NOVA SCOTIA COURT OF APPEAL

Citation: *L.L. Fisheries Limited v. Atkinson*, 2024 NSCA 32

Date: 20240320
Docket: CA 525589
Registry: Halifax

Between:

L.L. Fisheries Limited, a body corporate

Appellant

v.

Richard S. Atkinson

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	January 19, 2024, in Halifax, Nova Scotia
Subject:	Summary Judgment on Pleadings – CPR 13.03 Question of Law – CPR 12
Summary:	The parties were in litigation arising from an agreement relating to commercial fishing licences. The agreement purported to provide rights in relation to the transfer of the licences and sale of catch. L.L. Fisheries alleged Atkinson was in breach by the sale of catch to a third party. Atkinson pled the agreement was not enforceable because it was prohibited by the policy and regulations of the Department of Fisheries and Oceans. He counterclaimed for losses arising from the alleged breach of a vessel lease. L.L. Fisheries brought motions to strike the counterclaim and answer a question of law as to whether the agreement was in breach of DFO rules. The motions judge agreed the counterclaim was deficient in relation to the cause of action pled but did not strike it as another cause of action could be inferred. He found the agreement was of the type prohibited by DFO on the *Rule 12* motion.

Issues: (1) Should the counterclaim have been struck?
(2) Should the *Rule 12* motion have been considered?

Result: The appeal was allowed with respect to both issues. The judge erred in inferring a cause of action which had not been pled. The counterclaim should have been struck. Atkinson was given leave to file an amended counterclaim within 30 days. The interpretation of the agreement was a question of mixed fact and law which should not be dealt with as a question of law on a *Rule 12* motion. The judge said the agreement was a standard form contract, the interpretation of which is a question of law. There was no basis for this conclusion.

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Judges:	Wood, C.J.N.S., Fichaud and Derrick, JJ.A.
Appeal Heard:	January 19, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Wood, C.J.N.S.; Fichaud and Derrick, JJ.A. concurring
Counsel:	Scott R. Campbell, for the appellant Andrew S. Nickerson, K.C., for the respondent

Reasons for judgment:

[1] L.L. Fisheries Limited ("L.L. Fisheries") and Richard S. Atkinson have been in a business relationship since 2005 involving lobster and herring licences ("the licences"). The parties entered into an agreement in November 2005 whereby Mr. Atkinson agreed the licences, which were issued in his name, were held in trust for the sole benefit of the owner of L.L. Fisheries.

[2] In April 2014, the parties entered into a new agreement (the "2014 agreement") with the following recitals:

> WHEREAS the parties signed an Agreement dated November 23, 2005 (hereinafter referred to as "previous agreement") regarding use and ownership of Lobster License #111398 and Herring License #105258; (hereinafter referred to as "the license package").
>
> AND WHEREAS the parties acknowledge that the License package was purchased exclusively with the funds of the Company and the license package was, up to this date, owned exclusively by the Company;
>
> AND WHEREAS as a result of policy requirements from DFO the Company may no longer exert control or influence over the Fisherman's requests for transfer of licenses, the parties agree that that previous agreement is no longer binding and execute this agreement below in substitution;

[3] In addition, the 2014 agreement included the following clauses:

> 1. The Company hereby acknowledges that the Fisherman is no longer subject to its control and influence with respect to the License package as stated in the previous agreement.
>
> 2. In the event the license package or any component thereof is ever sold, disposed of or rendered invalid or unusable or cancelled as a result of any actions or inactions of the Fisherman, the Fisherman agrees to pay the Company the full market value of the license package or the component affected at that time.
>
> 3. Until such time as the license is sold or dealt with as noted in clause 2 above the fisherman agrees to sell all product caught with the license package to the Company or to a designated buyer agreed upon by both Parties at Fair Market Value.

[4] On April 22, 2022, L.L. Fisheries commenced an action against Mr. Atkinson alleging breach of the 2014 agreement as a result of the sale of product caught pursuant to the licences to a third party. The Statement of Claim also

requested a declaration of the rights of L.L. Fisheries in the event of any sale of the licences by Mr. Atkinson.

[5] Mr. Atkinson defended on the basis the 2014 agreement was not enforceable because it was a "Controlling Agreement" which contravened the policy and associated regulations under the *Fisheries Act*, R.S.C., c. F-14 enacted by the Department of Fisheries and Oceans ("DFO").

[6] Mr. Atkinson counterclaimed for damages as a result of interference with economic relations. He alleged his lease of a fishing vessel from a company associated with L.L. Fisheries was breached and he was unable to find a suitable replacement prior to commencement of the fishing season.

[7] L.L. Fisheries brought a motion which was heard by Justice Kevin Coady of the Supreme Court of Nova Scotia on March 9, 2023. The relief sought was:

1. Setting aside Mr. Atkinson's defence and counterclaim pursuant to *Civil Procedure Rule* 13.03.

2. An order, pursuant to *Civil Procedure Rule* 12, declaring the 2014 agreement to be enforceable.

[8] On July 7, 2023, the motion judge released a written decision (2023 NSSC 223). With respect to the request for summary judgment on pleadings pursuant to *Rule* 13.03, he said:

> [17] The Defendant's counterclaim does not disclose a sustainable cause of action in economic interference because the Plaintiff did not directly commit an unlawful act against a party that caused the Defendant to suffer harm indirectly. I grant the Plaintiff's motion for summary judgment on the claim for interference with economic relations.
>
> [18] Additionally, another cause of action that could arise from the Defendant's counterclaim is an inducement of contract breach. The essential elements of this tort are:
>
> 1. The existence of a contract between the Plaintiff and a co-contractor;
>
> 2. The knowledge on the part of the Defendant that the contract exists; and,
>
> 3. The intention on the part of the Defendant to cause a breach of that contract.
>
> …

> [21] This statement provides a factual basis that would permit an inference that there was a leasing agreement, and that the Plaintiff's actions caused the associate company (the third party) to end the agreement. The Defendant did not specifically plead inducing breach of contract. However, he does clearly state that the breach of the leases impacted his ability to fish, and therefore his income, and seeks damages for the seizure of the boat and fishing gear and for lost income.
>
> …
>
> [23] The Plaintiffs motion for summary judgment on the pleadings is allowed regarding the economic harm or interference pleading. Inducing breach of contract may still go forward. It is not certain to fail.

[9] *Civil Procedure Rule* 12 allows a court to determine a question of law in certain circumstances. With respect to this motion, the judge identified the questions to be answered as follows:

> [30] For these reasons, it is appropriate to frame the questions as:
>
> 1. What constitutes a controlling agreement pursuant to the regulations?
>
> 2. Does the 2014 agreement, on its face, fit into the definition of "controlling agreement" thereby violating the regulations?
>
> I conclude that determining the status of "controlling agreement" in the DFO regulations is a pure legal question and is one that Rule 12 can address.

[10] The motion judge's conclusion with respect to the *Rule 12* motion was:

> [43] It is notable that DFO chose to define "controlling agreements" as ones that "control or influence" the licence holders decision to sell or transfer the licence. Clause 2 of the 2014 agreement does not prohibit the Defendant from transferring a licence, but stipulates that if the Defendant does so he will provide the Plaintiff with its full market value. Though the Plaintiff correctly notes that the 2014 agreement does not give the Plaintiff control over the Defendant's ability to sell or transfer the licence, it cannot be said that the 2014 agreement would not influence the Defendant's decision to transfer his licence.
>
> [44] The Plaintiff characterizes the 2014 agreement as a "private arrangement regarding financing and debt", akin to a security agreement. To interpret the 2014 agreement as simply a private financial agreement would not be in keeping with the purposes of the regulations which are aimed explicitly at preventing contracts that allow exertion of control or influence over the licence holder. It is noteworthy that the 2014 agreement replaced the 2005 agreement to achieve compliance with the regulations.

> [45] Regardless of the determination of clause 3 of the 2014 agreement (catch), it is clear that clause 2 violates the regulations, making the 2014 agreement a "controlling agreement". It is well established that no person may enter into a legal binding contract under which they assume an obligation to do something that is prohibited by law, as for instance where the performance of the contract would contravene a statutory prohibition.
>
> …
>
> [47] On the Rule 12 motion I make the following finding: The regulations enshrine the policy of DFO and prohibit controlling agreements as they are defined in the policy. Clause 2 of the 2014 agreement, stipulating that the Defendant must provide the Plaintiff with the full market value of the licence if he transfers it, is a controlling clause that violates the prohibition against controlling agreements.

[11] L.L. Fisheries appeals, alleging the motion judge erred by refusing to set aside the counterclaim in its entirety and by concluding that clause 2 of the 2014 agreement violated the DFO prohibition on Controlling Agreements.

[12] For the reasons which follow, I would allow the appeal with respect to the *Rule* 13.03 decision and strike out the counterclaim in its entirety. However, I would give permission to Mr. Atkinson to file an amended counterclaim within 30 days. With respect to the *Rule* 12 motion, I would allow the appeal and set aside the decision on the basis the motion judge erred by considering the questions when the pre-conditions to a *Rule* 12 motion did not exist.

Analysis

Leave to Appeal

[13] This is an interlocutory appeal and requires leave. The respondent did not contest the granting of leave. I am satisfied an arguable issue exists and would grant leave to appeal.

Summary Judgment on Pleadings

[14] *Civil Procedure Rule* 13.03(1)(a) requires a judge to set aside a pleading that discloses no cause of action or basis for a defence. The counterclaim of Mr. Atkinson alleged interference with economic relations by L.L. Fisheries. The motion judge concluded the elements of this tort had not been pled and the pleading should be set aside. Mr. Atkinson does not challenge that conclusion. Even though the counterclaim did not reference the tort of inducing breach of

contract, the motion judge found this cause of action could be inferred from the facts in the pleading.

[15] On the motion, Mr. Atkinson did not argue the counterclaim encompassed inducing breach of contract. He submitted the solution to L.L. Fisheries' concerns about the scarcity of information in the counterclaim was a demand for particulars or further amendment. This position was repeated in his factum:

> 27. At the time the pleading was drafted it was not clear exactly which company or entity was the lessor of the relevant vessel. We submit that is a matter to be addressed in further amendments or a demand for particulars and is not something that makes the claim "certain to fail". Nor does this consist of reliance on "the possibility that new facts may turn up". The facts exist and are pleaded and can be expanded on in amendments or particulars.

[16] The L.L. Fisheries' factum outlines the course of action which it says the motion judge should have undertaken:

> 52. While the Appellant maintains that the Amended Counterclaim should have been dismissed in its entirety, the Appellant also recognizes that amendments will generally be permitted unless there is evidence of bad faith or irreparable prejudice. Given the Respondent's stated intention to seek leave to amend, the appropriate course of action would have been to allow this process to unfold rather than 'reading in' a cause of action. A potential claim for inducing breach of contract was not raised with the parties at the hearing, nor were they invited to provide further submissions.

[17] I agree with this submission and would set aside the counterclaim of Mr. Atkinson in its entirety. This Court has the jurisdiction to permit the amendment of pleadings (*Jeffrey v. Naugler*, 2006 NSCA 117), and I would do so in the circumstances of this case. Mr. Atkinson shall have 30 days from the date of this decision to file an amended counterclaim if he wishes to do so. L.L. Fisheries will have the opportunity to file a defence to the counterclaim within the time limits specified by the *Civil Procedure Rules*.

Rule 12 – Question of Law

[18] *Civil Procedure Rule* 12.01 describes the ambit of a motion for the preliminary determination of a question of law:

> 12.01 Scope of Rule 12

> (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
>
> (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.

[19] This Court described the nature of a motion under *Rule* 12 in *Mahoney v. Cumis Life Insurance Company*, 2011 NSCA 31:

> [16] The new *Rule* 12 does not require an agreed statement for the determination of a preliminary question of law. This is clear from *Rule* 12.01(1) - a party may "in limited circumstances, seek the determination of a question of law ... even though the parties disagree about the facts relevant to the question".
>
> [17] *Rule* 12.02 recites those "limited circumstances": (a) "the facts necessary to determine the question can be found without the trial or hearing", (b) the determination will reduce the length or expense of the proceeding, and (c) "no facts to be found in order to answer the question will remain in issue after the determination". Conditions (a) and (c) contemplate that the Chambers judge, on a *Rule* 12 motion, may find facts, but only (1) the facts necessary to determine the pure legal question before him and (2) if all those facts, necessary to decide the pure legal question, can be determined without a trial.
>
> [18] So the first step with *Rule* 12 is to identify the pure legal question to be determined. *Rule* 12.01(1) permits a motion for determination of "a question of law". *Rule* 12.03(1) permits the judge either to determine "the question of law" or appoint a time to determine that question of law. The *Rule* does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under *Rule* 12.02(a) as I have discussed.
>
> [19] The second step is to identify all the facts that are necessary to determine that question of pure law. Nothing in *Rule* 12 permits a judge to decide facts that are unnecessary to determine the question of pure law in the motion. A party who wishes an assessment of evidence on other matters, leading to a judgment by interlocutory ruling, should make or join a summary judgment motion under *Rule* 13.04 ("Summary judgment on evidence").
>
> [20] The third step under *Rule* 12 is to decide whether all those facts necessary to determine the issue of pure law in the motion "can be found without the trial or hearing".
>
> [21] This third step generates the question - What does *Rule* 12.02(a) mean that those facts "can be found without the trial or hearing"? In my view, it does not mean that a judge under *Rule* 12 can assess evidence in the same fashion as in a motion for summary judgment on the evidence under *Rule* 13.04. Under *Rule* 13.04, a responding party must "put his best foot forward" with evidence or risk a determination that there is no genuine issue of material fact requiring trial, or that its claim or defence has no real chance of

> success, and a consequent dismissal of the action or defence: *Aylward v. Dalhousie University*, 2011 NSCA 20, para. 11, affirming *Dalhousie University v. Aylward*, 2010 NSSC 65, paras. 20-25; *Ristow v. National Bank Financial Ltd.*, 2010 NSCA 79, paras. 5-9; *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, para. 173. *Rule* 12 does not give the chambers judge that power. A judge under *Rule* 12 may not determine contested facts that might hinge on testimony at a trial. That is the point of *Rule* 12.02(a)'s condition that "the facts...can be found without the trial".

[20] The conclusion that questions of mixed fact and law cannot be determined under *Rule* 12 was reiterated in *T.E. Gordon Home Inspections Inc. v. Smith*, 2021 NSCA 13 which involved interpretation of a limitation clause in a home inspection agreement.

[21] The interpretation of a contract is generally a question of mixed fact and law. As noted in *T.E. Gordon*:

> [49] Historically, the common law treated interpretation to determine the legal rights of the parties under a written contract as a pure question of law. In *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, the Supreme Court of Canada rejected that historical approach. Rothstein J., for the Court, explained:
>
> > [49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).
> >
> > [50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. **Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.**
> >
> > [Emphasis in original]
>
> [50] Appeal courts must defer to a trial court's resolution of questions of mixed fact and law. The jurisdiction to interfere exists in cases of extricable legal error or if the trial judge committed clear and material error.

[22] This means questions requiring contractual interpretation will normally not be amenable to a *Rule* 12 determination. There is, however, an exception if the contract is shown to be a standard form contract. This was also discussed in *T.E. Gordon*:

> [51] However, contractual interpretation may not always be a question of mixed fact and law. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 clarified that sometimes interpretation of standard form contracts, such as insurance policies, is a question of law. Wagner J., as he then was, for the majority concluded as follows:
>
> > [24] I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.
>
> [52] This begs the question: what is a standard form contract? The reasons penned by Wagner J. offer some insight. First, he cited with approval Professor John D McCamus's description of a standard form contract:
>
> > [25] The statements made in *Sattva* on the standard of review of contractual interpretation must be considered in their full context. That case concerned a complex commercial agreement between two sophisticated parties — not a standard form contract. Professor John D. McCamus has described standard form contracts as follows:
> >
> > > ... the document put forward will typically constitute a standard printed form that the party proffering the document invariably uses when entering transactions of this kind. The form will often be offered on a "take it or leave it" basis. In the typical case, the other party, then, will have no choice but either to agree to the terms of the standard form or to decline to enter the transaction altogether. Standard form agreements are a pervasive and indispensable feature of modern commercial life. It is simply not feasible to negotiate, in any meaningful sense, the terms of many of the transactions entered into in the course of daily life.
> >
> > (*The Law of Contracts* (2nd ed. 2012), at p. 185)

[23] Whether the 2014 agreement includes provisions which would bring it within the definition of Controlling Agreement under the DFO policy, requires interpretation of those provisions. This is a question of mixed fact and law which would preclude a motion under *Rule* 12.

[24] Before the motion judge, L.L. Fisheries said *T.E. Gordon* could be distinguished because they were not asking the court to decide the enforceability of the 2014 agreement, only its "proper *legal characterization*". For this reason they argued the motion involved a pure question of law and was permissible under *Rule 12*. Mr. Atkinson's position was the motion should not be dealt with because the factual context of the 2014 agreement had to be considered.

[25] The motion judge recognized that interpreting a contract involved questions of mixed fact and law. In his decision he identified, and relied on, the exception for standard form contracts:

> [31] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court stated that contractual determination is generally a question of mixed fact and law and that contractual interpretation does not fit within the definition of a pure question of law. Nonetheless, in situations involving standard form contracts, it is more appropriately classified as a question of law in most circumstances.
>
> [32] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, the Court recognized the need for consistent precedent in interpreting standard form contracts as the interpretation could affect many people who are subject to such standard form contracts. The majority stated at paragraph 39:
>
> > [39] These teachings, however, do not necessarily apply in cases involving standard form contracts, where a review on the standard of correctness may be necessary for appellate courts to fulfill their functions. Standard form contracts are "highly specialized contracts that are sold widely to customers without negotiation of terms": *MacDonald*, at para. 37. In some cases, a single company, such as a bank or a telephone service provider, may use its own standard form contract with all of its customers: *Monk*, at para. 23. In others, a standard form agreement may be common throughout an entire industry: *Precision Plating*, at para. 28. Either way, the interpretation of the standard form contract could affect many people, because "precedent is more likely to be controlling" in the interpretation of such contracts: Hall, at p. 131. It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — "ensuring the consistency of the law" (*Sattva*, at para. 51) — is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.
>
> I have reviewed the 2014 agreement and I conclude it is a standard form of agreement in the inshore fishing industry.

[26] The difficulty with this analysis is neither party suggested the 2014 agreement was a standard form contract nor was there any evidence in the record which would permit such a finding.

[27] The panel raised this issue with the parties and requested supplemental submissions. The submission on behalf of L.L. Fisheries said, in part:

> As submitted during the hearing on January 19, 2024, the Appellant agrees that the Motion Judge's decision to answer the Rule 12 Question is discretionary in nature. In which case, it can be reviewed by his Honourable Court for error of law, error in principle, or patent injustice.
>
> Given that the Appellant sought an answer to the Rule 12 Question in the Court below, it takes no position as to whether the Motion Judge committed a reviewable error in this regard. That said, and even though this issue was not raised as a ground of appeal by either party, the Appellant agrees that this Court has broad authority to conclude that the Rule 12 Question is best left for trial or some other procedural vehicle for determination.
>
> Should that be the panel's decision, the Appellant submits that the appropriate relief would be to: (a) allow the appeal on that basis; and (b) set aside the Motion Judge's answer to the Rule 12 Question, without any comment on its merits.

[28] On behalf of Mr. Atkinson, counsel candidly acknowledged as follows:

> In the case before the Court, there is no evidence that the agreement in question was on a preprinted form. On its face, it appears not to be. Secondly, there was nothing in the Agreed Statement of Facts that establishes the form of agreement as one widely used in the Nova Scotia Fishing industry.
>
> The lack of it being established that the agreement before the Court was widely used, supports the position that there can be no precedential value.
>
> On this point alone, I submit that the Motion Judge was wrong in law to apply Rule 12, and I was wrong in not rais[ing] this issue on appeal.
>
> Upon reflection, the proper interpretation of the agreement before the Court could entail many factors. A partial list might be:
>
> - What was said by either the Appellant or Mr. Harding, the solicitor who drafted the agreement, to the Respondent about the agreement?
> - Do the circumstances raise the principle of *contra proferentem*?
> - What was the Appellant's state of knowledge as to the DFO policies?
> - What was the Respondent's state of knowledge as to the DFO policies?
> - Are there facts that could lead a court to decline to enforce it as being unconscionable?

> I acknowledge that it would be in my client's interest for the decision under appeal to be upheld, but, given the law as I now understand it, I am unable [to] find a persuasive basis to advocate for that.
>
> In conclusion, I submit that it is open for the Court to decide that an appropriate disposition would be to set aside the Motion Judge's ruling, and send the entire matter back to the Supreme Court to follow the normal course of litigation, including the amendment of pleadings, disclosure and oral discovery examinations.

[29] I am satisfied there was no evidentiary basis for the motion judge to conclude a standard form contract existed. As a result, interpretation of the 2014 agreement was one of mixed fact and law and not determinable under *Rule* 12. I would allow the appeal and set aside the motion judge's decision.

[30] The issue of whether the 2014 agreement is in violation of the DFO policy concerning Controlling Agreements is obviously central to the litigation. It is understandable why counsel would have wanted an early determination of that question, if possible. Unfortunately, the avenue of a *Rule* 12 motion was not available. Although the motion judge erred in attempting to answer the questions, counsel also bear some responsibility for not properly assessing the applicability of *Rule 12*. In the circumstances, I would order that both parties bear their own costs.

Disposition

[31] I would allow the appeal without costs. Mr. Atkinson will have thirty days from the date of this decision to file an amended counterclaim.

Wood, C.J.N.S.

Concurred in:

Fichaud, J.A.

Derrick, J.A.