC will have to adjust its trial preparation to a more focussed and defined issue - the legal nature of the MOU and the consequences flowing from such determination.
>
> I find that, given the extraordinary and exceptional nature of this very complex case, it is both just and convenient to have the issue of the MOU decided before the trial of the other issues. It is just because it will allow the parties to dispense with a major issue without the necessity of calling a large number of witnesses, reviewing an enormous quantity of documents or adducing lengthy expert testimony. In spite of some inconvenience in re-focussing attention from the general trial to a specific aspect of it, there appears to be no serious prejudice. To decide the MOU issue in advance of trial is convenient in that it provides the parties with the opportunity to concentrate on one principal issue which may result in a substantial saving of trial time. This, of course would depend on how the MOU issue is resolved. It will also break the "log jam" and require the parties to focus their attention on a major disparate issue.

JPC applies for leave, and, if granted, appeals the decision of the case management judge. JPC submits that the case management judge applied wrong principles of law in reaching his decision, and that a patent injustice to JPC arises from that decision.

Standard of Review:

This appeal is from an interlocutory discretionary order, by the case management judge, made pursuant to **Civil Procedure Rule** 28.04 which provides as follows:

> **28.04** The court may order any question or issue, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial, and may give directions as to the manner in which the question or issue shall be stated.

In **Fraser v. Westminer** (1998) N.S.J. No. 239, Justice Cromwell, for the Court, said the following concerning appellate review of such an order:

> The order sought on this interlocutory application was discretionary and required the Chambers judge to weigh and balance a number of considerations concerning the just and efficient conduct of this litigation. On appeals from such orders, this Court will not intervene unless persuaded that the Chambers judge applied wrong principles of law or the result of the order is a patent injustice. Where, as here, the application relates to the orderly progress of the litigation and the judge is the case management judge, these limitations on appellate intervention are particularly apt.

Counsel for Mitsui submits that Justice Cromwell's remarks should be interpreted to mean that, on appellate review, greater deference should be afforded by this Court to an interlocutory discretionary order of a case management judge, than that usually afforded to such an order of a Chambers judge. The purpose of case management, he submits, is to streamline and expedite the just administration of litigation. It arms the judge with greater knowledge of the facts and circumstances of the case to enable the judge to respond more efficiently and effectively to issues arising in the course of litigation. For the case management system to function, counsel concludes, it must be recognized that the case management judge has a good deal of latitude to manage a case, and that decisions taken in the course of management of the case are not liable to be appealed and overturned except in the clearest of cases. Therefore, counsel submits, the policy reasons for Appeal Courts to defer to discretionary decisions on interlocutory applications apply with even greater force where the interlocutory decision is that of the case management judge.

If counsel's submission is that the orders of a case management judge, which emanate from the application of wrong principles of law, are specially protected from appellate review, I do not agree. The streamlining and expediting of litigation, which are laudable goals of the case management system, are not goals to be achieved at the

expense of principles of law. If, in the exercise of discretion, a judge applies wrong principles of law in granting an interlocutory discretionary order, it is of no consequence that the judge was acting in the capacity of a case management judge. Intervention by the Court of Appeal would be mandated. The Court in **Fraser** did not suggest anything to the contrary, but expressly affirmed review for error of law.

I do agree, however, that absent legal error, and, as Justice Cromwell said in **Fraser**, where the order appealed from relates to the orderly progress of the litigation, and involves the assessing and balancing of a number of considerations concerning a just and efficient conduct of the litigation, this Court, generally speaking, should be slow to interfere with the case management judge's conclusions concerning the proper assessment and balancing of the relevant considerations.

In the particular matter before this court, the case management judge has been intimately involved with these proceedings for over a year. He has heard numerous applications, presided over a number of case management meetings, and has reviewed the numerous and extensive experts' reports which were filed by the parties. The detailed reasons for judgment of the case management judge, on the application which is the subject of this appeal, are a clear indication of how involved in, and familiar with, the proceedings the case management judge has become. In these circumstances, if the case management judge, in the exercise of his discretion under **Rule** 28.04, has not applied wrong principles of law, and if he has considered, and balanced, the respective positions of the parties - as to whether it is just and convenient to order a separate trial on the issue

of the MOU - then the manner in which the case management judge has exercised his discretion should be afforded great deference by this Court on appellate review.

Analysis:

Counsel for JPC submits that the case management judge applied wrong principles of law in the exercise of his discretion under **Rule** 28.04: and, further, that a patent injustice will be permitted to occur if the decision is allowed to stand.

Principles of Law:

In considering the legal framework upon which he should exercise his discretion under **Rule** 28.04, the case management judge reviewed the current authorities. His premise was the fact that the application of **Rule** 28.04 (based on the English rule) has been broadened since the decision of the Court of Appeal of England in **Coenen v. Payne** [1974] 2 All E.R. 1109. Lord Denning said in **Coenen** at p. 1112:

> I think the time has come to adopt a new approach. There is no need to order a new rule. The practice can be altered without it. The courts already have power to do it. RSC Ord 33, r 4(2), says:
>
> > In any [action begun by writ] different questions or issues may be ordered to be tried at different places or by different modes of trial and one or more questions or issues may be ordered to be tried before the others.
>
> In future the courts should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trials wherever it is just and convenient to do so.

The case management judge noted that the concept of "just and convenient" had been adopted by Justice Tidman of the Supreme Court of Nova Scotia in the case of

McManus v. Nova Scotia (Attorney General) (1991), 119 N.S.R. (2d) 137.

The case management judge then reviewed various guidelines which the courts have enumerated in endeavouring to articulate what ought to be considered in determining what is just and convenient on such an application. Having reviewed those guidelines, he concluded, correctly in my opinion, that the guidelines are "neither cumulative nor individually dispositive in their application". The case management judge regarded the guidelines as "helpful guides to the court in the exercise of its discretion". Following his review of the decision of this Court in **Fraser v. Westminer** (*supra*) as well as the decision of the trial judge in that case, the case management judge measured the circumstances of this particular case against what was just, and against what was convenient.

In his notice of appeal, counsel for JPC raises three grounds of appeal as follows:

> (a) that the learned judge erred in law in concluding that severance of the MOU validity issue was permissible when the trial of the severed issue could not be dispositive of the entire proceedings;
>
> (b) that the learned judge erred in law by failing to give proper, or any, weight to the fact that the trial of the severed MOU validity issue would not result in a significant saving of time and expense;
>
> (c) that the learned judge erred in law by failing to give proper consideration to the prejudice to the appellants of proceeding with trial of the MOU validity issue.

I would dismiss the first ground of appeal because there is no principle of law which requires that an issue must be dispositive of the entire proceeding before that issue

can be severed and tried separately. While it is relevant to consider what may, or may not, be accomplished by a separate trial of the MOU issue, that does not give rise to an invariable rule.

I would also dismiss the second ground of appeal because the case management judge did consider and weigh this factor, as one of many things which he considered in his goal to determine what was just and convenient in these circumstances. He decided that the separate trial would allow the parties to dispense with a major issue without the necessity of calling a large number of witnesses, reviewing an enormous quantity of documents or adducing lengthy expert testimony. He considered that, depending on how the issue of the MOU was resolved, it may result in the substantial saving of trial time. More importantly, the case management judge decided that the separate trial would break the “log jam” which had developed in these proceedings and which was impeding the process and adding uncertainty to the commencement and duration of the trial.

I will deal with the third ground of appeal in my assessment of JPC’s submission that a patent injustice will arise from the decision and order of the case management judge.

In my opinion, the case management judge did not apply wrong principles of law in his consideration of this matter; and I would reject the submissions of counsel for JPC to the contrary.

Patent Injustice:

Counsel for JPC submits that JPC is prejudiced by a separate trial on the validity and enforceability of the MOU. There are, essentially, three aspects to his submission:

1. That because of a provision in the order, which confines the evidence at the separate trial to that evidence relevant to certain paragraphs of the statement of claim, counsel's ability to cross-examine witnesses, on the general issue of credibility, is hampered.
2. That counsel for JPC has prepared for trial on the understanding that all matters will be dealt with in one trial. His experts have been instructed on the basis that there will be one trial, and on the basis that the MOU is nothing but an agreement to agree, and, therefore, not enforceable. If at the separate trial the MOU is found to be enforceable, he has no expert report, nor does he have his expert prepared to assess his damages claim.
3. That a determination of the validity of the MOU is not dispositive of anything, saving a very narrow issue. Further, that a separate trial on the issue of the MOU should only be ordered if it is to the advantage of all concerned, and it is not to the advantage of JPC.

With respect to the first submission, counsel for Mitsui advised the Court (without objection by counsel for JPC, or challenge on reply) that, subsequent to the order of the case management judge, a further case management meeting was held to deal with

the parameters of the evidence that would be called in a separate trial relating to the MOU. Rather than the case management judge giving directions to counsel, counsel agreed on time frames within which to present their direct and cross-examination on the issue. The case management judge (who is also the trial judge) acknowledged that it would be for counsel to present any evidence they choose on the issue. I would, therefore, reject counsel's submission that his ability to cross-examine witnesses, on the general issue of credibility, is hampered by the order of the case management judge.

With respect to the second submission, the validity and enforceability of the MOU is, and has been since the day following its execution, an issue between these parties. Mitsui has consistently taken the position that the MOU constituted a global settlement reached between the parties in July 1992. JPC's position is completely opposite; ie. that the MOU is nothing but an agreement to agree, and as such is not enforceable. If the validity and enforceability of the MOU is not determined at a separate trial, it will have to be determined at the main trial. That being the case, the submission of JPC's counsel, as to the problem he will have if the MOU is found to be valid at a separate trial, is a problem he would have, in any event, at the main trial. It does not arise because there is a separate trial on that issue. Further, the case management judge considered this submission. He was not convinced that a separate trial of the MOU issue would result in serious prejudice to JPC. The case management judge did allow that JPC would have to "adjust its trial preparation to a more focussed and defined issue - the legal nature of the MOU and the consequences flowing from such determination". However, on balance, the case management judge decided that given the extraordinary and exceptional nature of this

very complex case that it was both just and convenient to have the issue of the MOU decided before the trial of the other issues. I would not interfere with that conclusion.

JPC's third submission is, essentially, what is contained in the second ground of appeal, which I would dismiss for the reasons previously set out.

Summary and Conclusion:

In my opinion, the case management judge, in the exercise of his discretion under **Rule** 28.04, did not apply wrong principles of law. Further, the matter at issue involves the orderly progress of litigation, which litigation, in the opinion of the case management judge, has reached a "log jam of significant proportions." In the discharge of his responsibility as case management judge, to move the case along, he weighed and balanced the respective positions of the parties before concluding that it was just and convenient to have the issue as to the validity and enforceability of the MOU determined at a separate trial. Considering these factors, as well as the involvement of the case management judge in these proceedings, and the intimate knowledge he has of all of the issues involved, great deference must be given to the manner in which he has exercised his discretion in this matter. I have not been persuaded that there is any basis upon which I should interfere with the conclusions of the case management judge.

I would grant leave to appeal, however, I would dismiss this appeal. Counsel advised the Court that neither party has sought costs on any of the pre-trial matters which have been dealt with to date in these proceedings. I would, therefore, make no order as

to costs.

Flinn, J.A.

Concurred in:

Glube, C.J.N.S.

Freeman, J.A.

C.A. No. 151066

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

JONES POWER CO. LIMITED and J.A. JONES CONSTRUCTION

Appellants

- and -

MITSUI & CO. (POINT ACONI) LTD.

Respondent

- and -

SARGENT & LUNDY

Third Party

AND BETWEEN:

JONES POWER CO. LIMITED

Appellant

- and -

MITSUI & CO. (POINT ACONI) LIMITED and SARGENT & LUNDY

Respondents

REASONS FOR JUDGMENT BY:

FLINN, J.A.