SUPREME COURT OF NOVA SCOTIA
Citation: *2288450 Ontario Ltd. v. Novajet,* 2016 NSSC 77

Date: 20160322
Docket: Hfx. No. 444032
Registry: Halifax

Between:

2288450 Ontario Limited

Plaintiff/Respondent in Motion

v.

2106701 Ontario Inc. o/a Novajet

Defendant/Applicant in Motion

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: February 8, 2016, in Halifax, Nova Scotia

Counsel: Cheryl A. Canning and Robert Fenn, for the Applicant in Motion
Clarke Tedesco, for the Respondent in Motion

By the Court:

OVERVIEW

[1] 2299450 Ontario Limited, ("Ontario Limited") started an action in the Supreme Court of Nova Scotia, against 2106701 Ontario Inc. ("Novajet") It seeks damages for breach of contract and in negligence. Ontario Limited's action was brought in compliance with a forum selection clause that makes Nova Scotia the preferred jurisdiction to resolve legal disputes arising from the contract.

[2] In response, Novajet has brought this motion to stay the action on the basis that the forum selection clause is a nullity because it referred to Nova Scotia by mistake, or, in the alternative, that this Court ought to decline jurisdiction despite the clause on the ground that Ontario is the more appropriate forum for resolving the dispute.

[3] The mover and defendant Novajet is a commercial air carrier incorporated under the law of Ontario, and carrying on business from its registered office and base of operations at the Toronto Pearson International Airport in Mississauga, Ontario. Novajet is licensed by Transport Canada and the Canadian Transportation Agency to provide domestic and international commercial air transportation services in and throughout Canada, the United States, and elsewhere. Novajet offers full service aircraft charter, management, and acquisition services to individuals and companies, including Barry S. Allan, principal of Ontario Limited. Novajet is the plaintiff in an Ontario action against Ontario Limited arising from the same factual circumstances.

[4] The respondent in this motion and plaintiff in the Nova Scotia action, Ontario Limited, is incorporated under the law of Ontario, carrying on business from a registered office in Toronto, Ontario. According to the Nova Scotia Notice of Action, Ontario Limited was incorporated for the primary purpose of holding title to an Israel Aircraft Industries Galaxy (G200) Jet (the "Aircraft"), which was leased under agreement by Novajet.

[5] As of the date of hearing this motion, neither Novajet nor Ontario Limited was, or for that matter, ever has been, registered to carry on business in Nova Scotia.

[6] This information was first revealed in answer to an inquiry made by the Court. It did not form the basis of an argument by Novajet to dismiss Ontario Limited's claim under s. 17(1) of the *Corporations Registration Act*, RSNS 1989, c. 101. If it had, then based on the decision of Duncan J. of this Court in *101252 P.E.I. Inc. v. Brekka*, 2013 NSSC 390; [2013] N.S.J. No. 730 [upheld by the Nova Scotia Court of Appeal in [2015] N.S.J. No. 318; 2015 NSCA 73], Ontario Limited would not be able to maintain its action. At para 28, Duncan J. wrote:

> I conclude that the plaintiff, as a non-registrant in Nova Scotia, has not met the preconditions set out in section 17(1) of the *Corporations Registration Act* and therefore could not have commenced or maintained these actions in its own name.

[7] Since it was not argued before me I will not use it as the basis for dismissing Ontario Limited's action. It is something, however, I can take into consideration in determining whether the parties, or one of them, ever intended to have their contractual obligations towards one another governed by the laws of the Province of Nova Scotia.

[8] For the reasons that follow, I find that this Court should decline jurisdiction over the Nova Scotia action. The issue would be better pursued by way of counterclaim to the Ontario action.

FACTS

The Agreements

[9] In July 2012, representatives of Novajet were involved in negotiations with Ontario Limited for the purpose of entering into an agreement to manage, lease and operate the Aircraft. An Aircraft Management and Operating Agreement was reached on or about July 31, 2012 (the "2012 Agreement"). All contractual negotiations took place within Ontario, and none took place in Nova Scotia.

[10] On July 24, 2012, shortly before concluding the 2012 Agreement with Ontario Limited, Novajet entered into a similar agreement with a Nova Scotia company to manage its aircraft based and operated from the Halifax International Airport in Nova Scotia. The Nova Scotia agreement contained paragraph 16(iii) under "General Provisions", which states that the applicable law and jurisdiction of the agreement is the Province of Nova Scotia (the "Jurisdiction Clause"). Novajet submits that it used the Nova Scotia agreement as a template for the 2012

Agreement with Ontario Limited, and, through inadvertence, neglected to change the clause to recognize exclusive jurisdiction of Ontario law.

[11] Between 2012 and 2015, the parties entered into four Short Form Aircraft Lease Agreements (the "Lease Agreements"), as contemplated by the 2012 Agreement and required by Transport Canada. These Lease Agreements were signed in Ontario, and all contain paragraph 10, which reads: "This Lease shall be governed by the laws of the Province of Ontario."

[12] The 2012 Agreement was subsequently renewed on or about May 23, 2014 (the "2014 Agreement"). Novajet submits, by way of affidavit sworn by its President Philip Babbit, that although there were changes to the 2012 Agreement, the Jurisdiction Clause was not discussed, and therefore still purported to place the 2014 Agreement within the jurisdiction of Nova Scotia law. None of the revised or renegotiated terms were in any way related to Nova Scotia. The parties agree that all discussions related to the agreement and the signing of the document occurred in Ontario.

[13] Novajet did not engage the services of a lawyer to review and obtain advice regarding the 2012 or 2014 Agreements, and submit that they did not feel a lawyer was necessary.

The Dispute

[14] Between July 2012 and June 2015, Ontario Limited incurred substantial liabilities to Novajet, including invoices directly relating to the maintenance, storage, and operation of the Aircraft. Ontario Limited disputes the legitimacy of some of the invoiced amounts, alleging that Novajet had overbilled Ontario Limited for expenses throughout the term of the 2012 Agreement. In particular, Ontario Limited alleges that Novajet "double billed" navigation costs, landing fees, ground handling and other incidental expenses by charging both the person chartering the Aircraft and Ontario Limited, as well as inflating and improperly charging certain claimed expenses to Ontario Limited. Ontario Limited also alleges incidents of negligence and breach of the 2012 Agreement.

[15] Ontario Limited gave notice of termination to Novajet pursuant to section 11 of the 2012 Agreement, which allowed for termination without penalty by either party at any time upon not less than sixty days written notice. Ontario Limited refused to pay the disputed invoices, amounting to $319,199.71.

[16] As a result of Ontario Limited's refusal to pay the disputed invoices, Novajet registered a lien for the claimed amount in Ontario under the *Storage and Repair Liens Act*, RSO 1990, c. R.25. Novajet seized, and refused to release, the books and records of the Aircraft that were legally required to operate it. Despite asserting the illegality of the lien, Ontario Limited paid money in trust into the Ontario Superior Court of Justice on July 30, 2015, to discharge the lien.

[17] On October 6, 2015, Ontario Limited filed an action for breach of contract and negligence in Nova Scotia, pursuant to the Jurisdiction Clause. The next day, Novajet issued an action in the Ontario Superior Court of Justice against Ontario Limited and its principals, Barry Allan and Darlene Litman. Ontario Limited has filed a motion to strike Novajet's Statement of Claim, arguing that commencing the action in Ontario is in breach of the Jurisdiction Clause.

[18] In this motion, Novajet has asked this Court to stay the Nova Scotia action, pursuant to Civil Procedure Rules 23.03(1), 88.02(1), and subsections 41(e) and (g) of the *Judicature Act*, R.S.N.S. 1989, c. 240, on the basis that the Jurisdiction Clause was included by mistake and Nova Scotia is not the appropriate forum for the dispute to be heard. Novajet also asks this Court to dismiss Ontario Limited's action for want of jurisdiction pursuant to Civil Procedure Rule 4.07(1).

[19] In response, Ontario Limited asks this Court to dismiss the motion and allow the Nova Scotia action to proceed.

ISSUES

[20] The issues to be considered on this motion are as follows:

1. Has Ontario Limited attorned to the jurisdiction of Ontario with regard to the issues that are the subject matter of the Nova Scotia action?
2. Is the jurisdiction clause a nullity due to mutual or unilateral mistake?
3. Does the Supreme Court of Nova Scotia maintain jurisdictional competency to hear the action? If so, should it exercise jurisdiction?

ATTORNMENT

[21] Novajet argued that by paying money into the Ontario Superior Court of Justice in response to the lien, Ontario Limited attorned to the jurisdiction of Ontario. Ontario Limited maintain that the lien was illegal due to the Jurisdiction

Clause, and asserts that they paid money into Court only to mitigate their losses by removing the legal barriers to the use of the Aircraft.

[22] In *Wolfe v. Wyeth*, 2011 ONCA 347, the appellants argued that the motions judge had erred in finding that Ontario could take jurisdiction over the matter based on the real and substantial connection test. Goudge J.A., for the Court, found that even if the real and substantial connection test was not met, in that case, the appellants had attorned to the jurisdiction of Ontario because they had voluntarily engaged the jurisdiction of Ontario by seeking to have the court apply the doctrine of issue estoppel, and they did not come before the motions judge under duress.

[23] This motion can be distinguished from *Wolfe* on the basis that Ontario Limited cannot be said to have voluntarily engaged with the Ontario Superior Court of Justice when they paid money into Court to discharge the lien. The only way to have Novajet release the Aircraft books and records required for it to fly was to pay the money into court. Faced with the unavailability of its primary revenue earning asset, Ontario Limited had no choice. This is not the same as engaging in a legal proceeding on the merits.

[24] On the other side, Novajet has not attorned to the jurisdiction of Nova Scotia by seeking to have the Nova Scotia action dismissed by virtue of Civil Procedure Rule 4.07(2). The issue must therefore be resolved on grounds other than attornment.

MISTAKE

[25] Novajet submits that the Jurisdiction Clause 16(iii) of the 2012 and 2014 Agreements is a nullity by reason of mistake. They seek rectification to reflect what they say is the original understanding of the parties, that the Agreement be governed by the laws of the Province of Ontario.

[26] *Consensus ad idem*, or mutuality of agreement, is a necessary precondition for contract formation. Consensus is identified objectively, from the perspective of an impartial and reasonable observer. In the case of written commercial contracts, the search for agreement focuses on the mutual and objective intentions of the parties as expressed in the words of the contract: *Halifax (Regional Municipality) v. Canadian National Railway Company*, 2014 NSCA 104 at para 57. Equity, however, has provided exceptions to allow for rectification where a mistake has been made.

[27] Equity recognizes that mistakes may be bilateral or unilateral in nature. Bilateral mistake occurs when both parties are mistaken as to the content of an agreement. Under this heading, common mistake occurs where both parties have made the same mistake, and mutual mistake occurs where both parties are mistaken about different aspects of an agreement. Both forms of bilateral mistake give rise to a remedy of rectification: see *Kings (County) v. Berwick (Town)*, 2010 NSSC 128 at para 82. As noted by Professor Fridman, "little, if any, theoretical or practical effect may flow from the differentiation of common and mutual mistake": The Law of Contract, 5th Edition (Toronto: Thomson Canada Limited, 2006) at p. 252.

[28] In the circumstances of the 2012 and 2014 Agreements, it would be surprising if both or either party had intended for the Jurisdiction Clause to submit the Agreements to the jurisdiction of Nova Scotia law. Aside from the Aircraft having landed at one point at the Halifax Stanfield International Airport while chartered to a third party, there is absolutely no connection between the parties, the Agreement, and the Province of Nova Scotia. Both businesses are registered and operate in Ontario. Ontario Limited does not carry on any business in Nova Scotia. The principals of both companies reside in Ontario. The Aircraft is maintained and stored at a hangar at Toronto Pearson International Airport. All Transport Canada Leases adopt Ontario as the applicable legal jurisdiction. All negotiations for and the signing of the Agreements occurred in Ontario.

[29] The evidence tendered by Novajet that the Agreement template originated from a previous agreement entered into with a Nova Scotia company shortly before concluding the 2012 Agreement with Ontario Limited supports the notion that the Jurisdiction Clause referred to Nova Scotia through mere inadvertence rather than as a result of either party's intention. The fact that the clause was never subject to discussion or negotiation corroborates this. This is further reinforced by the fact that neither corporation is registered in Nova Scotia and are therefore barred from bringing civil action in this Province pursuant to section 17(1) of the *Corporations Registration Act*, R.S.N.S. 1989, c. 101.

[30] Ontario Limited has not refuted any of the above evidence contained in Novajet's affidavits filed in support of this motion. In fact, counsel for Ontario Limited did not file an affidavit. I am therefore satisfied on the evidence proffered that the reference to Nova Scotia in the Jurisdiction Clause 16(iii) was by mistake, and the parties must have intended the Agreements to operate under the laws of the Province of Ontario.

[31] Ontario Limited submits that the test for bilateral mistake cannot be established because it was not mistaken as to the contents of the Jurisdiction Clause, and the only available ground for rectification would be unilateral mistake. Ontario Limited has offered no evidence for this bald assertion. Nevertheless, in this case a finding of unilateral mistake would not preclude rectification.

[32] Unilateral mistake occurs where only one party has made a mistake as to the content of the agreement. Between commercial parties, rectification will only be granted where the unmistaken party either knew or ought to have known about the mistake, and permitting the unmistaken party to take advantage of the error would amount to "fraud or the equivalent of fraud": *Performance Industries v. Sylvan Lake*, 2002 SCC 19 at para 38. "Fraud or the equivalent of fraud" is taken here to refer to fraud in the wider sense, including "transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained": *First City Capital Ltd. v. British Columbia Building Corp* (1989), 43 B.L.R. 29 (BCSC) at p. 37.

[33] Whether or not Ontario Limited had actual knowledge that there was a mistake in the Jurisdiction Clause, they certainly ought to have known that Novajet intended for the Agreement to be subject to the laws of Ontario for the reasons supporting mutual mistake above. If Ontario Limited had, like Novajet, simply not reviewed Clause 16(iii), there would have been no reason to assume the Agreement was governed under the laws of Nova Scotia. If Ontario Limited had adverted to Clause 16(iii), then in the absence of any prior discussion regarding the appropriate forum for dispute resolution, it must have at least suspected that Novajet had intended the clause to refer to the laws of Ontario. It would be unconscientious for Ontario Limited to now avail itself of the clause and frustrate the legal action commenced in Ontario with the registering of a lien against it.

[34] Unilateral mistake may not be used to extricate dissatisfied contract makers from a poor bargain: *Performance Industries* at para 35. In this case, however, Novajet is not asserting mistake to avoid performance of a material contractual term, but rather in an attempt to rectify what appears to be a mistaken choice of legal forum for resolving disputes under the contract. The merits of the legal dispute would not be avoided by consolidating the action in Ontario.

[35] A finding of mistake with regard to jurisdiction under Clause 16(iii) may give rise to rectification of that clause alone without disturbing the remainder of the Agreement. Clause 16(iv) states:

> Any provision of this Agreement which is deemed invalid, illegal or unenforceable in any jurisdiction shall, as to that jurisdiction and subject to this paragraph, be ineffective to the extent of such invalidity, illegality or unenforceability, without affecting the remaining provisions hereof in such jurisdiction or rendering that or any other provisions of this Agreement invalid, illegal or unenforceable in any jurisdiction. If any covenant should be deemed invalid, illegal or unenforceable because its scope is considered excessive, such covenant shall be modified so that the scope of the covenant is reduced to only the minimum extent necessary to render the modified covenant valid, legal and enforceable.

[36] In this case, I am satisfied that rectification of Clause 16(iii) is the appropriate remedy, and the Jurisdiction Clause should be taken as intending to submit to the jurisdiction of the laws of the Province of Ontario.

JURISDICTION

[37] Where the Jurisdiction Clause properly refers to the laws of the Province of Ontario, there is no basis under which this Court ought to take jurisdiction over the matter, which could be more appropriately resolved in the Ontario courts. Even without rectification, however, the Court is not bound by the Jurisdiction Clause. If the Supreme Court of Nova Scotia is entitled to accept jurisdiction under Clause 16(iii), then it has discretion as to whether to do so.

[38] Section 4 of the *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2d Sess), c 2 (*CJPTA*), says:

> A court has territorial competence in a proceeding that is brought against a person only if
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based

As discussed above, there is virtually no connection between the parties, the agreement, or the action, and the Province of Nova Scotia. Similarly, Civil

Procedure Rule 4.07(2) notes that Novajet does not submit to the jurisdiction of the court by moving to dismiss the action for want of jurisdiction. The only possible bases for a Nova Scotia court to have territorial competence over the action are through subsections 4(c) or (e) by virtue of the Jurisdiction Clause.

[39] *CJPTA* subsection 11(e)(ii) states that a real and substantial connection between the Province and the facts on which the proceeding is based is presumed to exist if the proceeding concerns contractual obligations, and by its express terms, the contract is governed by the law of the Province.

[40] *CJPTA* section 12 provides that a court may decline to exercise its territorial competence on the ground that a court of another state is a more appropriate forum in which to hear the proceeding, considering:

a) The comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any other alternative forum;

b) The law to be applied to issues in the proceeding;

c) The desirability of avoiding multiplicity of legal proceedings;

d) The desirability of avoiding conflicting decisions in different courts;

e) The enforcement of an eventual judgment; and

f) The fair and efficient working of the Canadian legal system as a whole.

[41] Counsel for Novajet helpfully observed that: the parties, their lawyers and all possible witnesses are located in Ontario; the Nova Scotia action and the Ontario action relate to the same series of events, which could be consolidated into one action by way of counterclaim; and that any eventual judgment will have to be enforced in Ontario.

[42] The test to be applied when determining whether to enforce a valid forum selection clause is the "strong cause" test from *"Eleftheria" (The) (Cargo Owners) v. "Eleftheria" (The)*, [1969] 1 Lloyd's Rep. 237 (Eng P.D.A.), adopted by the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 at para 19, and the Nova Scotia Court of Appeal in *Armoyan v. Armoyan*, 2013 NSCA 99 at para 330. The test states that a forum selection clause in an otherwise valid and binding contract should be upheld unless "strong cause" is shown for not doing so.

[43] Again assuming that the rectification is unavailable to remedy mistake, the strong cause test from *Pompey* places the burden on the applicant to show why a stay should be granted. The Court may take into account all the circumstances of the case, and in particular should consider:

1. In what province the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of a trial as between the Ontario and Nova Scotia courts;
2. Whether the law of Nova Scotia applies, and if so, whether it differs from Ontario law in any material respect;
3. Whether the respondent genuinely desires trial in Nova Scotia, or is only seeking procedural advantage;
4. Whether the applicant would be prejudiced by having to sue in the Ontario Court because they would:
    a. Be deprived of security for that claim;
    b. Be unable to enforce any judgment obtained;
    c. Be faced with a time-bar not applicable in Ontario; or
    d. For political, racial, religious or other reasons be unlikely to get a fair trial.

[44] All evidence of issues of fact are located in Ontario. With regard to the claims in breach of contract and negligence, which are largely based in common law, the laws of Ontario and Nova Scotia are similar. Both parties are intimately connected with Ontario, and neither is in any way connected with Nova Scotia. There is no clear evidentiary basis for concluding whether Ontario Limited genuinely desires trial in Nova Scotia or is only seeking procedural advantage; however, it is worth noting that the assumption of jurisdiction in Nova Scotia would likely lead to a stay of proceedings in Ontario and may provide evidence supporting the plaintiff's contention that the Ontario lien was illegally obtained pursuant to the Jurisdiction Clause. Finally, there would be no prejudice in having to sue in the Ontario court. The courts of Ontario will undoubtedly provide a fair trial, and moreover, a judgment from that Court would be easier to enforce given that both parties are located in Ontario.

[45] Ontario Limited relies on a line of cases applying the "strong cause" test stemming from *Expedition Helicopters Inc. v. Honeywell Inc*, 2010 ONCA 351, where Juriansz J.A. at para 24 wrote:

> A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[46] Ontario Limited asserts that none of these factors apply here, and in particular, because Nova Scotia has jurisdiction and is able to deal with the claim, it should do so. Ontario Limited also notes that Novajet has been unable to point to a single case in the commercial context where there has been a "strong cause" to decline jurisdiction.

[47] *Expedition Helicopters* has also been applied by the BC Court of Appeal in *Viroforce Systems Inc v. R&D Capital Inv.*, 2011 BCCA 260, and by Justice Pickup of this Court in *Instrument Concepts-Sensor Software Inc. v. Geokinetics Acquisition Company*, 2012 NSSC 62 at para 37.

[48] Despite the strong words of Juriansz J.A., this case can be distinguished from those applying the *Expedition Helicopters* test because those cases dealt with courts deciding whether or not to assume jurisdiction where the forum selection clause referred to another jurisdiction. Here, Nova Scotia is the jurisdiction referred to in Clause 16(iii). One of the "few factors" referred to by Juriansz J.A. includes that "the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim." Whereas *Expedition Helicopters* may be directly relevant to the Ontario court's consideration of whether to assume jurisdiction over the action started there by Novajet, I do not take that test as ousting the Supreme Court of Nova Scotia's discretion to decline jurisdiction over the action brought by Ontario Limited. Although parties may bind themselves by contractual agreement, they may not bind the Court in areas where it enjoys discretion.

[49] The *Pompey* factors discussed above therefore remain persuasive. On balance, Novajet has satisfied the "strong cause" test for declining jurisdiction in Nova Scotia despite the Jurisdiction Clause.

[50] In summary, the Court is not bound to exercise jurisdiction when faced with a forum selection clause. The Court may consider whether it is the appropriate forum under *CJPTA* section 12. In this case, the weight of the evidence favors declining jurisdiction, and allowing Ontario to assume jurisdiction. The action has absolutely no connection with Nova Scotia, and a very strong connection with Ontario and no other jurisdiction. Even if Clause 16(iii) is found to be valid, I find that Ontario is still the proper jurisdiction for resolving the legal dispute.

CONCLUSION

[51] Accordingly, the motion is granted, and the Nova Scotia action brought by Ontario Limited against Novajet is stayed.

[52] Should the parties fail to reach an agreement on costs, counsel shall have thirty days from the date of this decision to file their written submissions on the issue.

McDougall, J.