SUPREME COURT OF NOVA SCOTIA

Citation: *Wilson Fuel Co. Ltd, v. Power Plus Technology Inc.*, 2015 NSSC 304

Date: 20151023
Docket: Hfx No. 419357
Registry: Halifax

Between:

Wilson Fuel Co. Limited, a body corporate

Plaintiff

v.

Power Plus Technology Inc., a body corporate
and Jason Lutes

Defendants

DECISION

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: June 3, 2015 in Halifax, Nova Scotia

Counsel: Scott C. Norton, Q.C., and Nathan Saruk for the Plaintiff
Geoffrey Saunders and Dillon Trider, for the Defendants

By the Court:

INTRODUCTION

[1] The parties bring opposing motions for disclosure in a proceeding respecting a contract for the supply of petroleum products.

BACKGROUND

[2] On November 1, 2006, Wilson Fuel Co. Limited ("Wilsons") entered a ten-year agreement (the "Agreement") with Power Plus Technology Inc. ("Power Plus") pursuant to which Wilsons would act as Power Plus's exclusive supplier of petroleum products for its gas station located at 2731 Mountain Road, Moncton, New Brunswick (the "Premises") from October 1, 2006 until September 30, 2016. Jason Lutes, President of Power Plus, personally guaranteed Power Plus's performance under the Agreement.

[3] The Agreement required Power Plus to pay the "Imperial Oil Terminal Unbranded Rack Price for Saint John, NB + 0.7 cents per litre + freight charges". Around December 21, 2012, however, Wilsons began improperly charging Power Plus the Wilsons Rack Rate instead of the Imperial Oil Rack Rate. This resulted in Power Plus overpaying Wilsons over the next few months.

[4] Power Plus says it discovered the pricing discrepancy in August 2013. By letter dated August 28, 2013, Power Plus, through counsel, gave written notice of termination of the Agreement. The Notice of Termination stated in part:

> … contrary to the clear conditions of the contract entered into between Wilson's and Power Plus, Wilson's was no longer charging our client the agreed to price; it has been overcharging our client since at least December 21st, 2012.
>
> Wilson's actions are a fundamental breach of the contract between the parties. Therefore;
>
> TAKE NOTICE that Power Plus Technology Inc. is treating the contract (Dealer Service Agreement) executed between the parties on November 1, 2006 as ***terminated*** effective immediately.
>
> AND FURTHER TAKE NOTICE when Power Plus Technology Inc.'s accountants complete their work Power Plus Technology Inc. intends to demand repayment of the overcharges it has paid due to Wilson Fuel Co. Limited's fundamental breach of the contract it had entered into with our client, together with interest.

[5] On September 3, 2013, the day that Wilsons received the Notice of Termination, Wilsons' branding was removed from the Premises. On September 4, Irving Oil Ltd. ("Irving") branding was installed.

[6] Wilsons says the Wilsons Rack Rate had always been the same as the Imperial Oil Rack Rate, until December 2012, when Wilsons raised it. Wilsons says it incorrectly assumed that all of its dealer agreements provided for an unspecified rack rate, and began charging all of its dealers, including Power Plus, the higher rate accordingly. The mistake, Wilson's says, only came to its attention when Power Plus gave Notice of Termination. Wilsons then contacted Power Plus by email on September 3, 2013, advising that it would be remedying the default. Wilsons says it also attempted to call Mr. Lutes several times.

[7] Receiving no response to these communications, on September 10, 2013, Wilsons filed a claim against Power Plus and Mr. Lutes for breach of contract. Wilsons alleges that Power Plus improperly terminated the Agreement and acted in bad faith by "surreptitiously" negotiating an agreement with another marketer,

Irving. Wilsons also says that Mr. Lutes failed to honour his contractual guarantees.

[8] The Defendants say they were entitled to terminate the Agreement because Wilsons committed a fundamental breach by overcharging. They also say Wilsons acted in bad faith, claiming that the pricing discrepancy was intentional, and not the result of administrative error.

[9] Following the close of pleadings, the parties exchanged Affidavits Disclosing Documents. The Defendants now seek further production, and have brought a motion for disclosure of the following:

a. Documents providing details with respect to the total cost to Wilsons associated with Superstore, Esso Extra, and other promotions offered by Wilsons from 2012 to the present;

b. Details of any repayments made by Wilsons to other Wilsons branded dealers as a result of overcharging between 2012 and the present;

c. Documents relating to the decision to increase prices to Wilsons branded dealers in 2012 or 2013; and

d. All documents relating to the decision to cease providing an email to Wilsons branded dealers setting out the Imperial Oil Rack Rate.

[10] Wilsons has filed its own motion for production, seeking disclosure of the following:

a. A copy of the agreement between Irving and Power Plus and/or Mr. Lutes governing the retail sale of Irving's petroleum products at the Premises beginning in or around August 2013; and

b. Any and all communications between Irving and Power Plus and/or Jason Lutes leading up to the agreement between Irving and Power Plus and/or

> Jason Lutes governing the retail sale of Irving's petroleum products at the Premises beginning in or around August 2013.

[11] The parties oppose each other's motions on the basis that the requested documents are not relevant to any facts in issue. In support of their motion, the Defendants filed the Affidavit of Jason Lutes sworn May 19, 2015. Wilsons filed the Affidavit of its Vice-President, David Collins, sworn May 21, 2015.

ISSUE

[12] The issue is whether any of the requested documents are relevant to a fact in issue.

LAW AND ANALYSIS

[13] Full disclosure of relevant materials is presumed to be necessary to do justice in a proceeding: see Civil Procedure Rule 14.08(1). The motions for disclosure are brought pursuant to *Civil Procedure Rule* 14.12, which permits a judge to "order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding." Rule 14.01 defines "relevant" and "relevancy":

> **14.01 - Meaning of "relevant" in Part 5**
>
> (1) In this Part, "relevant" and "relevancy" have the same meaning as at the trial of an action or on the hearing of an application and, for greater clarity, both of the following apply on a determination of relevancy under this Part:
>
> > (a) a judge who determines the relevancy of a document, electronic information, or other thing sought to be disclosed or produced must make the determination by assessing whether a judge presiding at the trial or hearing of the proceeding would find the document, electronic information, or other thing relevant or irrelevant…

[14] In *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, [2011] N.S.J. No. 8, Moir J. elaborated on the meaning of Rule 14.01, and the meaning of relevance in general. He said, at para. 46:

> This examination of the legislative history, the recent jurisprudence, and the text of Rule 14.01 leads to the following conclusions:
>
> * The semblance of relevancy test for disclosure and discovery has been abolished.
>
> * The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best as it can be constructed.
>
> * The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The Rule does not permit a watered-down version.
>
> * Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.

[15] In *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, [2011] N.S.J. No. 164, Bryson J.A. adopted these principles, and explained that the abolition of the semblance of relevancy test that existed under the *Civil Procedure Rules 1972* comes at a cost: judges now have to "determine relevancy long before trial, without the forensic advantages of the trial judge" (para. 12).

[16] In considering the meaning of relevance in evidence law generally, the authors of *The Law of Evidence in Canada*, 4th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014) consider several historical definitions of relevance at §2.42, concluding:

> … More recently, Rothstein J. in *R. v. White* stated:
>
> > In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the

> proposition for which it is advanced more likely than the proposition would be in the absence of that evidence".

… Doherty J.A. in *R. v. Watson* stated that "relevance"

> … requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation, then "Fact A" is relevant and *prima facie* admissible.

[17] A determination of relevance must therefore be made with reference to the facts in issue as identified in the pleadings. However, even if alleged in the pleadings, a fact will not truly be in issue unless it is a necessary and material allegation. To meet the test for relevance, then, (1) the document or electronic information must prove or render probable the past, present or future existence or non-existence of a fact; (2) the fact must relate to an allegation set out in the pleadings; and (3) the allegation must not be unnecessary or immaterial to the claim or defence: see generally *The Law of Evidence in Canada* at §§2.43-2.49.

Is Bad Faith an Unnecessary or Immaterial Allegation?

[18] Both parties have pleaded bad faith, and the parties each argue that the requested information relates to their respective allegations of bad faith. It is necessary to determine whether bad faith is unnecessary or immaterial to their claims or defences. An allegation will be unnecessary and immaterial when it is made frivolously, i.e. it lacks any rational argument based on the evidence or law and is obviously unsustainable: *Mercier v. Nova Scotia (Police Complaints Commissioner)*, 2014 NSSC 79, [2014] N.S.J. No. 304, at paras. 25 and 30).

[19] Wilsons says the Defendants acted in bad faith by:

- Surreptitiously negotiating with Irving and taking steps to change branding before terminating the Agreement;
- improperly terminating the Agreement;
- not giving Wilsons an opportunity to remedy the default within 15 days pursuant to para. 8 of the Agreement; and
- refusing to communicate with Wilsons following the Notice of Termination.

[20] Wilsons says this bad faith conduct goes to their claim for breach of contract, and submits that it also disentitled the Defendants from properly terminating the Agreement.

[21] The Defendants say it was Wilsons who acted in bad faith by unilaterally increasing the price and intentionally overcharging Power Plus, and this entitled them to terminate the Agreement.

[22] I am satisfied that the parties' allegations of bad faith are material to their respective claims and defences. I will next consider whether it could possibly be shown that the parties had a duty to act in good faith.

[23] Good faith is not a stand-alone duty. Rather, where the circumstances justify it, a duty to act in good faith will be implied into the terms of a contract. In *Key Equipment Finance Ltd. v. Jacques Whitford Ltd.*, 2006 NSSC 68, [2006] N.S.J. No. 76, Hood J. adopted, at para. 125, the following passage from *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457, [2003] O.J. No. 4656 (C.A.) [*Transamerica*]:

> … Canadian courts have not recognized a stand-alone duty of good faith that is independent from the terms expressed in a contract or from the objectives that emerge from those provisions. The implication of a duty of good faith has not

> gone so far as to create new, unbargained-for, rights and obligations. Nor has it been used to alter the express terms of the contract reached by the parties. Rather, courts have implied a duty of good faith with a view to securing the performance and enforcement of the contract made by the parties, or as it is sometimes put, to ensure that parties do not act in a way that eviscerates or defeats the objectives of the agreement that they have entered into …

[24] Angela Swan and Jakub Adamski, in *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis Canada Inc., 2012) similarly state at §8.134:

> The justification for requiring parties to behave in good faith is that such a requirement fulfils the expectations of the parties. It is not an externally imposed requirement but inheres in the parties' relation.

[25] The authorities tend to agree that good faith will be implied in most long-term commercial contracts. *Halsbury's Laws of Canada – Contracts* (2013 Reissue) states at §HCO-119:

> Scope of good faith. Long-term contractual relationships that allow parties wide discretion of performance, such as joint ventures, franchise agreements, employment relationships or partnerships, typically impose more extensive obligations of good faith than discrete transactions, such as sales of goods or provision of services. This distinction exists because any long-term relationship is certain to be based on an assumption that each party to it will behave in good faith.

[26] Swan & Adamski, *supra*, similarly state at §8.136, that "[a]ny long-term relation is certain to be based on the assumption that each party will behave in good faith."

[27] Thus, while good faith is not a standalone duty, such a duty will be implied into a commercial contract where it is necessary to give effect to the parties' intentions. Parties to long-term commercial contracts typically have this intention, so good faith will often be implied in this context. That said, determining whether good faith is to be implied into a particular contract usually requires hearing and weighing evidence, which is an exercise better left for trial.

[28] Because they both plead bad faith, the parties apparently agree that good faith was an implied term of the Agreement. Accordingly, this is not really an issue. Even if it was, it would be premature to make any findings of fact at this stage. Thus, I find that good faith could be implied into the Agreement, and the allegations of bad faith are not clearly unnecessary or immaterial on this basis.

[29] Having found that the parties could have been subject to a duty to act in good faith, I will next consider whether bad faith can be pleaded as a defence. Counsel for Wilsons raised this issue at the hearing. At the closing of his submissions, counsel stated:

> … The only cause of action for the Court is the claim by Wilsons against Power Plus for wrongly declaring this contract to be at an end. There's no cause of action or damages being sought or a counterclaim by Power Plus against Wilsons alleging bad faith or anything like that. It's not relevant. The only issue is whether or not the decision to declare the contract at an end was justified on the law of contract or not.

[30] In reply, Defendants' counsel stated:

> It's true … that there's no counterclaim or anything here, but the allegations of bad faith go directly to the defence filed by Power Plus … and deals directly with the justification of what they did and why they did it. It is not … simply a question of law for the trial judge to determine, looking at two letters and the decision made whether or not Power Plus were justified in doing what they did. The factual background or why Wilsons did what they did has everything to do with that decision. It was their position, or Power Plus's position that they were entitled to do what they did because of those actions.

[31] The question is whether bad faith may be raised as a defence, or whether the Defendants could only raise this issue in a counterclaim. In other words, can bad faith be used only as a sword, or also as a shield? Counsel have not pointed me to any cases that address this issue. I have identified a handful of cases that provide some guidance.

[32] In *Canadian Imperial Bank of Commerce v. Romas*, 2010 ONSC 4492, [2010] O.J. No. 3444, the plaintiff bank brought an action against the defendant for the amount owing on a line of credit. The defendant pleaded that there was an implied term of good faith, and the plaintiff had acted in bad faith when, after slow business conditions prevailed and he failed to make payments, the plaintiff "froze" his account, refused to accept further payments in reduction of the loan, and ultimately terminated the agreement. Langdon J. granted summary judgment to the plaintiff, holding that good faith was not an implied term of the contract, and even if it was, the plaintiff had not acted in bad faith. Langdon J. cited the above-quoted passage from *Transamerica*, *supra*, as authority for the proposition that "[e]ven if the bank had acted in bad faith, bad faith is not a substantive defence to a claim of debt" (para. 46). With respect, I fail to see how that passage, or anything in the *Transamerica* decision, stands for the proposition that bad faith cannot be a substantive defence to a claim of debt or any other type of claim.

[33] *Transamerica*, *supra*, involved an action by Transamerica against ING to recover damages for misrepresentation and breach of warranties and covenants contained in a share purchase agreement. ING pleaded, *inter alia*, that Transamerica breached implied duties of good faith and fair dealing and was, therefore, precluded from asserting its indemnity claims. The motions judge struck this part of ING's defence, holding that no duty to bargain in good faith exists in such a commercial setting absent a special relationship. As such, the parties' obligations were governed solely by the express terms. On appeal, however, O'Connor A.C.J.O., for the majority, held that although "Canadian courts have proceeded cautiously in recognizing duties of good faith in the performance and

enforcement of contracts", such a duty may be implied where it is necessary to give effect to the parties' intentions (para. 51). Further, at paras. 55 & 56:

> Accepting the facts as pleaded, it is at least arguable that if Transamerica is permitted to recover the damages now claimed, one of the objectives of the agreement - namely that the parties would use the price adjustment mechanism in the agreement to address claims of the kind now asserted - would be defeated. Such a duty, if implied, would not be independent of or unconnected to the bargained for agreement but rather would be directed at preventing Transamerica from defeating one of the objectives of its agreement with ING.

[34] O'Connor A.C.J.O. concluded that the evidentiary aspects meant that the ultimate determination was best left for trial. Although he did not explicitly state that bad faith may be pleaded as a defence, this is implied by the outcome. ING argued that Transamerica's bad faith precluded it from seeking indemnity from ING for losses related to that bad faith conduct. The Defendants in the present case make a similar argument. *Transamerica* therefore leads me to conclude that the Defendants' plea of bad faith is not obviously unsustainable. The following jurisprudence reinforces that conclusion.

[35] In *LAPD Holdings Ltd. v. Clark*, 2012 MBQB 307, [2012] M.J. No. 390, the defendant pleaded bad faith in an oppression action. The plaintiff's motion to strike the pleading on the basis that it did not disclose a cause of action failed. The court held that in pleading bad faith, the defendant was alleging a material fact, i.e. that the plaintiff had conducted itself in bad faith, thereby breaching the shareholders' agreement, which justified the defendant's conduct, i.e. expelling the plaintiff as a shareholder of the company. The Court concluded that, "the description of conduct as being in bad faith is a shield to the claim not a swinging sword commencing a tort action" (para. 13).

[36] In *Montreal Trust Co. of Canada v. Quad-Ram Development Group Ltd.* (1994), 136 N.S.R. (2d) 333, [1994] N.S.J. No. 504, the Court of Appeal held that the chambers judge erred in granting summary judgment to the plaintiff after finding that the defendants did not raise an arguable issue. The defendants were a mortgagor and guarantor who, encountering difficulty in making the payments, attempted to transfer the property. Under the mortgage, the plaintiff's consent was required, and the plaintiff did not provide it. In the eventual foreclosure and deficiency proceeding, the defendants alleged that the plaintiff had unreasonably refused to consent to the transfer. Palmeter A.C.J. struck out the defence. Allowing the appeal, the Court of Appeal held that whether the plaintiff had an obligation to act reasonably, and whether the plaintiff had acted unreasonably in withholding consent, were questions of fact that could only be answered at trial.

[37] In my view, unreasonable conduct may be raised as a defence. Although it is not precisely the same as an allegation of bad faith, the two concepts are closely related and have "very similar effects" (Swan & Adamski, *supra* at §9.183). I see no reason for allowing one to be raised as a defence and not the other. As such, I conclude that bad faith may be raised as a defence to an action for breach of contract.

[38] In conclusion, I find that the parties' pleas of bad faith are material to their respective claims and defences; that the duty of good faith could be found to apply to the Agreement; and that bad faith may be raised as a defence. For these reasons, I conclude that the parties' respective allegations of bad faith are neither unnecessary nor immaterial allegations.

The Meaning of Good Faith

[39] Having found that bad faith is alleged in the pleadings, and that bad faith is not unnecessary or immaterial, the final step is to determine whether the requested disclosure would prove or render probable the existence or non-existence of bad faith conduct. Before I proceed with this final step, I will briefly address the meaning of good faith. Swan & Adamski, *supra*, state at §4.186, that the "only workable definition of good faith is that it denotes the absence of bad faith; its function is to exclude certain kinds of conduct that can be characterized as bad faith and it is defined by being distinguished from various kinds of bad faith."

[40] Various statutes define good faith. For example, the *Sale of Goods Act*, R.S.N.S. 1989, c. 408, provides that "[a] thing is deemed to be done in good faith within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not": s. 3(1). Several federal statutes, such as the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 48(2) and the *Trust and Loan Companies Act*, S.C. 1991, c. 45, s. 84, employ the following definition: "'good faith' means honesty in fact in the conduct of the transaction concerned."

[41] *Black's Law Dictionary*, 7th edition (St. Paul, Minn.: West Pub. Co., 1979) defines good faith as "[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage…"

[42] Thus, the cornerstone of good faith is honesty. If good faith is implied into the Agreement, each of the parties had an obligation to conduct themselves honestly throughout the operation of the Agreement.

The Defendants' Motion for Disclosure

[43] I will first deal with the Defendants' motion for disclosure of the following:

a. Documents providing details with respect to the total cost to Wilsons associated with Superstore, Esso Extra and other promotions offered by Wilsons from 2012 to present;

b. Details of any repayments made by Wilsons to other Wilsons branded dealers as a result of overcharging between 2012 and present;

c. Documents relating to the decision to increase prices to Wilsons branded dealers in 2012 or 2013; and

d. All documents in relation to the decision to cease providing an email to Wilsons branded dealers setting out the Imperial Oil Rack Rate.

Documents regarding Wilsons' promotions

[44] The Defendants seek production of documents providing details with respect to the total cost to Wilsons associated with Superstore, Esso Extra and other promotions offered by Wilsons from 2012 to present. The Defendants say these documents are relevant to the special damages claimed by Wilsons. Had the contract been performed, Wilsons would have received profits from its sales to Power Plus until September 30, 2016. The measure of these profits depends on the total cost of fuel paid by Wilsons. Where Wilsons offers promotions, this affects its costs and therefore its profits.

[45] After the Defendants filed their motion, Wilsons agreed to disclose its Reseller Supply Agreement with Imperial Oil, subject to a Confidentiality Order. Wilsons says the Reseller Supply Agreement sets out the cost to Wilsons of petroleum products supplied by Imperial Oil. Wilsons admits that the Agreement is therefore "potentially relevant" to its claim for special damages.

[46] The Defendants continue to seek disclosure of the aforementioned documents. Wilsons says the requested documents are not relevant to a fact in issue. Furthermore, the costs associated with Superstore, Esso Extra and other promotions are borne by the program providers, not Wilsons. While Wilsons pays a monthly fee, the fee is not site-specific and cannot be determined with reference to a particular location. The Defendants respond that "typically, Wilsons bears all costs associated with such promotions and that fuel savings obtained by customers is paid by Wilsons" (Affidavit of Jason Lutes sworn May 19, 2015, at para. 9).

[47] The Defendants say that Wilsons bears the costs of promotions. Wilsons says it does not, but then says that a dealer's price is based on both the volume of gas sold and the amount of coupons used. It seems, then, that Wilsons does bear some of the costs of promotions, and those costs appear to be relevant to Wilsons claim for damages.

[48] In oral submissions, Wilsons did not directly deny the relevance of the documents. It says it cannot calculate its loss without knowing how much product Power Plus has sold since termination of the Agreement. A dealer's price is based on both the volume of gas sold and the amount of coupons used, but it is not calculated station by station. Thus, while the documents may be relevant, disclosure at this time would be premature. The Defendants say that delaying

disclosure of relevant documents will only add to the time and cost of discovery examinations, and the documents should therefore be disclosed prior to discovery.

[49] I conclude that these documents are relevant to a material fact in issue, that is, special damages, and must be disclosed. It is inconsistent with the object and purpose of the *Civil Procedure Rules* for the Defendants to have to wait for disclosure of documents, unless there is a clear signal from Wilsons that the documents are not relevant because the scope of its claim for damages is such that the cost of promotions is not relevant. Short of that assurance, I find in favour of the Defendants' position.

Details of repayments made by Wilsons to other retailers as a result of overcharging

[50] The Defendants request disclosure of details of any repayments made by Wilsons to other Wilsons branded dealers as a result of overcharging between 2012 and the present.

[51] Wilsons says these details are not relevant, and in any event, the repayments are covered by confidentiality agreements. With respect to relevance, Wilsons says that it does not matter how much other dealers, with different volumes of sales, were repaid. I agree that the amounts repaid are irrelevant to damages. However, my understanding is that the Defendants seek disclosure of these documents not because they are relevant to damages, but because they are relevant to the allegation that Wilsons acted in bad faith. The Defendants say other dealers have made similar allegations of intentional breach of dealership agreements and the requested documents are relevant to prove a pattern of overcharging that

demonstrates bad faith. In essence, the Defendants say that the requested documents are relevant as similar fact evidence.

[52] Determining the relevance of similar fact evidence requires answering two questions: (1) whether the similar fact evidence is relevant to some other issue beyond disposition of character; and (2) whether the probative value of the evidence outweighs its prejudicial effect: *Barthe v. National Bank Financial Ltd.*, 2008 NSSC 30, [2008] N.S.J. No. 49 at para. 20, citing *Dhawan v. College of Physicians and Surgeons of Nova Scotia*, [1998] N.S.J. No. 170 at para. 61. In considering the scope of similar fact evidence, Hood J. cited *MacDonald v. Canada Kelp Co. Ltd. et al.* (1973), 39 D.L.R. (3d) 617, [1973] B.C.J. No. 846 (B.C.C.A.). In that case, in a claim for fraudulent misrepresentation, evidence that the defendant had made similar misrepresentations in other transactions was admissible to prove that he made the misrepresentations alleged by the plaintiff. Bull J.A. said:

> When there is a real and substantial nexus or connection between the act or allegation made, whether it be a crime or a fraud (but not, of course, limited to those), and facts relating to previous or subsequent transactions are sought to be given in evidence, then those facts have relevancy and are admissible not only to rebut a defence, such as lack of intent, accident, mens rea or the like, but to prove the fact of the act or allegations made. The respondents submit that is not so, and "similar acts" are never admissible to prove the doing of the act itself. I cannot agree ...

[53] Applying this reasoning to evidence of a settlement agreement and various disciplinary records advanced as similar fact evidence in a claim of negligent supervision of an employee, Hood J. concluded that the evidence was admissible as similar fact evidence for the following reasons:

> **24** In my view the evidence of the settlement agreement, decision of the IDA and the IDA Bulletin are "logically probative" of matters in issue here. There is a

> "real and substantial nexus" between the allegations here and the acknowledgements in the Quebec matter.
>
> **25** As I have said above, the settlement agreement, decision and Bulletin all refer to a failure to supervise. Although certain of the facts relating to the Montreal and Joliette infractions differ from those alleged here, it is clear there is a similarity. NBFL failed to supervise its employees and admitted to not having proper policies and procedures in place. This, in my view, is not evidence of NBFL's general disposition or character but of a failure to supervise, one of the issues at stake in this matter. In my view, it is not oppressive or unfair to NBFL to have this material before the court. Clearly, NBFL has had sufficient notice of it to deal with it in the summary judgment application.

[54] In support of the assertion that the requested documents are relevant, Mr. Lutes attaches to his affidavit a Notice of Action and Statement of Claim of a separate lawsuit against Wilsons by the Scholten Group. From the Statement of Claim, it appears that Wilsons' agreement with the Scholten Group did not specify a price based on the Imperial Oil Rack Rate, but the "St. John, NB unbranded Reseller Rack Rate". The Scholten Group says that in January 2013, Wilsons advised that rather than continuing to use the Imperial Oil Rack Rate, it would begin using its own rack rate. Accordingly, the issue is whether Wilsons was entitled to begin using its own rack rate, the Wilsons Rack Rate, not whether Wilsons made the price adjustment underhandedly. This is a question of contract interpretation, not bad faith.

[55] In this case, there is no question that Wilsons was not entitled to use the Wilsons Rack Rate for Power Plus. Wilsons acknowledges that the Agreement required it to use the Imperial Oil Rack Rate. The question is whether the pricing error occurred intentionally or inadvertently.

[56] The allegations in the Scholten Statement of Claim differ to a significant extent from the issues in the present case. I also consider para. 8 of Mr. Collins' Affidavit sworn May 21, 2015:

> … The innocent administrative error referred to in the September 9, 2013 letter from Mr. Norton to Mr. Rinzler was the fact that Wilsons incorrectly understood that all of the contracts with their existing dealers referenced an unspecified rack rate. This was not the case with respect to the Agreement between Wilsons and Power Plus which makes reference to the Imperial Oil Rack Rate at Appendix "D".

[57] This, together with the Scholten Statement of Claim, suggests that the use of the Imperial Oil Rack Rate in the Agreement would be the exception for Wilsons, not the rule. Accordingly, I find that the Defendants have failed to establish a real and substantial connection between the other overcharging cases and the facts in issue in these proceedings. I decline to order disclosure of the requested documents.

[58] Having found that the Defendants have failed to establish relevancy, I do not need to consider whether the confidentiality agreements protect the documents from disclosure.

Documents relating to the decision to increase prices to Wilsons dealers

[59] The Defendants request documents relating to Wilsons' decision to increase prices to Wilsons branded dealers. Again, they say that these documents are relevant to Wilsons' allegation that the improper pricing was inadvertent and not intentional. Wilsons says that because the Agreement provided for the Imperial Oil Rack Rate, not the Wilsons Rack Rate, Wilsons' decision to increase the Wilsons Rack Rate has nothing to do with any facts in issue. I agree. The Defendants' allegation of bad faith is based on the assertion that Wilsons intentionally overcharged Power Plus by using the Wilsons Rack Rate when it knew that it was supposed to be using the Imperial Oil Rack Rate. Whether Wilsons was entitled to charge Power Plus the Wilsons Rack Rate, and whether Wilsons was entitled to

unilaterally increase the Wilsons Rack Rate, are not facts in issue in this proceeding.

Emails

[60] The Defendants seek disclosure of all documents in relation to the decision to cease providing an email to Wilsons dealers setting out the Imperial Oil Rack Rate. The Defendants say that sometime between 2006 and 2012, Wilsons developed a practice whereby it would send an email in the evening confirming the Imperial Oil Rack Rate for the following day. The Defendants have provided examples of these emails at Exhibit "C" of the Lutes Affidavit. The Defendants say that around July 2012, Wilsons stopped sending these emails. They say this put Wilsons in a position of trust with respect to the rate being charged. They suggest that Wilsons' decision to stop sending the emails was related to its decision to start overcharging, and therefore the documents surrounding that decision are relevant to show that price change was, in fact, underhanded.

[61] Wilsons' evidence on this point is somewhat confusing. Mr. Collins says at para. 21 of his Affidavit sworn May 21, 2015, that "[b]etween 2006 and 2012 Wilsons would send an email to its dealers in the evening providing the Wilsons Rack Rate for the next day. The Wilsons Rack Rate information provided by Wilsons was equal to the Imperial Oil Rack Rate." This suggests that the email set out the Wilsons Rack Rate, not the Imperial Oil Rack Rate (although the two rates were typically identical). However, Mr. Collins goes on to state:

> 22. In or about July 2012 Imperial Oil ceased sending Wilsons emails with the Imperial Oil Rack Rate for the next day. The dealers continued to receive the Wilsons Rack Rate, which was equal to the Imperial Oil amount. In December

> 2012 the Wilsons Rack Rate was increased and was no longer equal to the Imperial Oil Rack Rate. [Emphasis added]

[62] Mr. Collins' evidence leaves it unclear as to whether, before July 2012, the emails sent by Wilsons set out the Imperial Oil Rack Rate, the Wilsons Rack Rate, or both. If both, was there one email, or two separate emails?

[63] On examining the emails at Exhibit "C" of the Lutes' Affidavit, I find that as of July 14, 2012, Wilsons was sending its dealers an email setting out the Imperial Oil Rack Rate. The subject lines of these emails clearly state, "Imperial Oil Terminal Unbranded Rack Prices". The attached files state, "Imperial Oil Terminal Unbranded Rack Prices: Imperial Oil terminal rack prices quotes below are …" The second email (dated July 14, 2012) states, "See attached HTML file for Wilsons Rack Price changes". There is no evidence of what this means.

[64] I am also confused about whether Wilsons stopped sending emails altogether, or whether it continued sending emails, but with the Wilsons Rack Rate, not the Imperial Oil Rack Rate.

[65] That said, having found that as of July 14, 2012, Wilsons was sending its dealers an email setting out the Imperial Oil Rack Rate, and given the temporal proximity of Wilsons' decision to stop sending these emails and the pricing error, I find that Wilsons' reasons for stopping the emails is relevant to whether the pricing error was intentional and underhanded. Any documents relating to Wilsons' decision to stop sending the emails to its dealers with the Imperial Oil Rack Rate, those documents must be disclosed. If, as Wilsons says, its reason for stopping the emails is simply because Imperial Oil stopped sending the emails to Wilsons, then I expect it will be easy for Wilsons to fulfill its duty to disclose the requested documents because few if any such documents will exist.

Wilsons' Motion for Disclosure

[66] Next I will deal with Wilsons' motion for disclosure of the following:

a. A copy of the agreement between Irving and Power Plus and/or Mr. Lutes governing the retail sale of Irving's petroleum products at the Premises beginning in or around August 2013; and

b. Any and all communications between Irving and Power Plus and/or Jason Lutes leading up to the agreement between Irving and Power Plus and/or Jason Lutes governing the retail sale of Irving's petroleum products at the Premises beginning in or around August 2013.

[67] Wilsons says that documentation relating to the negotiation and execution of the agreement between Irving and Power Plus is relevant to Wilsons' allegation that Power Plus surreptitiously negotiated with Irving before terminating the Agreement with Wilsons.

[68] Wilsons' evidence in support of this allegation is as follows. On August 28, 2013, before it received the Notice of Termination, Wilsons' sign company informed Wilsons that it been instructed to remove Wilsons' signage from the Premises. On September 3, 2013, Wilsons' signage was removed and the next day, on September 4, 2013, Irving branding was installed. Wilsons says that based on this timeline, it is likely that the Defendants had been negotiating with Irving well in advance of the Notice of Termination.

[69] I note that Mr. Lutes admits to having noticed irregularities with respect to Power Plus's profitability, and having taken steps to investigate the sources, as early as May 2013 (Lutes affidavit, para. 16).

[70] Power Plus says that the requests are an "overbroad fishing expedition" because, while there may be relevance to the timing of communications with Irving and the execution of an agreement, the contents of the communications and agreement are not relevant.

[71] I find that any communications between Irving and the Defendants leading up to the execution of the agreement between Irving and Power Plus or Jason Lutes are relevant to a fact in issue, that is, whether the Defendants surreptitiously negotiated with Irving. The requested communications must be disclosed, subject to redaction of privileged or irrelevant information.

[72] However, I am not convinced that the content of the agreement between Irving and Power Plus or Jason Lutes is relevant to a fact in issue and I decline to order disclosure of the agreement itself.

Disposition

[73] To summarize, the Defendants' motion for disclosure is disposed of as follows:

a. Documents providing details with respect to the total cost to Wilsons associated with Superstore, Esso Extra and other promotions offered by Wilsons from 2012 to present are relevant to damages and must be disclosed;

b. The details of any repayments made by Wilsons to other Wilsons branded dealers as a result of overcharging between 2012 and present are not relevant to a fact in issue and do not need to be disclosed;

c. Documents relating to the decision to increase prices to Wilsons branded dealers in 2012 or 2013 are not relevant to a fact in issue and do not need to be disclosed; and

d. Documents relating to the decision to cease providing an email to Wilsons branded dealers setting out the Imperial Oil Rack Rate, to the extent that such documents exist, are relevant to a fact in issue and must be disclosed.

[74] Wilsons' motion for disclosure is disposed of as follows:

a. The agreement between Irving and Power Plus and/or Mr. Lutes governing the retail sale of Irving's petroleum products at the Premises beginning in or around August 2013 is not relevant to a fact in issue and does not need to be disclosed; and

b. Any communications between Irving and Power Plus and/or Jason Lutes leading up to the agreement between Irving and Power Plus are relevant to a fact in issue and must be disclosed.

[75] Since each of the parties' motions had mixed success, I decline to order costs.

LeBlanc, J.