Cite as: Mosher Limestone Company v. Smith, 1985 NSCA 6

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

MacKeigan, C.J.N.S.; Jones and Macdonald, JJ.A.

B E T W E E N:

MOSHER LIMESTONE COMPANY LIMITED Appellant - and - ALBERT A. SMITH Respondent	)	Edward J. Flinn, Q.C. for the appellant W. Bruce Gillis for the respondent Appeals Heard: October 9, 1984 Judgment Delivered: January 10, 1985

THE COURT: Appeal allowed with costs and trial order for judgment varied; cross-appeal dismissed with costs; per reasons for judgment of MacKeigan, C.J.N.S.; Jones and Macdonald, JJ.A., concurring

MACKEIGAN, C.J.N.S.:

The appellant ("Mosher") is the sole Nova Scotia producer of crushed limestone for agricultural purposes. The respondent Albert Smith operates a limestone spreading service for other farmers in Annapolis County. In March, 1967, the parties agreed in writing as follows:

> "... that the Company agrees that Albert A. Smith the Contractor shall be their sole limestone sales agent in the County of Annapolis, Province of Nova Scotia, and shall be paid a commission by the Company of twenty-five cents (25¢) for each ton of bulk limestone sold in the County of Annapolis by the company.
>
> "The Contractor agrees that he shall set-up and operate a limestone spreading service in the County of Annapolis.
>
> "It is mutually agreed that the Contractor may advertise that he is the sole agent for limestone in the County of Annapolis.
>
> "This agreement shall remain in force as long as the Contractor continues the limestone spreading service in the County of Annapolis."

At issue in this appeal is whether the agreement was in law and fact terminated December 31, 1981, by Mosher's letter to Mr. Smith of June 19, 1981, which stated:

> "Pursuant to an agreement dated some day in March, 1967, attached, we hereby give notice that we intend to terminate this agreement as of December 31, 1981."

This appeal marks the third time these parties and this agreement have come before this Court. On February 27, 1981, the Court, per judgment of Coffin, J.A. ((1981), 45 N.S.R. (2d) 230)), held that Mr. Smith was entitled not only to the sales commission of 25¢ per ton on all limestone sold to others "in Annapolis County", but

also to damages against Mosher for selling limestone to other limestone spreading operators in Annapolis County, in breach of what the Court found to be an implied term in the agreement.

Damages were later assessed by Richard, J., of the Trial Division of the Supreme Court for the years 1975 to 1980 inclusive. This Court, differently constituted, reduced the damages for those years to $12,835.71, per Macdonald, J.A., April 13, 1982, 52 N.S.R. (2d) 397.

Mr. Smith rejected the purported termination of the agreement and in May, 1982, brought action against Mosher in County Court for damages since 1980. Judge Peter Nicholson of the County Court of District Number Three held that the agreement had not been terminated and allowed damages and commission for 1981, 1982 and 1983 totalling $5,436.39, plus pre-judgment interest. This appeal is from that decision challenging the awards for 1982 and 1983 on the ground that the agreement was effectively terminated.

The learned County Court judge in reviewing the purported termination of the agreement acknowledged that most contracts of this type were terminable on reasonable notice. He emphasized that the agreement here contained what he considered a termination clause which barred Mosher from terminating the agreement by merely giving "reasonable" notice. The last sentence of the agreement stated that:

> "This agreement shall remain in force as long as the Contractor continues the limestone spreading service in the County of Annapolis."

Judge Nicholson said (pp.32-33 of the case):

"In my view, the specific terms of the Agreement between the parties, looked at against the background where the Defendant enjoyed a complete monopoly in the limestone business in Nova Scotia, and where the Plaintiff on the faith of the Agreement set up and maintained as well as he could, under the circumstances, the limestone spreading services that he undertook to provide, there was no room for me to rule that one should tack on to the particular contract an important term of providing for a method of termination other than that specifically provided for in the agreement. In the Hillis and Wynn case, 1983, 55 N.S.R. (2d) at 351, the Nova Scotia Court of Appeal observed as follows, per Hart, J.A.:

> 'Many cases have been cited which stand for the proposition that where parties to a distributor's contract on a continuing basis have failed to include an express provision concerning the termination of the distributorship that the ccurt will imply a term requiring reasonable notice to be given to the other party.
>
> 'I can find no fault with this proposition in law, but since, in my opinion, it does not apply in the case before us I see no purpose in reviewing the cases which have been referred to by counsel for the respondent.'

"In my view the intention of the parties is clearly and precisely set out in the terms of the Agreement.

...

"There is no room or reason here to depart from a restrictive interpretation of what the parties committed to writing. Having so found, it follows that there were no questions of fact to put to the Jury as to whether or not the notice was reasonable, because such a notice was not effective to terminate the contract."

I respectfully think the learned judge erred in construing the last sentence of the agreement as a provision for termination. In result, the agreement was held perpetual and non-terminable by Mosher (except for cause), a result surely never intended by the parties or by the courts.

Bowstead on Agency, 14th ed., p.193, best states the basic principles:

> "Termination upon notice. If the contract is a continuing contract, the question may arise whether either party can determine it by giving the other notice and, if so, how much notice is required.[44] If there is an express provision in the contract, this will govern the situation. If there is no express provision, reference must be made to such terms as may be implied. There is, it seems, a presumption that parties to an agency contract do not intend it to be perpetual, especially in the field of mercantile agency contracts.[45] But it is possible for a perpetual contract to exist if the parties, by the words they have used, show that such is their intention.[46] Normally, however, an agency contract which is not for a fixed period can be terminated by either party. Whether or not notice is to be given will depend on the terms to be implied. In the case of a commission contract under which the agent is not obliged to do any work for the principal, nor the principal to provide any work for the agent to do, it appears that, usually, either party can terminate summarily.[47] In some types of contract a term may be implied from the usage of the trade that notice is to be given.[48] The usage may also provide how much notice is to be given."

[44] If either party has broken the contract in such a way as to justify the other in terminating it, no notice will be required: *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch.D. 339.

[45] Carnegie (1969) 85 L.Q.R. 392; *Martin-Baker Aircraft Co. Ltd.* v. *Canadian Flight Equipment Ltd.* [1955] 2 Q.B. 556. See also cases cited in n. 47, *infra*.

[46] See, *e.g. Re Berker Sportcraft Ltd.'s Agreements* (1947) 177 L.T. 420; and in the field of master and servant see *Salt* v. *Power Plant Co. Ltd.* [1936] 3 All E.R. 322 and *McClelland* v. *Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594. In all these cases the contracts made express provision for termination in certain defined circumstances and no term could properly be implied that the parties intended that the contract should be terminated in any other way.

[47] *Alexander* v. *Davis & Co.* (1885) 2 T.L.R. 142; *Henry* v. *Lowson* (1885) 2 T.L.R. 199; *Morton* v. *Michaud* (1892) 8 T.L.R. 253; affirmed at p. 447; *Joynson* v. *Hunt & Son* (1905) 93 L.T. 470; *Levy* v. *Goldhill* [1917] 2 Ch. 297. *Cf. Barrett* v. *Gilmour & Co.* (1901) 17 T.L.R. 292.

[48] *Parker* v. *Ibbetson* (1858) 4 C.B.(N.S.) 346. The usage must not be inconsistent with the express terms; *Joynson* v. *Hunt & Son*, *supra*; *Levy* v. *Goldhill*, *supra*.

See also Halsbury, 4th ed., para. 875.

The principle referred to in Bowstead, supra, that no term may be implied in an agency agreement overriding or supplementing an express provision as to how and when it may be terminated is

affirmed by two judgments of this Court binding us.

In Doyle v. Phoenix Insurance Co. (1893), 25 N.S.R. 436 (N.S.C.A.), Phoenix had appointed Doyle as "general agent" for Nova Scotia and Prince Edward Island, to be remunerated by commission. The agreement provided that "either party may terminate this agreement by giving to the other written notice to that effect and the agent shall not be entitled to any commission after the expiration of such notice." Phoenix gave written notice of termination which put an immediate end to the agency. The plaintiff contended that a reasonable period of notice should be implied.

Townsend, J. (as he then was), for the court stated (pp.438-439):

> "As I read clause 11 the defendant company could terminate the contract at any moment by giving a written notice to that effect. The expression relied upon by the plaintiff, 'after the expiration of such notice,' as indicating some period of time to intervene between the giving of the notice and the date of the termination of the agency, does not support the contention. ... The moment the notice was given the contract was at an end. The 'expiration of such notice' clearly meant the expiration of the time mentioned in such notice, and, as the defendants could make that time instantly, or in six months, the doubts suggested as to its meaning cannot be regarded as grave."

He concluded that the plaintiff had no right of action and set aside a verdict by McDonald, C.J., and a jury which had awarded $1,700.00 damages for failure to give "reasonable time".

In Hillis Oil and Sales Limited v. Wynn's Canada Ltd. (1983), 55 N.S.R. (2d) 351 (N.S.C.A.), a distributor agreement for a

brand of oil provided that the agreement was terminable by either party "by notice in writing". Mr. Justice Hart for the Court rejected the argument that the contract should imply a reasonable period of notice, and after making the comments which were quoted by Judge Nicholson, supra, he said (pp.359-360):

> "I am persuaded by the arguments of counsel for the appellant that we have here a case where the terms of the contract are perfectly clear. I can see no ambiguity relating to the termination provisions, and, in my opinion, the trial judge was in error when he implied an additional agreement between the parties which was not necessary to the interpretation of the written contract between them. Either party had the right to terminate the distributor's agreement without cause at any time they chose, and Wynn's chose February 11, 1980, the date upon which they delivered the notice of termination to Hillis."

Another Canadian case illustrating the same principle is Cooke v. CKOY Limited, [1963] 2 O.R. 257 (High Court - Schatz, J.). The agreement hiring Cooke provided (p.258):

> "Your employment shall be effective from June 1, 1949, and shall continue until terminated in the events and in the manner following:-
>
> [Then followed a list of 'events', e.g., bankruptcy, loss of licence, drop in profits, etc., which specified what notice, if any, could be given.]"

The company attempted to dismiss on six months' notice because of alleged change of circumstances. Mr. Justice Schatz held (pp.267-8) that, although the agreement was of a kind ordinarily terminable on reasonable notice, the principle did not apply because of the "express provisions for termination".

The last sentence of the Mosher-Smith agreement states that "This agreement shall remain in force as long as the Contractor

continues the limestone spreading service ..." I respectfully cannot agree that this is either expressly or impliedly a provision for termination. It merely supplemented Mr. Smith's promise to "set up and operate a limestone spreading service" with an implied promise to "continue" the service. In consideration of these promises, Mosher by the agreement expressly promised to pay Mr. Smith commission and impliedly, so this Court has held, assured Mr. Smith that he would be its sole and exclusive agent for selling and spreading limestone. The sentence thus does not, unlike the provisions in Doyle v. Phoenix, supra, Hillis Oil, supra, or Cooke v. CKOY Limited, supra, prescribe how or when this indefinite agreement may be terminated. It thus cannot override or prevent termination of this agreement "as of December 31, 1981" pursuant to the letter by Mosher to Smith of June 19, 1981.

Once this Court held that the agreement implied that Mosher had to pay Mr. Smith loss of profits of which Smith was deprived by Mosher supplying limestone to other custom spreaders spreading limestone in Annapolis County, Mosher's position became difficult. As the sole producer of limestone it might well not be able legally to refuse to sell limestone to anyone. Yet, as a result of this Court's decision, it had to pay Mr. Smith both commission and loss of profit on every ton it sold to the other spreaders.

No problem had arisen for many years. Mr. Smith had been the only spreader available for farmers who did not do their own spreading. From 1975 to 1979, however, quantities of Mosher's limestone ranging from 644 tons to 1590 tons had been spread in

Annapolis County by spreaders other than Smith, apparently because some spreaders, from Kings County, used modern equipment, a flotation spreader, which was favoured by many farmers because it could be used on marshy land or on wet lands in spring, when Mr. Smith's truck spreaders could not be efficiently used.

Mr. Smith did not himself sell limestone in the legal sense. He hauled limestone in bulk from Mosher's plant at Upper Musquodobit, Halifax County, to Smith's storage shed at Lawrencetown, Annapolis County, where he stocked it on consignment from Mosher. He delivered some limestone to farmers who did their own spreading. Most of it (e.g., over 2,500 tons in 1981, and over 3,500 tons in 1982) he delivered and spread for other farmers. His customers paid Mr. Smith for hauling, delivering and spreading the limestone but paid Mosher for the limestone itself.

Mr. Smith, in a letter to Mosher dated November 12, acknowledged Mosher's letter of termination of June 19, 1981. He pointed out:

> "Over the years I have invested a great deal of money to enable me to provide the service needed to comply with our agreement, which, I believe you will agree, the Courts have deemed valid.
>
> "The equipment used in conjunction with my limestone spreading business is:
>
> Two Spreader trucks, Loaders, Tractor Trailer, Storage Shed and two Tandem Trucks.
>
> ...
>
> "If we go back to the Courts to see if you can terminate our agreement and I win, I will have to up-date some of my equipment to keep up with the extra business I expect

> in the coming years. Being of an age when I no longer enjoy conflicts of any kind, I would much rather come to some mutual agreement.
>
> "With this in mind I would suggest your Company purchase my two Spreader Trucks. These to be sold at a fair market value. The Shed, Loaders and Trucks I can either sell or utilize in other parts of my business."

Mosher did not respond to Smith's offer to sell the spreader trucks. Mr. Smith's business, including the limestone spreading, was operated by his company, Alron Excavating Ltd., which was principally engaged in road construction, etc., with bulldozers, trucks and other heavy equipment.

The agreement before us was in fact and law clearly terminated by the Mosher letter to Smith of June 19, 1981, which was effective December 31, 1981. That notice was, in my opinion, entirely reasonable in form and in length of notice. Any implied term of reasonable notice to terminate was thus not breached.

In reaching this conclusion I have reviewed the nature of the agreement and all the circumstances discussed above. The law seems clear that a simple commission sales agency agreement, such as this, is a mere voluntary arrangement terminable at will with little, if any, notice. See Bowstead, supra.

Thus, in Motion v. Michaud (1892), 8 T.L.R. 253 (Day, J., Q.B.D.), and 447 (C.A., Lord Esher, M.R.), a French wine merchant (Michaud) in June, 1890, entered into an agreement with an English wine merchant (Motion) to receive Michaud's brandies on consignment and to secure orders for them for which Michaud would pay Motion 22% commission. In March, 1891, Michaud summarily terminated the

the agreement without notice. Motion claimed damages emphasizing that as sole agent in England he had spent much time and money setting up a market for the Michaud line.

Mr. Justice Day (8 T.L.R. at p.253) dismissed the claim, holding that there was "no evidence ... of a contract only determinable on notice." The agent was not bound to devote any time or energy to the business on Michaud's behalf. The Court of Appeal (p.447) affirmed this decision, holding that a commission agency such as this might be terminated without notice.

In Joynson v. Hunt and Son (1905), 93 Law Times 470, the defendants were glove manufacturers and the plaintiff a commission agent. By letter the defendants undertook to give the plaintiff 2 1/2% on all orders secured. He secured orders over a period and was duly paid commission. He was dismissed without notice. He claimed he should have received notice or, alternatively, that the custom in the glove trade was to give six months' notice. Lawrence, J., at trial rejected the evidence of custom and dismissed the action.

The Court of Appeal (Collins, M.R., Romer and Matthew, L.JJ.) by three separate but similar judgments dismissed the appeal. The essence was, I think, expressed by Romer, L.J., in saying (p.471):

> "... It was simply a purely voluntary arrangement on the part of principal and agent, neither party being bound to do anything. From the very nature of the arrangement made in writing, it follows that either party may cause it to cease at any time."

In Canada the same principle was applied in McDevitt v. Grolier Society (1916), 30 D.L.R. 471 (Alta. C.A.), to authorize termination without notice of a commission agreement to sell "Books of Knowledge".

Here we have what was basically a very simple arrangement. Smith was in no way under the control or direction of Mosher or under any obligation to sell or spread limestone in any particular way or area or quantity. Indeed, in 1980 he refused to spread any limestone at all to protest Mosher's supplying limestone to other spreaders.

The whole setup is entirely different from special licensing or franchise agreements which have been held to require reasonable notice of termination because time was required for the parties to dispose of goods on hand or to fill contracts already made or to arrange other sources of supply or other employment.

Thus in National Bowling & Billiards Ltd. v. Double Diamond Bowling Supply Ltd. et al. (1961), 27 D.L.R. (2d) 342 (B.C.S.C., Macfarlane, J.), four months' notice was required to terminate an exclusive sales agency to fill contracts, etc.

In Toronto Type Foundry Ltd. et al. v. Miehle-Goss-Dexter Inc., [1969] 2 O.R. 431 (High Court - Stark, J.) a complex agency for special types was summarily terminated by liquidation after sixty years' relations. Damages of $150,000.00 were granted in lieu of notice. Apparently (Stark, J., p.444) one year's notice would have been considered fair having regard to the size of the

distributor's investment and the extent to which its business was dislocated.

In A & K Lick-A-Chick Franchises Limited v. Cordiv Enterprises Limited et al. (1981), 44 N.S.R. (2d) 159 (Richard, J., at pp.172-3), it was held that a franchise agreement of indefinite duration was reasonably terminated on three months' notice.

In Pratt Representatives (Newfoundland) Limited v. Hostess Food Products Limited (1978), 18 Nfld. & P.E.I.R. 412 (Nfld. S.C., Trial Div., Mahoney, J.), a fifteen-year old agreement for exclusive distribution of potato chips was held reasonably terminable on thirty days' notice.

I should refer also to the leading English trial case of Martin-Baker Aircraft Co. Ld. et al. v. Canadian Flight Equipment Ld., [1955] 2 Q.B. 556 (McNair, J.), where a very complex aircraft manufacturing licensing agreement and related sales agency were held to require the equivalent of twelve months' notice: p.581. In dealing with the sales commission agency, McNair, J., said (p.582):

> "... If it were a pure agency agreement and nothing more, there is much to be said for the view that it would be terminable summarily at any moment. But if an agreement of this nature has to be looked at as a whole, and the whole of its contents considered, and if one finds (as one finds here) that the person who is described as sole selling agent has to expend a great deal of time and money and is subject to restriction as to the sale of other persons' products which may be competitive, it seems to me that it is a form of agreement which falls much more closely within the analogy of the strict master and servant cases where admittedly the agreement is terminable not summarily--except in the event of misconduct--but by reasonable notice."

He then referred to Motion v. Michaud, supra, and found the pure agency there involved entirely distinguishable from the complex Martin-Baker agreement.

In the present case the notice of over six months was, in my view, amply reasonable under any view of the agreement in issue. Here Smith had no intricate complex of contracts or arrangements from which he might have had to extricate himself nor was he left on termination with any useless stock or equipment. Indeed, in 1982, the first year after the termination, Smith in fact distributed and spread over 4,000 tons of Mosher's limestone in Annapolis County and, according to his financial claims, did so profitably; in 1981 he had spread only 2,927 tons. I cannot, ex post facto, see any basis for any greater notice than was given or for compensation in lieu of any additional notice.

It follows that the appeal should be allowed and the damages assessed against Mosher for 1982 and 1983 should be deleted. The trial judge's award for 1981 would not be affected--a total of $1,796.69, consisting of commission of $1,102.85, "lost profits" of $343.84 and pre-judgment interest of $350.00. (I have arbitrarily halved the total pre-judgment interest of $700.00 which the trial judge allowed by his order for judgment dated January 30, 1984.)

I turn to the respondent's cross-appeal. The respondent Smith claimed the trial judge erred in law in assessing the profit lost by Mr. Smith in the years 1981-3 as a result of Mosher supplying limestone to other spreaders in Annapolis County. The

learned trial judge assessed the loss as $343.84 for 1981, $1,103.20 for 1982 and $651.35 for 1983 (January 1 to May 31). He added these sums to the lost sales commissions of $3,338.00 for the same period, to arrive at the total damages of $5,436.39 awarded.

In view of my proposed disposition of the appeal and the finding that the agreement was terminated as of December 31, 1981, I need only consider the cross-appeal in respect of the 1981 damages.

The respondent argued that the judge wrongly considered income tax returns and wrongly apportioned Smith's costs and overhead between his spreading business and his other businesses. He argued that the judge wrongly rejected bookkeeping evidence submitted by the respondent, evidence of a type similar to but allegedly more accurate than that accepted by the courts in the previous proceedings.

I cannot say the learned judge erred. He said that he was "not impressed with the potential accuracy" of the rejected evidence and the "figures involved some rather heroic assumptions". He decided that it would be more accurate to examine the income tax returns and financial statements and make his own best estimate of how costs should be apportioned.

The learned judge has not, in my opinion, been shown to have applied any wrong principle of law in assessing the damages for 1981. I am not satisfied that the award took into account

any irrelevant factor or left out of account any material relevant factor or that it was "so inordinately low as to be a wholly erroneous estimate of the damage": Nance v. British Columbia Electric Railway Co. Ltd., [1951] A.C. 601 at p.611.

In result I would allow the appeal with costs and vary the trial order for judgment as indicated above. The cross-appeal of the respondent should be dismissed with costs.

C. J. N. S.

Concurred in:

Jones, J.A.

Macdonald, J.A.