

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Irving Oil Ltd. v. Caledonia Automotive Ltd., 2006 NSSC 12

Date: 20060112

Docket: S.K. No. 10305

Registry: Kentville

Between:

Irving Oil Limited

Plaintiff

v.

Caledonia Automotive Limited and Gary Lewis Mansfield

Defendant

Judge: The Honourable Justice Donald M. Hall.

Heard: May 21, 26, June 28, and Nov 15, 2004, Jan 21, March 22, 23 and May 17, 2005, in Kentville, Nova Scotia

Final Written Submissions: July 15, 2005

Counsel: Leroy Lenethen, Q.C., counsel for the plaintiff

The defendant was represented by agent Ms. Janice King

By the Court:

- [1] This is an action by the plaintiff, Irving Oil Limited (Irving), to recover an alleged debt owing to it by the defendant, Caledonia Automotive Limited (Caledonia), and to determine the amount of the debt, if any, owing to Irving.
- [2] Among other things, Irving is a major producer and supplier of petroleum products sold at retail through service stations throughout Atlantic Canada, Quebec and New England, some of which it owns and operates itself and others that are operated under franchise agreements.
- [3] Caledonia was such a franchise dealer located in Caledonia, Nova Scotia.
- [4] Initially, in May, 1996, Irving entered into an agreement with Caledonia whereby Irving would rent a service station that it owned at Caledonia, Nova Scotia, to Caledonia and would supply petroleum products including gasoline and other products to Caledonia for resale and use in Caledonia's business as a service station.
- [5] In May, 1998, the business arrangement between the parties was changed in accordance with a franchise agreement that was executed by the parties under date of May 17, 1996. The franchise agreement was subsequently renewed with minor variations on one or more occasions. The other defendant, Gary Mansfield, executed the agreement as guarantor.

- [6] Under the agreement Irving was to supply Caledonia with gasoline on consignment, with the cost of the gasoline sold being remitted to Irving on a weekly basis. Other products were provided by Irving on credit. In addition, Caledonia was to pay rent monthly for its use and occupation of the service station. Interest at the rate of two percent per month was to be paid to Irving on all overdue accounts.
- [7] Almost immediately problems arose with respect to the parties' accounting. Initially it appears that there was some improper billing by Irving which was a long time in being resolved. In fact, Caledonia contends that several of the discrepancies have still not been resolved.
- [8] On the other hand, it is apparent that payments by Caledonia were not always remitted promptly and in accordance with the agreement of the parties, resulting in the accumulation of significant arrears which attracted substantial interest charges.
- [9] Almost from the outset the parties were engaged in trying to reconcile their respective accounts. The difficulty in doing so was greatly contributed to by the fact that Irving used an "open item" system of accounting for accounts receivable in regard to its franchise dealers, whereas Caledonia used a conventional "balance forward" system.

- [10] Under the “open item” system payments are attributed to particular invoices and when paid the items disappear from the accounts receivable records. Credits are shown in the amounts of the individual invoices to which the credits were applied. When making payments it was the responsibility of Caledonia to indicate to which invoices each payment was to be applied.
- [11] In contrast, in the “balance forward” system all charges are debited to the account and all payments are credited to the account. In this system every individual charge and credit appears in the account which shows the balance outstanding at any given time.
- [12] Despite their efforts, the parties were not able to resolve the differences with respect to their accounts. It is evident, however, and I believe acknowledged by the defendants, that substantial arrears did accrue over a period of time. This resulted in Irving terminating the lease and franchise agreement effective December 6, 2000. According to Irving's records there was a balance owing by Caledonia of over \$78,000.00.
- [13] This proceeding was initiated by Irving on June 26, 2001. Summary judgment was entered against both defendants by order of this Court on July 11, 2002, with the amount owing to be subsequently determined. The matter was eventually scheduled to be heard beginning May 21, 2004. Initially

Caledonia was represented by Thomas Feindel, a Bridgewater barrister, but he withdrew. By order of this Court dated May 17, 2004, Ms. King was permitted to assist the defendants and present the case for the defence.

[14] At this point I should say something about the manner in which the hearing before me proceeded.

[15] Affidavits had previously been filed. The hearing began as scheduled on May 21, 2004. At that time counsel for Irving, Mr. Adrian Campbell, called Donald Paul Brooks as its only witness. Mr. Brooks was an “account manager” for Irving but not an accountant. He confirmed the correctness of the information contained in the two affidavits that he had sworn to.

[16] During the course of his testimony Mr. Brooks pointed out that there were four separate accounts for Caledonia at various times. He acknowledged that there were a number of discrepancies in Irving's account and conceded that Caledonia was entitled to a number of additional credits. At the conclusion of Mr. Brooks' evidence Irving closed its case and court adjourned to May 26, 2004, for defence evidence.

[17] On the adjourned date, Caledonia called Yvonne Edith Mansfield, its former bookkeeper, as its only witness. She testified to several apparent errors in Irving's account and concluded from an audit that she had performed that

Caledonia owed Irving \$40,738.57 as of December 5, 2001, less credits that were subsequently agreed to but not listed.

[18] Ms. Mansfield's cross examination was not completed on May 26 and the case was adjourned to June 28, 2004, for completion of her testimony.

Before adjourning, I informed the parties that I required each party to provide me with a detailed position as to where each stood respecting each item in dispute.

[19] At the conclusion of Caledonia's evidence on June 28, 2004, it was not clear to me as to what items were still in issue. Ms. King again acknowledged that there was a balance of \$40,000.00 owing but subject to credits established in court, which again were not quantified in an orderly manner. She also acknowledged that the goods had been provided by Irving as claimed but that there had been some double billing.

[20] As a result of the confusion respecting the parties positions, I requested that they have their respective accountants meet to review the accounts with a view to trying to narrow the issues, that is, to determine where there was genuine disagreement respecting whether particular invoices or amounts were paid or still outstanding.

- [21] A conference call took place on August 24, 2004, with myself, Ms. King and Mr. Campbell, for the purpose of setting out the details and arrangements for the meeting of the parties' accountants that I had requested. It was agreed that after the meeting had been held the parties would inform me of the results and a date for continuation of the trial, if necessary, would be arranged. As it turned out little if anything was resolved at this meeting.
- [22] In November, 2004, Caledonia moved to amend its defence to include a counter-claim. The Court ruled that it was too late in the proceeding to bring forth such a claim and dismissed the application.
- [23] At that time, however, I informed Mr. Lenethen that the court required from Irving a detailed statement of its account starting with a zero balance and showing all the debits and credits to the account from the beginning. Mr. Lenethen responded that he should be able to have such a statement by December 15, 2004. The matter was then adjourned to January 21, 2005, when it was expected the matter would be completed.
- [24] When the court reconvened on January 21, 2005, Mr. Lenethen informed the court that it was not possible for Irving to provide the detailed statement of debits and credits as requested by the court. Instead he proposed to present two new binders that included every item that went through the account by

way of rebuttal evidence. Ms. King had also prepared a new binder that included all the items for which she claimed Caledonia had not received credit or an appropriate adjustment and which she wished to place in evidence.

[25] In accordance with the apparent agreement of the parties, I directed that further evidence would be heard in explanation of the parties' respective accounting information. The hearing was adjourned to March 22, 2005, to hear the additional evidence.

[26] When the hearing continued on March 22, 2005, Mr. Lenethen called Ms. Anne Marie Arsenault, an accountant with Irving, who was familiar with the Caledonia account. She testified in detail as to the several disputed items. She stated that although she had not verified every item in the account she had done several random checks that confirmed her opinion that the account was accurate and concluded, after allowing some minor credits, that the amount claimed of \$77,466.74 was owing by Caledonia to Irving as of December 5, 2000. Her testimony contradicted the evidence of Mr. Brooks in some respects, particularly with respect to certain credits that he considered should be allowed.

[27] Irving also called Mr. Jeffrey Keith Kilpatrick, its credit manager for the Quebec, Atlantic Provinces and New England regions, who had been employed with Irving for sixteen years. He testified that the integrity of the open item accounting system is very high and that it is verified by Deloitte Touche on an annual basis. He also stated that most large corporations use it because of the huge number of transactions that are processed. He agreed that there were errors in the 78 page report prepared by Mr. Brooks and others, that it was not a proper approach to present in court and that he would not have recommended it if it had come to his attention. At the conclusion of Mr. Kilpatrick's evidence Irving again closed its case.

[28] Caledonia then re-called Ms. Yvonne Mansfield but it was apparent that she needed more time to review the new material provided by Irving. It was agreed that her testimony be put off to a later date. Caledonia then called the defendant, Gary Mansfield. He testified that he had had trouble with the account from the beginning. He stated that he thought he did not owe Irving anything.

[29] The hearing was then adjourned to May 17, 2005 for additional defence evidence. At that time Ms. Yvonne Mansfield was re-called. She testified to several items in the account where she believed that proper credits had not

been given and that Caledonia was entitled to additional substantial credits.

She expressed the opinion that Caledonia's Exhibit 31 was accurate.

[30] This concluded Caledonia's case.

[31] Ms. Arsenault was recalled by Irving in rebuttal to respond to a number of issues raised by Ms. Mansfield.

[32] At the conclusion of the evidence the Court requested that the parties provide written briefs. Caledonia's brief was received June 10, 2005, and Irving's June 30, 2005, with Caledonia's reply being received July 15, 2005.

[33] Contrary to what was stated at the hearing, in her written submission Ms. King claimed that Caledonia not only did not owe Irving anything but that it had overpaid Irving by \$37,058.28 for which it claimed reimbursement. In addition, Ms. King also claimed substantial costs and exemplary damages.

[34] In the brief submitted by Mr. Lenethen on behalf of Irving, he maintained that his client's accounting was accurate and reliable except with respect to two items. Mr. Lenethen conceded that from the original balance claimed of \$78,847.00, a credit of \$108.21 for a pricing error on one occasion, including interest thereon, should be allowed. In addition, he agreed that a credit of \$1,272.17 for interest that had been improperly calculated should be given. This resulted in a net claim of \$77,466.74. In addition Mr.

Lenethen claims interest on the balance owing from the commencement of the action to the date of judgment at the “contracted” rate of two percent per month or 26.4 percent per annum. He also claimed costs in the proceeding including with respect to the application for summary judgment.

[35] Turning now to the evidence, it is not my intention to discuss it in any detail here. I have reviewed my trial notes as well as the taped recordings where my notes were not clear or satisfactorily detailed. Suffice to say that the evidence was complex and by times confusing. This was due in large measure to the fact that the parties were not using the same accounting system to track their receivables-payables.

[36] I must say that the testimony of Mr. Brooks was not particularly helpful since he was not an accountant and was not familiar with the intricate details of the account.

[37] In her testimony in the initial stage of the hearing Ms. Mansfield raised many issues which, in my opinion, seriously put in doubt the validity and accuracy of Irving's claim. These issues, however, were subsequently dealt with and explained by Ms. Arsenault in her testimony.

[38] I do want to make it clear however that after Irving had initially closed its case and Caledonia had presented its evidence I was not able to determine

what, if anything, was owed by Caledonia to Irving. In other words, at that point I was not satisfied that Irving had met its burden to establish its claim on a balance of probabilities. At the same time I was not confident that I fully understood what the positions of the parties were and what was actually in dispute. For that reason, before inviting Mr. Campbell and Ms. King to make any submissions, I requested they meet together with their respective accountants, to try to narrow the issues as stated above. It was also for this reason and to aid my understanding that I subsequently asked Mr. Lenethen to provide a “balance forward” type of statement of his client's account.

[39] Whether it was procedurally correct for me to permit the parties to subsequently present additional evidence may remain to be seen. In any event, in her testimony Ms. Arsenault was able to identify and explain each of the items questioned by Caledonia. I found Ms. Arsenault to be a capable and credible witness. She impressed me as being an extremely able accountant. She appeared to be familiar with all the details of the account and was able to “match-off” the charges and credits supporting the amount of Irving's claim that were brought to her attention. As well, she testified that she did a number of random checks which confirmed that the account

was accurate. In summary, I am satisfied that the explanations and opinions she expressed are accurate and reliable and not impeached in any way by Caledonia's evidence.

[40] Accordingly, based on Ms. Arsenault's evidence alone, I am satisfied that Irving has established its net claim of \$77,466.74 on a balance of probabilities and is entitled to judgment for that amount.

[41] Finally with respect to costs and interest, the usual rule is that the successful party is entitled to costs pursuant to the **Civil Procedure Rules** as well as pre-judgment interest or where, as here, a rate is specified in a contract between the parties, the stipulated rate. In the circumstances of this case, however, I am inclined to depart from that rule. In my view, the case was needlessly prolonged by the fact Ms. Arsenault was not called as a witness at the beginning of the trial. Had she been, I suspect that the matter would have been concluded within two days rather than the lengthy period of time that has elapsed. In addition, Caledonia has complained of difficulty in obtaining disclosure from Irving and in getting their officials to meet with them to try to resolve their differences. I cannot attest to the validity of this complaint at this time, but I am aware of correspondence in the file where

Caledonia requested a meeting sometime before the trial to try to sort out their differences which was not acceded to by Irving.

[42] Since these issues have not previously been formally raised, it would not be fair or reasonable for me to make a ruling without giving the parties an opportunity to be heard. Accordingly, I am prepared to hear further oral submissions or receive written submissions as the parties wish. If they are not able to agree on the format, the submissions will have to be made orally.

Donald M. Hall, J.