NOVA SCOTIA COURT OF APPEAL

Citation: *Caterpillar Inc. v. Secunda Marine Services Ltd.*, 2010 NSCA 105

Date: 20101216
Docket: CA 337520
Registry: Halifax

Between:

Caterpillar Inc.

Appellant

v.

Secunda Marine Services Limited, Pucket Machinery Company and Halter Marine Inc.

Respondents

Judge(s):	Saunders, Fichaud, Farrar, JJ.A.
Appeal Heard:	November 30, 2010, in Halifax, Nova Scotia
Held:	Leave is granted, the appeal is allowed and the trial is adjourned with a condition of indemnity per reasons for judgment of Fichaud, J.A.; Saunders and Farrar, JJ.A. concurring.
Counsel:	Thomas M. Macdonald and Justin E. Adams, for the appellant W. Wylie Spicer, Q.C., and Daniel Watt, for the respondent Douglas Walter, for the Trustee in Bankruptcy, not present at hearing

Reasons for judgment:

[1] The trial judge denied an adjournment of the trial. The party seeking the adjournment appealed. After the appeal hearing on November 30, 2010, we gave our judgment that the appeal was allowed and the trial, scheduled to start the following week in the Supreme Court of Nova Scotia, would be adjourned. We said our reasons would follow. These are the reasons.

Background

[2] On February 3, 2001, there was a fire on a ship, the *Thebaud Sea*, owned by Secunda Marine Services Limited. In March 2002, Secunda filed an Originating Notice against Caterpillar Inc, claiming that the fire resulted from Caterpillar's negligence. In May 2004 Secunda served the Originating Notice on Caterpillar, who filed a defence in October 2004. After pretrial procedures, on June 26, 2009 at a date assignment conference, Justice Murphy set the finish date under *Civil Procedure Rule* 4.16(6)(c) as August 31, 2010, and scheduled the ten day trial to start on December 6, 2010 in the Supreme Court of Nova Scotia.

[3] Caterpillar's lead counsel, Mr. Gordon McKee is handling a trial in Ontario. That trial began in February 2010 and is scheduled through February 2011 for evidence and into April 2011 for closing submissions. On September 9, 2010, Caterpillar filed an application to adjourn the Nova Scotia trial. Justice Coughlan, the trial judge, heard the application on September 27, 2010 and, on that day, issued an oral decision denying the adjournment (2010 NSSC 392). Later I will discuss the judge's reasons.

[4] Caterpillar applies for leave to appeal and, if granted, appeals Justice Coughlan's denial of the adjournment.

Standard of Review

[5] This court applies a deferential standard to a trial judge's decision whether to grant or deny an adjournment. In *Abbott v. Sharpe*, 2007 NSCA 6, ¶ 74, Justice Saunders for the court said:

> A trial judge's right to supervise and control the trial includes a wide discretion to grant or refuse adjournments. The exercise of that discretion is owed considerable

> deference on appeal unless it can be shown that the judge erred in principle or that the judge did not exercise his or her discretion judicially. *Webber v. Canada Permanent Trust Co.* (1976), 18 N.S.R. (2d) 631 (N.S.C.A.), and *Moore v. Economical Mutual Insurance Co.* [1999] N.S.J. No. 250 (N.S.C.A.).

In *Moore*, cited in the passage from *Abbott*, Justice Cromwell said:

> 33 The decision to grant or refuse an adjournment is within the discretion of the presiding judge. It is a discretion which the judge is particularly well placed to exercise. An appellate court should not substitute its judgment for that of the presiding judge but should limit its review to determining whether the judge applied a wrong principle or the decision gave rise to an injustice.

The Principles for Adjournment After the Finish Date

[6] Rule 4.20(3) prescribes the three factors that a judge must consider on an application for an adjournment heard, as was this one, after the finish date:

> 4.20 . . .
>
> (3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:
>
> (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
>
> (b) the prejudice to other parties, if they lose the trial dates;
>
> (c) the prejudice to the public, if trials are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.

[7] The judge (¶ 8) correctly cited *Rule* 4.20(3) as stating "the factors a judge must consider in dealing with a request for an adjournment after the finish date". He also (¶ 9) cited Justice Cromwell's statement from *Moore* (¶ 35) that "the interests of justice always require a balancing of interests of the plaintiff and defendant". The judge properly moved to identify and then balance the three factors listed in *Rule* 4.20(3).

First Factor- Prejudice to Caterpillar

[8] The first factor in *Rule* 4.20(3)(a) is the prejudice to Caterpillar if the adjournment is denied. The judge (¶ 12) noted:

> The prejudice to Caterpillar is that it would not have the counsel of its choice at the trial.

This accurately summarizes Caterpillar's prejudice. Caterpillar does not cite any other prejudice.

[9] Still on the first factor, the judge also said (¶ 12) that "Mr. McKee is a partner in a large firm [Blake Cassels & Graydon LLP] with many experienced counsel who would have in excess of two months to prepare for trial". There is nothing to contradict that finding. At the appeal hearing, Caterpillar's counsel acknowledged this is not a case where Caterpillar is deprived of any counsel, or even of any experienced counsel. If the trial were to proceed as scheduled, Caterpillar would be represented by other experienced counsel from Blake Cassels & Graydon. So the prejudice to Caterpillar is mitigated by Mr. McKee's replacement by another experienced counsel in the same firm, having two months notice from the date of Justice Coughlan's denial of the adjournment, to prepare for this ten day trial. Caterpillar's Nova Scotia counsel would remain available to assist with the scheduled trial in December 2010.

[10] Caterpillar submits the judge gave insufficient weight to Caterpillar's prejudice from the replacement of its chosen lead counsel. I disagree that this is a basis to allow the appeal. The judge correctly found "[t]he prejudice to Caterpillar is that it would not have the counsel of its choice at the trial". Once this is acknowledged, this court's limited scope of review to a discretionary ruling does not, in my respectful view, include the mere attribution of more or less weight to one of the factors in the chambers judge's balancing exercise. The chambers judge's differing measure of weight is not the same as an error of principle.

Second Factor - Prejudice to Secunda

[11] The second factor is prejudice to Secunda if the trial is adjourned. It is in his assessment of this prejudice that, in my view, the judge erred in principle. Before coming to that error, I will discuss two of Secunda's submissions that relate to Secunda's prejudice.

[12] Secunda submits that the adjournment will cause two categories of prejudice that are not compensable in costs. First, the delay - according to the chambers judge, about 13 months for new trial dates - will erode witnesses' memories. Second, Secunda has two witnesses, Messrs. Derek John and Ken Miller, who are engineers on ships near Saudi Arabia, and who Secunda says may not be able to attend for the adjourned trial dates.

[13] I disagree with Secunda that these two concerns establish prejudice in the circumstances of this case. As to the first, almost ten years have elapsed already since the fire. After Secunda filed the Originating Notice, over two years passed before Secunda served Caterpillar. Given the sluggish pace so far, there is no basis to assume that a thirteen month delay now would incrementally damage witnesses' memories sufficiently to affect trial fairness. As to the second concern, the judge made no finding that Messrs. John or Miller would be unable to attend. Rather he said "[t]his does cause prejudice to Secunda Marine Services Limited, in that it would have to make arrangements for the witnesses' attendance". That was the only prejudice to Secunda identified by the judge.

[14] Based on the judge's finding, the prejudice to Secunda gels into the logistics of overcoming the inconvenience, which may be significant, of re-arranging the attendance of two far flung witnesses. Here I come to what I believe to be the judge's error in principle. The judge found prejudice to Secunda, in the statement I quoted in the preceding paragraph, then moved immediately to the next point - prejudice to the public under *Rule* 4.20(3)(c). Nowhere did the judge consider whether an indemnity from Caterpillar to Secunda could repair or materially reduce Secunda's prejudice.

[15] As Justice Cromwell said in *Moore*, ¶ 38:

> I also think that the learned trial judge ought to have considered whether any prejudice to the respondent caused by granting the adjournment could have been compensated by the imposition of costs or other terms in granting it."

Rules 4.21(e) and (f) authorize the court, upon an adjournment, to order indemnity from the party who caused an adjournment to a party who suffers prejudice from the adjournment. This confirms in the *Rule* the principle Justice Cromwell stated in *Moore*. Clearly the potential of indemnity under *Rules* 4.21(e) and (f) is relevant to the appraisal of the prejudice under *Rule* 4.20(3). If Secunda's prejudice is

reparable by an indemnity from Caterpillar, then an indemnified Secunda will suffer minimal net prejudice for the purpose of the balance under *Rule* 4.20(3).

[16] By ignoring the potential repair from the indemnity, the judge missed an essential step, and the omission artificially inflated Secunda's prejudice. This is not just a difference in weighing factors for the balancing exercise. It is an error of principle that is reviewable by this court under our standard of review to discretionary rulings.

[17] As a condition of the adjournment, Caterpillar should be ordered to indemnify Secunda, under *Rules* 4.21(e) and (f). Once Secunda is so indemnified, the balancing exercise under *Rule* 4.20(3) is markedly different, and favors an adjournment to avoid Caterpillar's prejudice from the forced replacement of its lead counsel.

Third Factor - Prejudice to the Public

[18] The third factor is prejudice to the public from lost trial time. I will add a few words about the judge's comments on this factor. He said:

> [15] When adjournments are requested shortly before the trial date there is a prejudice to the public, in that court facilities have been booked and there could be problems in scheduling other matters, resulting in wasted time. An adjournment request made after the finish date is on short notice.
>
> [16] The regime of scheduling trial dates established by the Civil Procedure Rules currently in force allows for obtaining trial dates based on the premise that all steps necessary to trial will be completed by the finish date.

[19] I disagree with Caterpillar's suggestion that this factor may only be considered if there is evidence, such as an affidavit of a court staff person, containing a statistical analysis of the docket or deposing that the lateness in the Caterpillar adjournment has prevented another identifiable trial from being slotted into the foregone December dates.

[20] *Rule* 30.02 of the former *Civil Procedure Rules* simply gave the court the broad power to adjourn “upon such terms as it thinks just”. The new *Civil Procedure Rules*, that govern here, replaced this general discretion with the three

principles stated in *Rule* 4.20(3) for adjournment applications after the finish date. That is one reason the *Rule* gives legal significance to the "finish date". The new *Rules* did not incorporate the strict "no late adjournment" approach of some other jurisdictions. Instead, *Rule* 4.20(3)(c) presumes that, at some point, "if trials are frequently adjourned when it is too late to make best use of the time of counsel, the judge, or court staff", there is a prejudice to the public which will figure in the balancing exercise under *Rule* 4.20(3). The *Rule* says "frequently" adjourned. This factor would have more significance, for instance, if Caterpillar sought another adjournment in the future.

Conclusion

[21] Because of the judge's error in principle in his assessment of the prejudice to Secunda, as I have discussed, leave should be granted, the appeal should be allowed and the trial should be adjourned. As a condition of the adjournment and to minimize Secunda's prejudice, under *Rules* 4.21(e) and (f) Caterpillar should, in any event of the cause, indemnify Secunda for Secunda's reasonable costs, assessed on a solicitor and client basis, related to both (1) the adjournment litigation in the Supreme Court and in this court, and (2) any wasted and duplicated effort of preparing twice for the trial, including securing the attendance of witnesses. Those costs, together with reasonable and necessary disbursements, may be calculated by the trial judge if the parties are unable to agree.

Fichaud, J.A.

Concurred in:

Saunders, J.A.

Farrar, J.A.