C.A. No. 121441

NOVA SCOTIA COURT OF APPEAL
Cite as: I.M.P. Group Ltd. v. Teleflex Inc., 1996 NSCA 82

Chipman, Jones and Pugsley, JJ.A.

BETWEEN:		
I. M. P. GROUP LIMITED	Appellant	J. George Byrne and Lloyd J. MacNeil for the Appellant
- and -		
TELEFLEX INCORPORATED	Respondent	Tim Hill and Erin O'Brien Edmonds for the Respondent
		Appeal Heard: February 2, 1996
		Judgment Delivered: April 2, 1996

THE COURT: The appeal and cross-appeal are both dismissed with no costs on either as per reasons for judgment of Chipman, J.A.; Jones and Pugsley, JJ.A, concurring.

CHIPMAN, J.A.:

This appeal and cross-appeal arise from a decision of the Supreme Court in Chambers giving the respondent summary judgment against the appellant for damages to be assessed for monies due under a contract between the parties.

The appellant, based in Halifax, is a manufacturer of aircraft and aircraft components. The respondent is a company incorporated in Delaware and has a plant in Pennsylvania. It manufactures and assembles aircraft components.

In 1987, the appellant entered into discussions and correspondence with the respondent relating to the manufacture by the respondent for the appellant of quadrant assemblies for S-2 Tracker aircraft. At this time the appellant was, to the respondent's knowledge, negotiating with the Brazilian Government to carry out a program for the turbinization of its Tracker aircraft fleet. The respondent had made a number of proposals to the appellant respecting the supply of quadrant assembly units for the program. A proposal made in April, 1989 was responded to by the appellant with purchase order #20640 for 13 quadrant assembly sets at $27,500 each. The shipping schedule provided for two sets a month commencing March, 1990. The order contained a number of conditions on the reverse side to which I will make more detailed reference. Among these conditions was a provision whereby the appellant could order a suspension of the work with a reasonable price adjustment, and a provision whereby the appellant could terminate the order with provision for payment to the supplier for completed and for uncompleted work. These provisions differed from a so-called "Termination/Liability Schedule" in the respondent's proposal which initiated the purchase order. That schedule provided for cancellation charges based on a percentage of the contract price which escalated in amount the later in time that cancellation was effected.

Thereafter, the respondent commenced manufacturing the quadrant assembly units. In September of 1989, the respondent received the first of a series of notices from the appellant requesting postponement of delivery of the units. On the occasion of these requests for delay, the respondent confirmed a willingness to do so subject to renegotiation of the price of the units and/or cancellation costs. The respondent was aware that the request for postponements was made because the

appellant continued to experience difficulties in closing the deal with the Brazilian Government for the turbinization program.

On April 10, 1991, following negotiations with the respondent regarding revised prices for a fewer number of units, the appellant issued an amended purchase order #20640 for 11 quadrant assemblies at a revised unit price of $35,010.40. It seemed to be common ground between counsel, and I am prepared to conclude, that the parties at this point had a revised contract for the supply of 11 quadrant assembly units which incorporated the appellant's conditions relating to termination of the work by the appellant.

The delivery schedule for the 11 units was:

2 units week of 2 December 1991 but not before
2 units week of 17 February 1992 but not before
2 units week of 20 April 1992 but not before
2 units week of 6 July 1992 but not before
3 units week of 19 October 1992 but not before

On July 25, 1991 the appellant wrote the respondent advising that due to a lack of firm commitment from the Brazilian Government, the appellant was obliged to delay the program. The appellant requested the respondent to postpone delivery of units until January, 1993, by which time it hoped to have a program with Brazil. Although the respondent generated some internal memoranda regarding calculation of a termination claim, there was no written response by the respondent to this request.

The next communication from the appellant on March 30, 1992 advised of a further delay in the program and requested postponement of the initial delivery of units until August of 1993: "By then we hope to have a program with Brazil".

There was no response from the respondent until December 16, 1992, when it confirmed to the appellant by fax that further to a telephone conversation it could not accommodate the latest schedule change without a price increase. It had been carrying material in its inventory since July, 1991 without a firm delivery schedule

from the appellant.

On December 22, 1992, the appellant faxed the respondent advising that negotiations with Brazil had reached an impasse and requested that all production of shipments be halted until further notice. On the same day, the respondent faxed the appellant acknowledging receipt of this stop work letter and advising that in the event of termination, its termination liability schedule "attached to our original proposal will apply".

Nothing further appears until April 28, 1993 when the appellant advised the respondent that negotiations with Brazil had resumed and the appellant was hopeful that the program would go forward and intended to advise of progress in 60 days.

The next communication was on January 13, 1994 when the appellant faxed the respondent advising that the Brazilian Air Force had put the turbinization program on hold indefinitely and that the appellant would not be requiring fulfillment of purchase order #20640 "at this time". The letter concluded with an expression of the hope that the appellant would have the respondent's cooperation in working together to develop future opportunities.

On January 27, 1994, the respondent wrote the appellant advising that its letter of January 13 was interpreted as a termination notice of purchase order #20640 and advising that a termination claim would be submitted. It was not until May of 1994 that the respondent sent the appellant termination claims based on work performed to date. The extensive list covered costs of materials, overhead and profit. The claim amounted to $229,576 U.S.

No quadrant assembly units were ever delivered by the respondent to the appellant, nor is there any evidence that any of the material prepared by the respondent was at any time inspected or approved by the appellant.

The respondent commenced action against the appellant in the Supreme

Court on March 27, 1995. Following the delivery of particulars, an amended statement of claim and an amended defence, the respondent made application in Chambers on July 26, 1995 for summary judgment pursuant to Rule 13 of the **Civil Procedure Rules**. The motion was heard on September 26, 1995 and by decision dated December 14, 1995, the Chambers judge granted the respondent's application to the extent of ordering summary judgment against the appellant for damages to be assessed.

In his written decision, the Chambers judge reviewed the law relating to summary judgments and concluded that on the material presented, the respondent had proved its claim clearly. He said:

> I am satisfied Teleflex, by the documents it has introduced, has established its claim. The correspondence between the parties demonstrates Teleflex made an offer to supply I.M.P. with the necessary parts for the turbinization project and I.M.P. responded to that offer by forwarding a purchase order for the manufacturer of these units. The ensuing conduct, particularly by I.M.P., as evidenced by the correspondence with the plaintiff, clearly shows I.M.P. interpreted its relationship with the plaintiff as a contractual one, according to the terms of the purchase order and as subsequently amended by the agreements reflected in the later correspondence between the parties.

The Chambers judge then addressed issues raised by the defence to determine whether the appellant had shown that it had either a **bona fide** defence or a fairly arguable issue to be tried. He reviewed and rejected arguments that a contract had not been formed between the parties, that the respondent had failed to deliver the goods, that the respondent's failure to treat postponement of delivery as notice of termination constituted waiver, that in any event the agreement was conditional on the conclusion between the appellant and the Brazilian Government of a contract, and that the law of Pennsylvania, rather than the law of Nova Scotia, applied with the possibility of leading to a different result.

The appellant appeals from the order for summary judgment and the respondent cross-appeals against the refusal of the Chambers judge to enter judgment

in the Canadian dollar equivalent of $229,576 U.S. as sought by the respondent.

On this appeal, there was no dispute as to the proper principles that apply on an application for summary judgment. They are succinctly put by Macdonald, J.A. in **Bank of Nova Scotia and Simpson (Robert) Eastern Limited v. Dombrowski** (1977), 23 N.S.R. (2d) 532 at p. 537.

> Rule 13 has its antecedents in Order 14 of the **English Supreme Court Rules**. As stated in the *Supreme Court Practice* (1976), Vol. 1, p. 136, the purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly, and if the defendant is unable to set up a *bona fide* defence, or raise an issue against the claim which ought to be tried. ... The defendant is bound to show that he has some reasonable ground of defence to the action.
>
> In *Anglo-Italian Bank v. Wells (and Davies)*, 38 L.T. 197, at p. 199, Jessel, M.R., said that 0.14 'is intended to prevent a man clearly entitled to money from being delayed, where there is no fairly arguable defence to be brought forward'.
>
> (emphasis added)

See also **Carl B. Potter Limited v. Anil Canada Limited et al** (1978), 15 N.S.R. (2d) 408 (N.S.C.A.); **Crown Cork and Seal Canada Inc. v. Cobi Foods Inc.** (1995), 137 N.S.R. (2d) 212 (N.S.C.A.); **Canadian Imperial Bank of Commerce v. Tench** (1990), 97 N.S.R. (2d) 325 (N.S.C.A.).

The question is whether the Chambers judge properly applied the principle on the application before him. The powers of the Chambers judge on an application for summary judgment are wide.

Rule 13.02 provides in part:

> 13.02 On the hearing of an application under rule 13.01, the court may on such terms as it thinks just,
>
> . . .

> (b) grant judgment for the plaintiff on the claim or any part thereof;
>
> . . .
>
> (d) allow the defendant to defend the claim or part thereof, either unconditionally or on terms relating to giving security, time, the mode of trial, or otherwise;
>
> (e) where the defence is to amount only, order an assessment of the amount or reference or accounting to determine the amount;
>
> . . .
>
> (j) award costs;
>
> (k) grant any other order or judgment as it thinks just.

In testing his decision, we are governed by the rule that in the exercise of a discretion, this Court will not interfere unless the Chambers judge has applied wrong principles of law, made a palpable or overriding error of fact or has worked a manifest injustice.

Against this background, the arguments of counsel raise the following issues:

(1) whether the respondent established an unconditional contractual obligation under the law of Nova Scotia on the part of the appellant, and not waived, to pay for the work performed by it to the date of termination;

(2) whether the appellant had raised an arguable defence based on the application of Pennsylvania law which might warrant a different result;

(3) whether the Chambers judge erred in not giving final judgment to the respondent on the application for the equivalent of $229,576 U.S.

UNCONDITIONAL CONTRACTUAL OBLIGATION

In addressing this issue, we cannot answer the question in the affirmative as long as the appellant has raised an issue respecting it which ought to be tried or which amounts to an "arguable" defence.

I have already indicated that on April 10, 1991 there was in place an amended or revised contract between the parties for the delivery of 11 quadrant assembly units at an agreed price. There was a delivery schedule. There was a detailed set of 13 Terms and Conditions on the back of the appellant's purchase order which applied to the transaction.

The appellant contends that the contract was changed by the respondent's acceptance of repeated delays requested by the appellant as a result of delay in the finalization of the Brazilian program. The appellant says that there is a "very arguable" defence that there was a waiver by the respondent of its contractual rights.

Delays were requested by the appellant on July 25, 1991, asking for postponement of delivery until January, 1993, and on March 30, 1992, asking for postponement of delivery until August, 1993. It is said that the respondent's failure to reply indicated that the appellant was entitled to rely on the respondent's "agreement to wait until the main turbinization contract with Brazil was completed before insisting on" performance of purchase order #20640. To this argument the Chambers judge said:

> . . . Nowhere in the defendant's pleadings, or affidavit, is there alleged a specific fact that would amount to, if taken at face value, evidence supporting any suggestion the agreement with Teleflex was to be conditional upon I.M.P.'s success in closing the deal with the Brazilian Government. In fact, nowhere does I.M.P., in the correspondence presented to this court, make such a suggestion or allegation. It only appears as a bald assertion in the statement of defence, and in the affidavit filed on this application.

The appellant says that waiver can be inferred from the facts. It says that the respondent's clear failure to respond to the two requests is enough to give rise to the inference that there is a fairly arguable case for waiver.

Among the Terms and Conditions on the reverse of the purchase order are:

> 5. Time shall be of the essence of this Order . . .
>
> . . .
>
> 9. The Purchaser may, at any time order a suspension of the work, in whole or in part, or make modifications or changes in or additions to the specifications in which event reasonable price adjustment shall be made.

In the absence of any other explanation, the request to postpone delivery can only be taken to amount to an exercise by the appellant of its right to waive time of the essence and order a suspension. In my view, the respondent had no choice but to accept postponements as orders by the appellant of suspension of the work, as it was entitled to do under clause 9 of the purchase order. Only when the appellant finally advised the respondent that it no longer required fulfillment of the order could it, as it did, treat the appellant's action as a termination of the order. Clause 11(a) of the Terms and Conditions provide:

> 11. (a) Notwithstanding anything in this Order contained, the Purchaser may at any time, by giving notice to the Seller terminate this Order (save and except the provisions of this clause and of clause 14 of these Terms and Conditions) as regards all or any part or parts of the work not theretofore completed. Upon such notice being given, the Seller shall cease work (including the manufacturing and/or procuring of materials for the fullfilment of this Order) in accordance with and to the extent specified in such notice. The Purchaser may at any time or from time to time give one or more additional notices with respect to any or all parts of the work which remain to be completed after the giving of any previous notice or notices;

I am unable, in the absence of any material offered by the appellant on the application, to infer an arguable case that there was a waiver by the respondent of its contractual rights.

The appellant also makes the assertion in its affidavit used on the application before the Chambers judge that from 1987 forward the respondent was aware that the purchase of the quadrant assembly units by the appellant was "contingent upon the completion of arrangements with the Brazilian Air Force for the

turbinization project". With respect to that argument, the Chambers judge said:

> In the case at bar, the defendant has also presented this court with nothing more than a bald assertion and nowhere in the correspondence or documents exchanged between the parties, up to the filing of this application, is there any statement by I.M.P., to which this court has been referred, where it asserts the contractual relationship, otherwise appearing between the parties, was conditional on the successful negotiation of the contract with the Brazilian Government. This suggestion arises, in the first instance, in the course of this proceeding.

Although the appellant did not state its argument that the contract was conditional or contingent in terms of the doctrine of frustration, this Court raised the application of that doctrine during argument. Was the successful negotiation of the Brazilian program the underlying basis of the contract between the parties so that its nonoccurrence altered the fundamental nature of the contract? Counsel had not had an opportunity to specifically consider the doctrine of frustration as bearing on the answer to that question. The Court asked for and received supplemental written submissions from counsel on this point. It is clear from these submissions that counsel have now given considerable thought to this issue. These submissions have been of great assistance, and the Court is grateful to counsel for their help.

The first position taken by the respondent on the supplementary submission is that since the doctrine of frustration was not pleaded or argued before the Chambers judge, it ought not to be considered by this Court now.

With respect to the failure to plead frustration, the question arises whether an amendment at this stage, if needed, would prejudice the respondent. An examination of the historical development of the doctrine of frustration shows that it sprang from as many as five concepts, the principal ones being the theory of the implied term and the theory of destruction of the foundation of the contract by the frustrating event. See **Lieberman v. Roseland Theatre Limited** (1946), 1 D.L.R. 342 (N.S.S.C.) per Chisholm, C.J. at pp. 348-9. See also Cheshire and Fifoot, **Law of**

Contract (3rd Edition), pp. 456-460; Cheshire, Fifoot and Furmston, **Law of Contract** (11th Edition), pp. 556-7.

While, as we shall see later, the theory of the implied term as the true basis of the doctrine of frustration has been supplanted by the principle requiring the imposition of a just and reasonable solution demanded in new circumstances, the appellant's submission that the entire contract was contingent upon completion of the Brazilian program, leads irresistibly to thoughts about the implication of terms and the disappearance of the basis of the contract. The label "frustration" was not attached to the appellant's pleadings and submissions, but it springs so readily to mind from the appellant's arguments that the court felt bound to raise it.

This is not an appeal from a decision following a trial. It is an appeal from the granting of a summary judgment motion upon which the Chambers judge was satisfied that the defence had failed to raise a triable issue. In **Sherman v. Giles** (1994), 137 N.S.R. (2d) 52, this Court allowed an appeal from a decision striking out a statement of claim. Roscoe, J.A. said at p. 59:

> The respondent submitted that this court should find that the Statement of Claim discloses no reasonable cause of action, even though the Chambers judge declined to do so. The appellant attempted to argue the question of possible Crown immunity before the Chambers judge, but was told it was not in issue. The main argument of the respondent on this issue, before this court, is that the appellant's claim is faulty because he did not plead malice. However, the appellant sought leave to amend his Statement of Claim to add an allegation of malice, but leave was summarily denied by the Chambers judge without reasons. In **Hunt v. Carey**, supra, Madam Justice Wilson adopted the statement of the British Columbia Court of Appeal in **Minnes v. Minnes** (1962), 39 W.W.R.(N.S.) 112, that:
>
> > . . . So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out.
>
> Although the claim of malicious prosecution is flawed,

> because malice has not been pled, it cannot be said that the claim is beyond a doubt, unsustainable, however improbable that it will succeed.

Indeed, the Chambers judge prior to granting the summary judgment in this case was prepared to allow the appellant amendments to its statement of claim to conform with its arguments raised before him at the hearing.

While the respondent is correct in its submission that a court of appeal ought only to deal with a ground put forward for the first time in very rare circumstances, I am satisfied that it is just that we do so here. As I have said, but for the use of the label "frustration", the appellant has, in substance, raised the issue of the failure of the Brazilian program to materialize as being the subject of an implied term or as destroying the foundation of a contract. The issue is solely a question of law. The mere granting of an amendment, were it needed, to specifically allege the doctrine of frustration does not prejudice the respondent. I am satisfied from reviewing the material put forward before the Chambers judge that the parties had ample opportunity to put forth and, in all probability did put forth, all of the relevant material relating to the formation of the contract and the assumptions on which the parties were proceeding as they negotiated to the conclusion of the amended contract on or about April 10, 1991.

For instance, while the respondent now argues that the court cannot be satisfied <u>beyond doubt</u> that it has all the relevant facts had the doctrine of frustration been pleaded, the fact is that the respondent produced the documentation which I have found to constitute the contract. It had the opportunity to produce and would be expected to produce, on a motion for summary judgment, all relevant information in its position respecting the terms of the contract. The deponent of its affidavit was cross-examined before the Chambers judge.

The appellant, on the other hand, suggests that there should be a trial because there is a need for "all the evidence constituting the contract". It refers to its

demand for particulars of all written and verbal communications alleged by the respondent to constitute the terms of the agreement. By way of answer, the respondent stated:

> There were a number of facts and verbal communications between the parties between April 18, 1989 and the termination of the contract, copies of which written communications will be provided in the list of documents in the normal course.

To this I say that the appellant caused an affidavit to be filed on its behalf and had the fullest opportunity to lead evidence of any verbal terms of the contract which might add to the written instruments. As I have said, there seemed to be common ground between counsel that the revised contract of April 10, 1991 was the ultimate contractual agreement between the parties.

The circumstances surrounding the making of the contract and its termination are covered in great detail in the numerous documents exchanged between the parties over a period of some seven years. They are appended to the affidavits and consist of some 48 documents and additional attached materials. Neither party offered any verbal evidence relating to the formation of the contract. The real issue is one of ascertaining the correct principles of law applicable to these facts.

I will now consider whether there is an arguable ground of defence that this contract was discharged by operation of the doctrine of frustration.

It is not necessary to review at length the history of the development of the doctrine of frustration. It was traced by the Ontario Court of Appeal in the case of **Capital Quality Homes Limited v. Colwyn Construction Limited** (1975), 61 D.L.R. (3d) 385 commencing at p. 389. See also **Cheshire, Fifoot and Furmston, supra**, pp. 554-558; **Davis Contractors Limited v. Fareham U.D.C.** (1956), A.C. 696. The law of frustration from the Canadian perspective is discussed by Fridman, **The Law of Contract** (2nd Edition), Carswell 1986, Ch. 16.

In **Kesmat Investments Inc. v. Industrial Machinery et al** (1985), 70 N.S.R. (2d) 341 Macdonald, J.A. speaking for this Court said at p. 347:

> The law appears clear that before an intervening event or change in circumstances can prematurely determine a contract by operation of the doctrine of frustration such event or change in circumstances must be of so catastrophic or fundamental a nature as to render performance of the contract impossible. I would refer to the following statement of Lord Radcliffe in **Davis Contractors Limited v. Fareham Urban District Council**, [1956] A.C. 696 (H.L.), page 729:
>
> > . . . frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. **Non haec in foedera veni**. It was not this that I promised to do.
> >
> > There is, however, no uncertainty as to the materials upon which the court must proceed. 'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred' (**Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.**, per Lord Wright). In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

The modern view of the doctrine of frustration is not that the court should imply a term that the parties would annul their bargain should circumstances not turn out as anticipated, but rather that the court will impose upon the parties the just and

reasonable solution that such changed circumstances demand. The court will not apply the doctrine unless it considers that to hold the parties to further performance would, in the light of the changed circumstances, alter the fundamental nature of the contract. Thus, where it appears that the continuing availability of some thing or person or state of affairs is essential to the performance of the contract, the contract is discharged at the time, but not before, that person, thing or other essential element disappears or fails to materialize.

As was put in **Davis Contractors, supra**, the question to be asked is whether the circumstances in which the performance is called for are such as to render the thing "radically different" from that which was undertaken by the parties to the contract.

Did the failure of the Brazilian program to materialize, which the parties appeared to have recognized was the case by early 1994, result in something radically different than that which was undertaken in April of 1991? To answer that question, it is necessary to consider the terms of the contract and the then existing circumstances, as well as the subsequent circumstances which are alleged to have rendered the performance of the contract something radically different from that originally undertaken.

The circumstances under which the amended contract was made are clear from the material presented in the affidavits and the **viva voce** testimony before the Chambers judge. Both parties knew that the appellant hoped to put in place a contract with the Government of Brazil. Both parties knew that this had already eluded the appellant for over three years. Whenever the appellant requested delay, the respondent confirmed a willingness to do so subject to renegotiation of price or cancellation costs under the original contract. A reasonable person in the position of the appellant would know that the respondent had, or should have had, in mind the

provision for suspension of the work with reasonable price adjustment.

When the amended contract was entered into, there was no express provision that it was subject to the completion of the Brazilian program. It is difficult indeed to imagine that both parties were not clearly aware of the real possibility of that program never materializing. The contract did, however, give the appellant the right to terminate the work at any time and from time to time with respect to all or any parts of the work. In such cases, a formula was provided for payment for work done to the time of termination.

I have no difficulty in concluding that the appellant's fax dated January 13, 1994 saying that it would not be requiring fulfillment of the purchase order at that time was a termination pursuant to the conditions of the amended contract. The respondent clearly elected to treat it so, and in due course put forth a claim purporting to be the compensation to which it was entitled under clause 11(b) of the Terms and Conditions which provide:

> 11. (b) In the event of any notice being given under the provisions of this clause
>
> > (i) all work completed by the Seller hereunder before the giving of such notice, and all work completed thereafter pursuant to such notice, shall be paid for (subject to acceptance by the Purchaser in accordance with the provisions of this Order) on the basis provided in this Order;
> >
> > (ii) in respect of work not completed before the giving of such notice, and not completed thereafter pursuant to such notice, the Seller shall be entitled to be reimbursed the actual cost to the Seller of such uncompleted work and to receive in addition an amount representing a fair and reasonable profit in respect of the work done thereon. For the purposes of this subdivision (ii) "cost" shall include direct labour costs, indirect labour and/or overhead charges, depreciation of plant and equipment (at rates not in excess of those allowable by the Income Tax Division of the Department of National Revenue in respect of the fiscal period or periods in which the work is performed and the cost of materials and parts

> incurred or procured by the Seller (including materials and parts contracted for and for which the Seller is obligated to make payment) in respect of and properly apportionable to the performance of this Order and not included in the price paid or payable to the Seller in respect of work completed by the Seller before or after the giving of any notice hereunder;
>
> (c) No reimbursement shall be made for materials, whether raw or in the course of manufacture or manufactured, which have been or may be rejected after inspection as not complying with the terms and conditions of this Order and the specifications; and no reimbursement shall be made of expenditures incurred by the Seller in respect of deliveries of which the Seller may be in arrears at the time the said notice is given unless the Seller is so in arrears due to a cause which was beyond the control of the Seller;
>
> (d) In no case shall the Seller be entitled to be reimbursed any amount, which taken together with any amounts paid or due or becoming due to the Seller under this Order, shall exceed the total amount payable for the work to be performed under this Order;
>
> (e) Upon reimbursement being made to the Seller as herein provided, title to the materials, parts, plant, equipment and/or work in process in respect of which such reimbursement is made shall pass to and vest in the Purchaser unless already so vested under any other provision hereof (the Seller hereby agreeing to execute and deliver all requisite instruments by way of further assurance) and such materials, parts, plant, equipment and/or work in process shall be delivered to the order of the Purchaser, but the materials thus taken over will in no case be in excess of what would have been required for performing this Order in full if no notice had been given under the provisions hereof;
>
> (f) The Seller shall have no claim for damages, compensation, loss of profit, allowances or otherwise by reason of or directly or indirectly arising out of any action taken or notice given by the Purchaser under or pursuant to the provisions of this clause except as and to the extent in this clause expressly provided.

Thus, both parties to the contract knew that the Brazilian program was uncertain and both agreed to provisions for cancellation or termination of the work at various times with a formula for compensation. In this setting, can it really be said that the failure of the Brazilian program to materialize altered the fundamental nature of this

contract? I think this question must be answered in the negative. **Cheshire, Fifoot and Furmston, supra**, discusses (p. 564) cases in which, although the parties made provision for changes in circumstances, the actual change was greater than that which appeared to have been contemplated. There are cases where the court may consider the provision to provide a complete solution in that it shows an intention to be bound no matter what changes may occur. In all other cases, however, the question the court must ask itself is the same; are the circumstances in which the performance is called for, such as to render it a thing radically different from that which was undertaken by the contract? The answer here must be no. The parties did, I think clearly, contemplate the possibility of the Brazilian program never materializing. The purchase order provided a formula for cancellation. The appellant could have stipulated no compensation on cancellation and thus thrust the risk of the Brazilian program entirely upon the respondent - if the respondent was willing to take it. The appellant did not do so, but rather elected to give itself an opportunity to cancel but with payment for compensation on the basis which it set out.

In short, the appellant was not saddled with a contract "that was incapable of being performed" because of circumstances making its performance "a thing radically different". The contract in question gave the appellant a right of cancellation at any time, albeit at a price. As circumstances changed, the appellant was in such control that it could terminate the contractual relationship.

The appellant refers to **McKenna and Mitchell v. F.B. McNamee and Co.**, [1827] 25 S.C.R. 311. There, the defendants had been contractors with the Government of British Columbia but the contract had been taken out of their hands. They had hoped to restore the contract, however, and entered into an agreement with the plaintiffs by which the latter were to complete the work and receive 90% of the profits. The defendants were, however, unable to procure the return of the contract.

The plaintiffs thereupon brought action for damages for failure to make the work available and for monies already expended on the work. (The appellant suggests that the monies extended on the work are particularly analogous to the situation here). In affirming a dismissal of the plaintiffs' action, Ritchie, C.J.C. said at p. 314:

> Both parties knew the contract had been cancelled and, no doubt, thought the Government of British Columbia would restore the contract to McNamee. It is quite clear that the plaintiff was fully impressed with the conviction that the retention of the contract would not be persisted in. In this state of the case both parties contracted and both parties were disappointed; the Government of British Columbia refused to give the contract back to McNamee. The fulfilment of the contract on either side was, therefore, prevented, by reason of a known difficulty of which both parties were aware and which both, at the time of entering into the contract, thought could be overcome.
>
> . . .
>
> It is clear that unless the contract was restored by British Columbia there could be no performance on either side. We cannot shut our eyes to the state of facts thus existing and known to both parties, and with reference to which the plaintiff and defendant were negotiating with a view to arriving at a right construction of the agreement into which the parties finally entered. It is our duty to construe the contract with the aid of the surrounding circumstances, influenced in the construction not only by the instrument but also by the circumstances under which, and the objects for which, it was entered into and with reference to the intention of the parties at the time it was made. Reading the contract in the light of the surrounding circumstances I think what both parties contemplated was, an agreement based on the restoration of the contract to McNamee . . .
>
> Therefore, in my opinion, the refusal of British Columbia was a common misfortune, so to speak, excusing both parties from the performance of the contract, and the loss must remain where it falls . . .

This case in distinguishable first because it was obvious that unless the defendant retrieved the contract from the Government of British Columbia, there was absolutely nothing the plaintiffs could do. More important, unlike the present case, the parties did not provide for a cancellation. The court, therefore, imposed the just solution

in the circumstances radically different from those contemplated.

The other cases referred to by the appellant are likewise distinguishable because the contracts being dealt with by the courts there did not, as here, have provisions obviously designed to deal with the allegedly radically different circumstances. Here, the alleged new circumstances were provided for in the agreement in such a way that the foundation of the contract cannot be said to be destroyed. In short, why does the appellant need the doctrine of frustration to terminate the contract when its express terms give it that very power?

As was said by Lord Simon in the House of Lords in **National Carriers Limited v. Panalpina (Northern) Limited**, [1981] A.C. 675, at p. 700:

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

(emphasis added)

I cannot conceive of the circumstances which ultimately developed in January of 1994 as not being contemplated by the parties in 1991 at the time they made their contract. I cannot conceive of these later circumstances, taken with the terms of the contract and the then surrounding circumstances, as rendering the contractual obligations something radically different. The cancellation provisions made the contract responsive to the circumstances existing when the Brazilian program fell through, so that it need not be struck down or discharged. The cancellation provisions removed from consideration the doctrine of frustration as an arguable defence.

There is no reasonable ground of defence available to the appellant based on the doctrine of frustration.

I am satisfied, therefore, that the respondent did establish an unconditional contractual obligation under the law of Nova Scotia on the part of the appellant, which was not waived, to pay for the work performed to the date of termination pursuant to the termination clause in the contract.

APPLICATION OF PENNSYLVANIA LAW

At the argument before the Chambers judge, the appellant requested leave to amend its statement of defence to raise the issue of the proper law of contract as being the law of Pennsylvania. Counsel made reference to Martindale-Hubbell (1994) containing provisions of the **Uniform Commerical Code** effective in Pennsylvania since July 1, 1954. In order to ensure that the appellant was provided with an opportunity to make the fullest answer and defence, the Chambers judge was prepared to grant an amendment to the appellant's pleadings raising the law of Pennsylvania as being applicable to the transaction. In the result, however, the Chambers judge found that there were no facts to support the submission that the law of Pennsylvania might apply and bring about a different result than would be reached by the application of the law of Nova Scotia. He therefore concluded that the appellant had not raised an arguable issue nor a bona fide defence with respect to its allegation of the applicability of foreign law.

Civil Procedure Rule 31.23 provides:

> 31.23 (1) A party who intends to raise an issue concerning the law of a foreign jurisdiction shall give notice of it in his pleadings or otherwise in writing at least ten days before the trial or hearing. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 31. The court's determination shall be treated as a ruling on a question of law.
>
> (2) When the law of a foreign jurisdiction cannot be determined in a proceeding, the court may,
>
> (a) assume that the parties acquiesced in the application of the law of the forum and apply that law;

> or
>
> (b) dismiss the proceeding and reserve the right of any plaintiff to recommence it.

As I have pointed out, the Chambers judge exercised his discretion and granted the appellant all necessary amendments to place in issue the law of Pennsylvania. He found however:

> . . . there was, in the circumstances, no waiver and nothing arising out of the law of Pennsylvania, has been advanced to indicate or to raise a fairly arguable issue that, unlike in Nova Scotia, a binding and enforceable contract had not been concluded between the parties.
>
> To my mind this finding is fatal to the appellant on this issue.

The general rule is that foreign law must be proved. Judicial notice cannot be taken of it. If it is not established before the court that the foreign law is different from the law of the forum, then it is presumed to be the same. In **Archie Colpitts Limited v. Grimmer** (1978), 27 N.S.R. (2d) 341, MacKeigan, C.J.N.S. speaking for this Court said at p. 343:

> We respectfully are of the opinion that the learned judge erred in reaching this conclusion. The law in this province is long established by cases such as **Perfect Fit Garment Co. Ltd. v. Arron et al.** (1925-26), 58 N.S.R. 445, which involved an action in Nova Scotia under a judgment recovered in the Province of Quebec for goods sold. Mr. Justice Mellish delivered judgment on behalf of the Court **in banco** and said at p. 449:
>
> > . . . If the law of Quebec governs this transaction it will as a matter of law I think be assumed to be the same as the law here, as there is nothing to shew that it is different.
>
> Thus unless a party as part of his case raises the foreign law as being different than the Nova Scotia law, in which case he has a burden to establish that fact, it will be presumed that the foreign law is the same as the Nova Scotia law.

I am not satisfied that the Chambers judge erred in finding that the appellant failed to meet the necessary burden.

WHETHER FINAL JUDGMENT SHOULD HAVE BEEN GIVEN TO THE RESPONDENT

In response to the respondent's request for final judgment for the Canadian dollar equivalent of $229,576 US, the Chambers judge said:

> The plaintiff seeks summary judgment in the sum of $229,576 US. In its statement of defence I.M.P. says that there has been a failure of Teleflex to mitigate its damages and puts Teleflex to the strict proof of its damages. In view of the specific allegation of a failure to mitigate and the right of the defendant to have the plaintiff establish the computation of its damages, pursuant to the terms of its contract, the defendant is entitled to a hearing in order to assess the quantum of damages for which it is liable.

In particular, what the respondent had to establish on the motion for summary judgment, if it could, was its costs under the formula set out in clause 11(b-f) of the Terms and Conditions. The only material before the Chambers judge was a number of documents consisting of statements of cost, many of which appeared on their face to include claims not within the scope of the costs allowable under the Terms and Conditions. No **viva voce** evidence was tendered to prove that any work was completed by the respondent.

I am certainly not prepared to conclude that the Chambers judge erred in exercising his discretion not to accept this evidence as proof of the claim. I agree that the costs incurred by the respondent as a result of the appellant's cancellation of the order are something which must be proved at trial. They must be shown to fall within the requirements of clause 11 of the Terms and Conditions. I would therefore dismiss the respondent's cross-appeal.

In the result, I would dismiss both the appeal and the cross-appeal and, because success was divided, I would order no costs on either.

Chipman, J.A.

Concurred in:

Jones, J.A.

Pugsley, J.A.