**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Business Depot Ltd. v. 2502731 Nova Scotia Ltd., 2004 NSCA 123

**Date:** 20041013
**Docket:** CA 217161
**Registry:** Halifax

**Between:**

The Business Depot Limited (Staples)

Appellant

v.

2502731 Nova Scotia Limited and Plazacorp Retail Properties Ltd.

Respondent

| | |
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| **Judge(s):** | Bateman, Saunders, Fichaud, JJ.A. |
| **Appeal Heard:** | October 12, 2004, in Halifax, Nova Scotia |
| **Held:** | Leave to appeal is granted, but the appeal is dismissed with costs. |
| **Counsel:** | John Shanks and Tara Humphry, articled clerk, for the appellant<br>D. Timothy Gabriel, for the respondent 2502731 Nova Scotia Limited<br>John Shanks and Tara Humphry, articled clerk, for the respondent Plazacorp Rental Property Ltd. |

Reasons for judgment:

[1] Justice Richard Coughlan ordered The Business Depot Limited (Staples) ("Staples") to produce information during the documentary discovery in this law suit. Staples is not a party to the principal lawsuit. Staples applies for leave to appeal and, if granted, appeals from Justice Coughlan's order.

## ***Background***

[2] The respondent 2502731 Nova Scotia Ltd. ("Mailboxes") is a tenant in the Woodlawn Mall. Mailboxes' business includes photocopying and printing. The respondent Plazacorp Retail Properties Ltd. ("Plazacorp") is the landlord. Their lease included an exclusivity clause, by which Plazacorp promised not to lease premises in the mall to Mailboxes' competitors, as defined in that exclusivity clause. The clause states that Plazacorp shall enforce the exclusivity covenant if "other principal business operations or a significant portion of their operations be distinctly similar in mix and style" to Mailboxes product or service.

[3] Plazacorp leased premises in the mall to Staples. Mailboxes claims that Staples is a competitor as defined by the exclusivity clause, and that Plazacorp breached the clause. Plazacorp's defence denies this. To determine the issues between Mailboxes and Plazacorp, the trial judge will need to decide whether Staples provides primary services of a nature specified in the exclusivity clause, and whether a significant portion of Staples' business operations are distinctly similar in mix and style to Mailboxes' products or services.

[4] Mailboxes applied for an order that Staples produce business information which Mailboxes considered necessary to establish its pleaded position. Associate Chief Justice MacDonald on August 7, 2003 ordered that Staples produce that information. That order was not appealed. Staples did not produce that information by the date stated in the order. Mailboxes filed an application for contempt which was to be heard on September 24, 2003. On September 23, 2003 Staples provided information to counsel for Mailboxes and, as a result, the contempt application was adjourned without day.

[5] In November, 2003 Mailboxes applied for an order requiring Staples to produce additional information. This second application was determined by the order of Justice Coughlan, under appeal.

[6] Justice Coughlan's order of March 1, 2004 states:

> 1. The Business Depot Limited (Staples) shall provide to counsel for the Plaintiffs, all information in its possession relevant to the derivation of net revenue with respect to its gross copying and printing sales (which gross sales figures were provided under cover of Staples' counsel's letter of September 23, 2003, a copy of which gross sales information is attached as Schedule A) including without limiting the generality of the foregoing:
>
> a. the number of copies generating the copying sales referred to;
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> b. the monthly lease payments or other charges or payments with respect to the copying and/or printing machines used;
>
> c. full details of the "click" or warranty charges applicable to the copying machines;
>
> d. the number of printing sales which generated the figure provided.

## *Issues*

[7] Staples makes two arguments. It says that the information ordered is not relevant to the Mailboxes - Plazacorp lawsuit. Staples also says that an order for production should not require Staples to create or compile information in a form different than the documents which Staples now possesses.

[8] Plazacorp takes no active position in this appeal. But Staples' counsel on this appeal is also Plazacorp's counsel in the defence of Mailboxes' action.

## *Standard of Review*

[9] This Court will only interfere with a discretionary order, such as this one, if the Chambers justice applied a wrong principle of law or if failure to interfere would result in patent injustice: *Eastern Canadian Coal Gas Venture Ltd. v. Cape*

*Breton Development Corp.* (1995), 141 N.S.R. (2d) 180 (C.A.) at para. 17-20; *Dowling v. Securicor Canada Ltd.*, 2003 NSCA 69, at para. 7.

***First Issue - Relevance***

[10] Mailboxes brought this application under *Civil Procedure Rule* 20.06:

> (1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.
>
> (2) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a trial or hearing, the court may, on notice to the person and any opposing party, order the production and inspection thereof or the preparation of a certified copy that may be used in lieu of the original.
>
> (3) An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

[11] The documents sought by the application from Staples would be compellable at the trial by subpoena under *Rule* 20.06(2). There is no injury to the public interest within *Rule* 20.06(3).

[12] The questions are whether the documents "relate" to the pleadings under *Rule* 20.06(1) and are necessary to "dispose fairly" of the proceeding under *Rule* 20.06(3). Relevant evidence, if accepted by the trial judge, is the raw material necessary to dispose fairly of the issues. So both questions focus on relevance.

[13] The *Civil Procedure Rules* respecting pre-trial disclosure, including the *Rule* governing production of documents, receive a broad and liberal interpretation to encourage pre-trial disclosure, avoid surprise, and ensure that the parties at trial have the relevant information to contest the issues which are joined in the pleadings: *Eastern Canadian Coal Gas Venture* at paras. 12-13, 23; *Dowling* at paras. 8-12; *Upham v. You* (1986), 73 N.S.R. (2d) 73 (C.A.) at paras. 25-30.

[14] Staples submits that the documents are not relevant and would not be necessary to dispose fairly of the proceeding. Staples' copying and printing business is less than five percent of its gross sales at this location. Staples says this is too small to trigger the "significance" standard in the exclusivity clause, and therefore Mailboxes cannot prove that Plazacorp has breached its lease. Mailboxes responds that Staples' direct gross profit from copying and printing may not disclose the true significance of that business, because Staples may use the copying and printing as a loss leader to attract other business. Further Mailboxes says that Staples' business is "significant" under the exclusivity clause because of its powerful impact on Mailboxes, regardless of its minor role in Staples' business mix.

[15] The contests on those items are for trial. They are not to be determined by a Chambers justice on an application for production or by this Court on appeal from that interlocutory order.

[16] Justice Coughlan considered the appropriate principles from *Upham v. You* which govern an application for production. The documents are relevant to the issues joined in Mailboxes' and Plazacorp's pleadings.

***Second Issue - "Creation" of Documents***

[17] Staples says that it does not possess the information requested in documentary form. Staples suggests that it does not distinguish between its copies and print services for sale and for internal store purposes. Therefore the retrieval of the ordered information "would require efforts of recording and compilation" and require Staples "to actively create documents", functions which are outside *Rule* 20.06.

[18] Justice Coughlan commented as follows on this point:

> [7] MacDonald, A.C.J., by order dated August 7, 2003, ordered that The Business Depot Ltd. (Staples) provide statements with respect to net revenue derived from printing and copying services. Staples says it does not have the information of the net revenue derived from the printing and copying services at the store in question. I find such a fact incredible. ...

> Even if Staples does not keep tallies of copies made at each store, it must have information as to the number of copies it sells each month at a store, if for no other reason than HST reporting. There must be a computerized record kept with each sale. ...
>
> In his affidavit, Brian Jackman states this information is contained only in the Markham, Ontario head office, and that it is confidential. ...
>
> ... In his discovery, an excerpt of which is attached to Malcolm George St. Croix's affidavit, Mr. Jackman says he only looks at the click charge once in a blue moon; however, the click charge is available as is the monthly lease or other charges with respect to the copying and printing charge.

[19] Justice Coughlan did not accept Staples' assertion that the information does not exist. I see no error in Justice Coughlan's finding. I share Justice Coughlan's incredulity that Staples would not possess information necessary to calculate HST and income tax.

[20] Justice Coughlan's order requires Staples to provide "all information in its possession" relevant to the specified matters. The order does not require Staples to produce information which it does not have in its possession. If, however, Staples possesses the information, then Staples must produce it.

[21] *Rule* 1.05(I) defines "document" as including "a sound recording, photograph, film, plan, chart, graph and any information generated, recorded or stored by means of any device, including but not limited to computers and digital media." If, for instance, Staples possesses any information of the categories stated in the order which is stored by computer, then Staples possesses a "document" which must be produced under Justice Coughlan's order. That Staples may have to input or "create" a retrieval request to obtain the information stored on the computer, does not except the information from production under the *Rule*.

[22] If Staples is unable to separate the ordered information from other information in its database, then under *Rule* 20.06 Staples is not required to create a new document. But neither is Staples excused from producing the information. Staples should produce the information it possesses in the categories covered by the order even if other information also appears on the document. Any such extraneous information easily may be expunged before production. Staples may

not refuse to produce merely because Staples chooses not to separate the information covered by the order from the other information.

[23] That Staples' information is in the form of uncompiled raw data does not excuse production of that raw data. The function of compilation may be explored by other pre-trial procedures such as oral discovery or expert analysis.

[24] Justice Coughlan's judgment does not err in principle. Compliance with his order would not result in patent injustice.

[25] I would grant leave to appeal but dismiss the appeal, with $2,000 costs all inclusive payable forthwith by Staples to Mailboxes.

Fichaud, J.A.

Concurring:

Bateman, J.A.

Saunders, J.A.