IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia Power Inc. v. AMCI Export Corportaion, 2008 NSSC 49

Date: 20080220
Docket: SH 219171
Registry: Halifax

Between:

Nova Scotia Power Incorporated, a body corporate

Applicant/Plaintiff

and

AMCI Export Corporation, a body corporate

Respondent/Defendant

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	August 9, 2007, in Halifax, Nova Scotia
Final Submissions:	August 24, 2007
Counsel:	Mr. David G. Coles, Q.C., Ms. Nicole Godbout and Cheryl Clark, Articled Clerk, for the plaintiff Mr. Craig Garson, Q.C., for the defendant

By the Court:

Introduction

[1] This is an application for summary judgment by the plaintiff, Nova Scotia Power Incorporated ("the applicant"). The applicant claims that the defendant, AMCI Export Corporation ("the respondent"), failed to supply coal as required by an agreement between the parties. A previous application, by which partial summary judgment was granted, was reversed on appeal. The present application is concerned with an amended defence filed while that application was ongoing. The only amendment was the addition of para. 8, which provides:

> As to the whole of the Amended Statement of Claim, the defendant says that at all material times, the Plaintiff was concurrently obligated under the Agreement to provide sufficient ships to load ... all of the South American Low Sulphur A Coal referred to herein at the Option Designated Load Port nominated by the Defendant. In breach of that obligation, the Plaintiff failed to provide sufficient ships to load the coal at the Option Designated Load Port nominated by the Defendant. In addition, therefore, to all of the defences set out herein or as a further alternative thereto, the Defendant says that if it did fail to deliver the coal as alleged by the Plaintiff at paragraph 15 of the Amended Statement of Claim herein, or otherwise, or at all, which failure is not admitted but denied, the Plaintiff, because of its own failure to provide ships to load the coal at the Option Designated Load Port referred to herein, has not sustained and could not have sustained any damages, whether as alleged, or otherwise or at all.

[2] This application is limited to a determination as to whether para. 8 of the amended defence provides an arguable issue for trial. The Court of Appeal made no comment on the effect of the amended defence: 2008 NSCA 2 at para. 2.

Background

[3] The parties entered into a Coal Supply Agreement ("the Agreement") in August 2001. The applicant issued a Confirmation Letter dated March 14, 2003, by which it purchased four call options for South American Low Sulfur A coal in 2004, in quarterly installments of up to 100,000 tonnes per quarter. There were deadlines for the applicant to exercise the options. There does not appear to be any dispute between the parties as to the mechanics of arranging a coal delivery. The applicant would nominate a laycan (a range of dates, normally a period of ten days,

during which it proposed to pick up the coal). The respondent would then nominate the port at which the coal could be collected (the loadport). In each of the relevant transactions in 2004 the designated loadport was Palmarejo, Venezuela. Upon receiving this information, the applicant would nominate the specific vessel that would pick up the coal, which the respondent was then required to submit for port approval. In the event that the proposed vessel was accepted, the applicant would fix that vessel to take delivery of the coal at the loadport. In submitting the vessel for approval, the applicant could indicate – by the term "or sub" – that it could substitute a vessel similar to the nominated vessel.

[4] In its Statement of Claim the applicant claims that the respondent failed to deliver on the call options in 2004 (with one exception), and seeks damages on account of the need to obtain replacement coal. In the amended defence the respondent alleges that the applicant did not have sufficient vessels. It points to a series of incidents, described in more detail below, as a basis upon which this should be considered a viable defence, which should be left for a trial judge rather than being disposed of in chambers, stating that there are issues of credibility.

[5] On this application, I will proceed as if the options were exercised. I am not making a determination of that issue. Similarly, I am not determining whether the applicant gave proper notice of the laycans, but will proceed as if it did so.

Q1-2004

[6] The applicant claimed that it designated two laycans for the first quarter of 2004 (abbreviated as Q1-2004), but the respondent delivered no coal at the loadport. The respondent claims that, regardless of its failure to deliver the coal, the applicant did not have sufficient shipping capacity to carry it. According to the respondent, the applicant nominated the MV *Alice Oldendorff* for a laycan of February 20 to 29. The respondent says this ship could only have lifted 43,000 tonnes, rather than the 100,000 tonnes required by the contract. The applicant says the burden is upon the respondent to prove that it lacked the necessary lifting capacity.

[7] As to the respondent's assertion that there is no evidence that the applicant had a vessel for the March 18 to 27 laycan, the applicant says it was advised by Mr. Thrasher on February 2 that the respondent would not be able to fulfill its first

quarter delivery obligations. The applicant claims it was entitled to rely on this default and mitigate its losses.

Q2-2004

[8] With respect to Q2, the applicant claims it nominated two laycans: May 15 to 25 and June 20 to 30. In his affidavit, Colin Thomson, Solid Fuel Manager for the applicant, who was responsible for providing ships, states that the applicant nominated the MV *Alice Oldendorff*. On May 5, Mr. Thomson notified Ernie Thrasher, the respondent's principal, that if the respondent did not acknowledge the laycan by May 7, the vessel would be diverted. On May 11, Mr. Thomson notified Mr. Thrasher that the ship had been diverted.

[9] The respondent claims that the applicant did not have a vessel for the May laycan and refers to an e-mail exchange between Mr. Thompson and Canada Steamship Lines (CSL) – with which the applicant had a shipping contract – indicating that the *Alice Oldendorff* would not be available prior to May 28, 2004. The respondent claims, given that the vessel would not have been able to pick up the coal at the designated port between May 15 and 25, and no substitute vessel was identified, the applicant should have notified the respondent that it did not have a vessel, rather than seeking confirmation of the laycan. The respondent suggests that there is an arguable issue related to the credibility of Mr. Thomson, claiming that the applicant's intention was to force it to default. There was no issue raised with respect to the second Q2 laycan.

[10] The applicant says the fact the vessel would have been late did not relieve the respondent from its contractual obligation. The contract between the parties, the applicant says, contemplated situations where a vessel arrived late. The applicant would have been responsible for any costs or damages arising from the delay.

[11] The applicant took the position that liability with respect to Q2 is *res judicata*, based on the finding by McDougall J. in the earlier application that the evidence "clearly demonstrated that the Q2 Option was indeed exercised and acknowledged being exercised by AMCI's president." He found that the applicant was entitled to judgment on liability because the respondent refused to commit to laycan dates. As such, the applicant says, the fact situation in Q2 was not addressed by para. 8 of the amended defence. Given that this decision was set

aside on appeal, and that the issue and materials before me on this application are distinct from those before the Court on the earlier application, I do not believe the matter is *res judicata*.

Q3 and Q4-2004

[12] With respect to Q3 and Q4, the applicant says it exercised the quarterly options on March 8 and June 29, 2004, nominating August 21 to 31 and September 20 to 30. According to Mr. Thomson's affidavit, the applicant did not have access to a self-loading vessel – which was required for loading at Palmarejo – for the August 21 to 31 laycan; CSL had only four such vessels, and NSPI could not gain access to one for that laycan. NSPI therefore attempted to arrange a vessel swap with Interamerican Coal.

[13] On July 27, Mr. Thomson wrote to Mr. Thrasher requesting updated inventory information and assurances that AMCI would have sufficient inventory for loading between August 21 to 31. According to Mr. Thomson, this correspondence was prompted by Mr. Thrasher's advice that trucking into Palmarejo was reduced and that the respondent's inventory had been depleted by loading the MV *Warsaw* in the June 20 to 30 laycan. The respondent did not reply by the deadline of July 28, and the applicant advised of its intention to purchase alternate coal.

[14] The respondent maintains that there was no swap of vessels and refers to an e-mail from Marcel Van Den Berg of Interamerican Coal – a company with whom Mr. Thomson had been attempting to arrange alternate shipping – dated July 30, 2004. In the message, Mr. Van Den Berg states that "we really much prefer the *Warsaw* to perform this operation for the dates agreed with the Bulk Wayuu and decline this August opportunity for a swap with a generic crane/grab type vessel." As a result of the failure to arrange a swap with Interamerican Coal, the respondent says, the applicant did not have a vessel for the August 21 to 31 laycan. The respondent says the applicant knew this by the time it notified the respondent that it was electing to replace the laycan.

[15] The applicant maintains that it had a vessel available for the August 21 to 31 laycan. The respondent argues that there is no proof that the applicant had a vessel available for the August 21 to 31 laycan. Given its claim that there are issues

respecting the credibility of Mr. Thompson, the respondent alleges that this is a matter for trial.

[16] There is no issue with respect to the second laycan in Q3, September 20 to 30. The respondent accepted the applicant's nomination of the MV *Bauta*. However, on August 20, 2004, Mr. Thrasher notified the applicant that the respondent did not have inventory to load the vessel. Mr. Thompson confirmed the default to Mr. Thrasher by e-mail on August 30, 2004. The applicant submits that there can be no claim that it failed to send a vessel for this laycan, given the prior advice from the respondent that it did not have sufficient inventory.

[17] The respondent submits that the applicant had no self-loading vessels available for any Q3 liftings. Contrary to the applicant's statement that it "was arranging a swap that would provide a self-loading vessel," the respondent says, a July 30 e-mail from Mr. Van Den Berg to Mr. Thomson indicates that no swap would occur. On July 27, the applicant had rejected the respondent's choice of loadport, contrary (the respondent says) to the terms of the agreement. The respondent says the evidence will show that the "attempt to reject AMCI's loadport nomination of Palmerejo was because [the applicant] did not have a vessel to lift coal at the port of Palmerejo." The applicant says the burden is on the respondent to demonstrate that it was not ready and willing to take delivery.

[18] On August 30, 2004 the applicant nominated laycans for Q4 of October 20 to 30 and November 20 to 30. The respondent did not nominate a load port for Q4, and on September 1, 2004, it notified the applicant that it was terminating the Confirmation Letter and Coal Supply Agreement on the basis of Force Majeure. The applicant says that it had no obligation to send vessels for Q4. The respondent submits that there is no evidence that the applicant had self-loading vessels available had it not terminated. The applicant says it had no obligation to arrange to take delivery under a terminated agreement, with no dates set.

LAW

[19] Civil Procedure Rule 13.01 provides:

> After the close of pleadings, any party may apply to the court for judgment on the ground that:

> ...
>
> (b) there is no arguable issue to be tried with respect to the defence or any part thereof. ...

Pursuant to Rule 13.02, on hearing an application under Rule 13.01 the Court may, *inter alia*:

> (a) give such directions as may be required for the examination of any party or witness, or for the production of any books or document or copy thereof, or for the making of any further inquiries;
>
> ...
>
> (d) allow the defendant to defend the claim or part thereof, either unconditionally or on terms relating to giving security, time, the mode of trial, or otherwise;
>
> ...
>
> (f) give directions as to the trial or hearing of the claim or part thereof;
>
> ...
>
> (j) award costs;
>
> (k) grant any other order or judgment as it thinks just.

[20] Where a party obtains judgment under Rule 13.02, the plaintiff may continue the proceeding in respect of any remaining part of the claim: Rule 13.03.

[21] The test for summary judgment was set out in *Potter (Carl B.) Ltd.* v. *Antil Canada Ltd. and Mercantile Bank of Canada* (1976), 15 N.S.R. (2d) 408 (S.C.A.D.), where Cooper J.A., writing for the Court, said:

> [8] We were referred to authorities which set out what an applicant under our Rule 13 and corresponding rules in other jurisdictions must establish to obtain summary judgment. It is stated in *The Supreme Court Practice 1973*, vol. 1 at p. 132 that:

"The purpose of O. 14 is to enable a plaintiff to obtain summary judgment without trial, if he can prove his claim clearly, and if the defendant is unable to set up a bona fide defence, or raise an issue against the claim which ought to be tried....

> 'When the Judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff' (per Jessel, M.R., *Anglo-Italian Bank* v. *Wells*, 38 L.T., p. 201, C.A.)."

[9] In *Royal Bank of Canada* v. *Malouf*, [1932] 2 W.W.R. 526 (Sask. C.A.) Martin, J.A., said at p. 529:

> "It is well settled that the provisions of Rule 127 are not to be used to strike out a defence, unless it is very clear that the defendant has no substantial defence to submit to the Court; but when a Judge is satisfied, not only that there is no defence, but no fairly arguable point to be presented on behalf of the defendant, it is his duty to give effect to the Rule and to allow the plaintiff to enter judgment for his claim.... Moreover, in order to resist an application under the Rule, it is not sufficient for the defendant to say he has a good defence on the merits; the defence must be disclosed, and sufficient facts must appear to show that there is a bona-fide defence, or at least, as stated by Jessel, M.R., in *Anglo-Italian Bank* v. *Wells*, *supra*, 'a fairly arguable point to be argued on behalf of the defendant:'..."

[10] The matter was also dealt with by the Ontario Court of Appeal in *Featherstonhaugh* v. *Featherstonhaugh*, [1939] 2 D.L.R. 262, where at p. 268 Robertson, C.J.O., said:

> "The defendant is to show the nature of his defence, and to disclose such facts as may be deemed sufficient to entitle him to defend, and it is upon his success or failure in doing so that the fate of the motion must turn. In a sense the usual rule is reversed for this special purpose, and the burden of proof, such as it is, lies upon the defendant and not upon the plaintiff."

[22] The leading case on summary judgment is *Guarantee Co. of North America* v. *Gordon Capital Corp.*, [1999] 3 S.C.R. 423; [1999] S.C.J. No. 60, where Iacobucci and Bastarache JJ. wrote, for the Court:

> 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for

> consideration by the court.... Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules Managements Ltd.* v. *Ernst & Young*, [1997] 2 S.C.R. 165 at para. 15).

[23] In *D.E. & Sons Fisheries Ltd.* v. *Goreham et al.* (2003), 217 N.S.R. (2d) 199 (C.A.) Cromwell J.A. said, "[s]ummary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried" (para. 2). The mere pleading of an issue does not establish an arguable issue; it is clear that "[b]efore any allegation in a defence can constitute an arguable issue to be tried with respect of a defence there must be some recital of the particulars of a factual nature that raise an arguable issue: *Bank of Nova Scotia* v. *Galeco Trading Co.*, 2006 NSSC 241; [2006] N.S.J. No. 317 (S.C.) at paras. 13-14.

ARGUMENTS

After-the-fact knowledge

[24] It is not alleged that the applicant's alleged failure to provide ships was the actual cause of the respondent's proven failure to deliver; the respondent acknowledges that it had no such knowledge at the time. The respondent submits, however, that "if facts emerge after the breach that demonstrate that the 'innocent' party would not have been able to perform its obligations under the contract, that party cannot succeed in an action for breach of contract." The respondent cites *Komorowski* v. *Van Weel*, [1993] O.J. No. 555 (Ont. C.J. Gen. Div.) and *Seagull Paving Ltd.* v. *Terasen Gas* (Vancouver Island) Inc., [2005] B.C.J. No. 2494 (B.C.S.C.) in this regard. In *Seagull Paving* H.J. Holmes J. said:

> 79 A party seeking to justify its repudiation of a contract may rely on the fundamental breach of the other party even if the first party learns of that fundamental breach after the repudiation. In *Schwartz* v. *Shepel*, [1986] B.C.J. No. 1124 at [para] 20 (C.A.) Seaton J.A. said:
>
> > The respondents' position is that what is essential is that they rescinded when they were entitled to rescind, whatever reasons were given. That seems to be the law. In *Universal Cargo Carriers Corporation* v. *Citati* (1957) 2 Q.B. 401, Mr. Justice Devlin (as he then was) said, after reviewing this issue carefully:

> "In that event can the rescinder, having rescinded for the wrong reason, perhaps because he misinterpreted the conduct of the other side, justify his action by relying on facts which come to his knowledge thereafter and with the aid of which he can prove inability? It is now well settled that a rescission or repudiation, if given for a wrong reason or for no reason at all, can be supported if there are at the time facts in existence which would have provided a good reason."

[25] The applicant says this is not a case of repudiation. The respondent does not claim to have repudiated the contract, but rather to have terminated it on the basis of force majeure; neither the evidence nor the pleadings support the suggestion that the respondent considered the contract to be repudiated, or that the respondent took the position that the applicant had fundamentally breached the contract.

Concurrent obligations

[26] The applicant submits that the respondent does not have an arguable defence in respect of its allegation that the applicant failed to provide vessels to take delivery of coal at the designated ports during the designated laycans. In each case, the applicant says, the respondent failed to acknowledge a laycan nomination, causing the applicant to divert the vessel, or failed to have sufficient coal available at the designated port for the applicant to load the vessel. When the respondent accepted the nomination of a laycan and a vessel and had coal available, the applicant provided a vessel. As such, the applicant says, para 8 of the amended defence does not disclose a defence with a real chance of success and should be struck as a result of summary judgment.

[27] The respondent says the application for summary judgment should fail because the applicant has not proven its claim with respect to para 8 of the amended defence, and because para 8 raises an issue that requires trial. The respondent says there was no confirmation of vessels for the 2004 laycans, particularly the May 15 to 25 and the August 20 to 30 laycans. If indeed there was a failure on the part of the applicant to secure vessels for these laycans, it is submitted, the applicant's assurance that there were vessels available is an issue which should be left to the trial judge.

[28] The respondent's claim to have raised an arguable issue rests on the notion that the legal effect of the Coal Supply Agreement was to create concurrent

obligations. By this reasoning, the respondent was obligated, "upon proper exercise by [the applicant] of its quarterly option, to deliver coal that met the contract specifications to the loadport of its designation"; the applicant was obligated "to provide vessels capable of lifting the coal at that loadport and to pay for the coal."

[29] The respondent refers to *Forrestt and Son Limited* v. *Aramayo* (1900), 83 L.T. 335, for the proposition that "[i]n a contract for the sale or manufacture of a chattel, the one party must be ready and willing to deliver; and the other party to accept delivery.... the party who brings the action must show that he was ready and willing to perform his part of the concurrent acts" (pp. 337-338). The respondent says that the applicant's contract with CSL did not ensure that it would have access to self-loading vessels, which were required to load coal at the port of Palmerejo. As such, having purchased the options, it did not have the type of vessels necessary to load the coal, and would be unable to prove at trial that it was prepared to take delivery of the coal it alleges the respondent failed to deliver.

[30] The applicant's position – which I believe to be correct – is that the parties obligations were not concurrent. Rather, it is clear that the applicant's obligation to provide a vessel would only arise upon confirmation that coal would be available to load the vessel.

[31] With the qualifications noted earlier, I am satisfied that the applicant has proven its case. There appears to be no factual dispute as to the allegation that the respondent failed to deliver coal as required.

[32] The respondent says there is an arguable issue as to whether it would have been justified in terminating the contract had it known at the relevant time that the applicant did not have vessels available to perform its obligations under the contract. The applicant, however, states that it has provided evidence that it had ships available or was ready and willing to do so, and says the respondent has not shown by any evidence that there is an arguable issue on this point. In addition, there were no concurrent obligations. The respondent was required to confirm the load ports and to accept the vessel nominated by the applicant; this would necessarily require the respondent to confirm that sufficient coal would be available as well. Until that was done, there was no responsibility or obligation on the part of the applicant to contract for a vessel. These were sequential steps, not concurrent ones.

[33] As a result, I am satisfied that the applicant should have summary judgment with respect to para. 8 of the amended defence. This decision does not purport to speak to issues relating to the applicant's exercise of the options or notification of laycans. It is concerned only with the narrow issue of whether para 8 provides an arguable defence. I have concluded that it does not.

[34] Accordingly, I grant the application for summary judgement and ask counsel to submit their positions on costs in writing within the next three weeks unless they reach agreement in the meantime.

J.