SUPREME COURT OF NOVA SCOTIA

Citation: ***Citibank Canada v. Begg***, 2010 NSSC 56

Date: 20100211
Docket: Hfx No. 320145
Registry: Halifax

Between:

Citibank Canada

Plaintiff

v.

Gerald R. Begg and Maritime Travel Inc.

Defendants

Judge: The Honourable Justice Peter M. S. Bryson

Heard: January 28, 2010, in Halifax, Nova Scotia, in Chambers

Counsel: John Keith & Andrew Sowerby, for Citibank Canada
Grant Machum & Matthew Pierce, for Maritime Travel

By the Court:

[1] Citibank Canada ("Citibank") has commenced proceedings against Gerald R. Begg seeking payment of credit card debt and a guarantee of that debt by Maritime Travel Inc., ("Maritime Travel"). Citibank made demand for payment against Mr. Begg on March 11, 2009 and against Maritime Travel on April 13, 2009. Having not received payment, Citibank commenced an application in court against both Mr. Begg and Maritime Travel on November 23, 2009. On December 4, 2009 Maritime Travel filed a notice of contest. Mr. Begg has not filed a notice.

[2] A motion for directions in December of 2009 was adjourned because Maritime Travel informed the court and Citibank that it intended to bring this motion to convert the application to an action. Mr. Begg was given notice of this motion but did not file any materials or appear.

[3] Maritime Travel says that there will be extensive and time consuming documentary disclosure, discovery and testimony of many witnesses, as well as the likely retention of experts. Fundamentally, Maritime Travel says that an application ". . . does not permit Maritime Travel to fully and fairly defend this proceeding" (Brief, p. 2, my emphasis). In addition, Maritime Travel says that it intends to cross-claim against Mr. Begg and to third party an individual and a company who were the beneficiaries of large credit card payments.

[4] In response, Citibank argues that the issues are well defined and really come down to a question of documentary interpretation.

[5] In support of its motion, Maritime Travel filed the affidavit of its counsel. It relies on that affidavit and on its notice of contest. Citibank relies on its notice of application and supporting affidavits.

[6] The parties appear to agree on the law, but not its application in this case. They both note the change of philosophy between the old distinction of action versus application and the new, more robust application process. More specifically, they both acknowledge that the purpose of applications is "a flexible and speedy alternative to an action," (***Rule*** 5.01(4)).

[7] A useful prelude to detailed consideration of the criteria in **Rule** 6, is to consider the nature of the action and Maritime Travel's "defence."

[8] Citibank's action against Maritime Travel is for payment under a written guarantee. Citibank says the case is largely a matter of legally interpreting the guarantee. Where the interpretation of documents is considered, the admissibility of *viva voce* evidence is constrained: **Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.**, [1980] 1 S.C.R. 888 and **Eli Lilly & Co. v. Novopharm Ltd.**, [1998] 2 S.C.R. 129.

[9] Maritime Travel's notice of contest really comprises three categories of defence:

> (1) the guarantee is not valid and binding on Maritime Travel – in essence *non est factum*;
>
> (2) if binding, the charges claimed fall outside the terms of the guarantee;
>
> (3) if initially binding, the guarantee no longer is so, owing to changes in the underlying obligation (new card), or conduct by Citibank and/or Begg prejudicial to Maritime Travel, thereby releasing the guarantee.

[10] From the foregoing it is apparent that the legal interpretation of the guarantee, in light of the factual basis for the claim, will be fundamental to a resolution of this law suit. The first issue is one of execution and ostensible authority. It can be addressed by affidavit and cross-examination.

[11] The law of guarantee has experienced a lengthy struggle between equity and contract . Owing to the guarantor's vulnerability to dealings between creditor and debtor, equity has always been astute to limit the guarantor's obligations to those initially undertaken by the guarantor. In response, the law of contract was invoked to anticipate and limit the equitable defences available to guarantors. (See, for example, the discussion in *Snell's Equity, 3rd ed.* ¶ 43.30 and following). Maritime Travel will want to fully test the dealings between Citibank and Mr. Begg to see whether or not they may affect the guarantee at issue here. Ample opportunity should be accorded Maritime Travel to do so. Can that be done in an application?

[12] Motions to convert are governed by **Rule** 6.00. **Rule** 6.02 provides:

Converting action or application

6.02 (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.

(2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.

(3) An application is presumed to be preferable to an action if either of the following is established:

(a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, and the erosion will be significantly lessened if the dispute is resolved by application;

(b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

(4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:

(a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

(b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

(6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

In this motion, Maritime Travel bears the burden of establishing that Citibank's claim should be determined by an action, rather than an application, (**Rule** 6.02(2)).

Rule 6.02(3) – Erosion of Rights

[13] Citibank expresses concern that its substantive rights will be eroded because of the delay in bringing its claim to trial. The bank is concerned about a decline in the capacity of Maritime Travel and of Begg to pay the claim. There is no evidence that would support any concern with respect to Maritime Travel's capacity to pay. There is some old evidence with respect to Begg – more than 10 years ago, he was an undischarged bankrupt. Citibank says this is one of the reasons why it insisted upon a guarantee of its credit card by Maritime Travel.

[14] On the other hand, as Maritime Travel argues, Citibank has moved with some leisure in this case. The debts upon which it sues arose primarily in 2008 and its demands for payment were not made until last spring and legal proceedings weren't commenced until late 2009. Moreover, prior to terminating card privileges, Citibank was extending large amounts of credit to Mr. Begg without apparent regard for prompt payment. No doubt Citibank relied on the guarantee, but its recent conduct is not consistent with a fear of repayment by Mr. Begg. . In the absence of new evidence, this factor cannot avail Citibank now.

[15] The evidence does not support Citibank's concern under **Rule** 6.02(3) that its rights will be eroded pending a trial.

Rule 6.02(4) – Presumption in Favour of an Action

[16] Maritime Travel argues that a presumption in favour of an action should apply because it is not reasonable to require Maritime Travel to disclose information about some of its witnesses early in the proceeding. Maritime Travel says that there will be substantial issues of credibility between the parties. There will likely be conflicting evidence. So it would be wrong to require Maritime Travel to disclose its witnesses – or some of them – because credibility will be important.

[17] If an issue of credibility excused parties from the obligation to disclose witness information, one would have thought **Rule** 6.02 would say so. But to the contrary, **Rule** 6.02(5) contemplates that credibility may be an issue. Moreover, the mere assertion that credibility will be important, without more, does not settle the question. Particularly in a case such as this, in which the suit is founded upon commercial documents, the court would need to understand specifically what the crucial credibility issues were, and how, for example impeachment played a critical role. Otherwise, the mere assertion of the importance of credibility would relegate all proceedings to an action.

[18] **Rule** 6.03(2) excuses a party from describing its impeachment evidence on a motion to convert. But that does not relieve that party from describing how impeachment is important to the issues that will be decided.

Rule 6.02(5) – Factors Favouring Application

[19] This **Rule** favours an application where:

> (a) the parties can quickly ascertain who their important witnesses will be;
>
> (b) the parties can be ready to be heard in months, rather than years;
>
> (c) the hearing is of predictable length and content;
>
> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

Witnesses

[20] Citibank claims it has only one witness. It says this is not a factor for it. Maritime Travel has identified its president, its comptroller and its director of finance as likely witnesses. Maritime Travel suggests that it may have expert witnesses and there will be other witnesses not yet identified arising from further disclosure. Maritime Travel also refers to its notice of contest filed on December 4th, in which it identifies issues, but no witnesses.

[21] The dispute between Maritime Travel and Citibank was crystalized early last year. Demand letters were sent out in March and April of 2009. It is therefore surprising that Maritime Travel says in its notice of contest that it has not identified any witnesses. It now has named three. In any event, I am not satisfied that this is an insuperable problem that cannot be addressed in an appropriately flexible motion for directions.

[22] In light of the legal basis on which Citibank sues, and the issues identified by Maritime Travel, it should not be difficult to identify most witnesses now. Others may turn up, but they can be addressed when they do.

[23] Legal proceedings are almost never static. They have a life of their own and they evolve. The rules of court anticipate and provide for this. There is no reason why a motion for directions could not favour generous documentary disclosure, or the late recognition and discovery examination of those not initially identified.

Readiness

[24] Maritime Travel argues that the parties are not likely to be ready in a matter of months. Maritime Travel also indicates that it wishes to advance a cross-claim against Mr. Begg and a third party claim against J.R.W. Farms Limited and/or a Mr. Waugh, who received large payments under the Citibank credit card.

[25] Maritime Travel's concerns here have some merit. There is no clear provision in **Rule** 5 for cross-claims and third party claims. As well, the discoveries which Maritime Travel indicates it would like to undertake and the document disclosure attendant upon same is likely to take more than a couple of months; but it should not take years or even a year. Under **Rule** 5.16 a judge may order two or more applications to be heard together. If Maritime Travel wishes to bring claims against Mr. Begg and others, it can do so and then apply to

consolidate or have the claims heard together. With respect to the evolution of this suit – **Rule** 5.09(3) allows the court to amend or supplement directions. The initial motion for directions is not necessarily "written in stone." On balance, the parties should still be ready earlier than for most actions.

Length of Hearing

[26] Maritime Travel claims that there is no predictability about the length and content of the hearing, although they concede that this uncertainty may be resolved at some point in the future. No doubt Maritime Travel will want to do such things as test the credit card charges claimed by determining if they fall within the terms of the customer card agreement and/or guarantee. There will likely be some discovery associated with this. The hearing may well take more than the 2.5 days estimated by Citibank. But again, this should not be fatal to the application process. The motion for directions can provide some flexibility with respect to the hearing. But the length of the hearing is something that the parties should be able to determine relatively quickly once they have fuller document disclosure. After all, whatever Citibank claims has a documentary foundation.

Credibility

[27] Credibility issues alone should not be a barrier to an application. The **Rule** anticipates that credibility may need to be assessed. As Justice Warner said in **Kings (County) v. Berwick (Town)**, 2009 NSSC 398, the best means of testing credibility is cross-examination. Generous cross-examination can be accommodated in an application. But then, Maritime Travel says **Rule** 6.02(4) is there to protect parties who wish to challenge credibility by impeachment. What issues may turn on impeachment are not described. Based on the issues set out in the "pleadings," I consider it unlikely that credibility will be crucial to a resolution of this case.

6.02(6) Costs and Delay

[28] On a motion to convert, the court must also consider the relative costs and delay of an action or application.

[29] The amount claimed here ($579,675.91) would be significant for most individuals, but is not a large sum in a commercial dispute. It is unlikely that an action will be either quicker or less expensive than an application in court. Maritime Travel expresses concern about the expense of testimony by affidavit, but the reality is that affidavit evidence is usually much more focussed and relevant than direct testimony because it has the advantage of being prepared with the assistance of counsel. The expense of preparing affidavits should be less than the expense of preparing witnesses and directly examining them. The real question is whether the savings in time and expense of an application is outweighed by any prejudice to Maritime Travel in adequately responding to claims against it. In my assessment, Maritime Travel can mount an equally effective defence by way of application as by way of action.

[30] At the end of the day, Citibank's claim comes down to the meaning of the "guarantee"purportedly signed by Maritime Travel's then president and whether it applies to the debt for which Citibank sues.

[31] After a full review of the materials filed in this motion to convert, including the very fine briefs submitted by counsel, as well as their oral submissions, I am persuaded that this matter can continue as an application in court, although it may be a little longer and a little more complex than the average application. Appropriate allowance will have to be made for document disclosure and witness discovery. Maritime Travel needs sufficient pre-hearing disclosure so that any equitable defences can be brought forward at the application and tested against the language of the guarantee. The disclosure will involve some time and effort. The hearing itself should be faster and shorter. The original motion for directions may require later amendment, but an application should work here.

[32] While I am satisfied that the claims and defences to it can proceed by way of application, I did have some initial reservations about how to accommodate Maritime Travel's cross-claim and potential third party claim within an application. But on reflection, these can be adequately addressed in other ways. First, it may be that the cross-claim involves sufficient overlap in issues and evidence that the motion for directions could include it. But if not, that can be a separate application, heard in conjunction with this one. The potential third party claim is not inextricably bound up with Maritime Travel's defence. The defence of Citibank's claim should not be compromised if the third party issues go ahead by way of separate proceedings. That is not to say that documents between Citibank

and the third parties may not be relevant to Maritime Travel's defence. But those documents and any related discovery can be provided for in the Motion for Directions.

[33] Finally, if it turns out that these proceedings become more convoluted and would be best determined by way of action, there is nothing in the **Rule** that would preclude a later motion to convert. Barring abuse of process, in appropriate circumstances I would think the court should entertain such a motion.

[34] Both parties made a good case and provided the court with excellent materials. The outcome here was by no means obvious. If the parties cannot agree on costs, I will hear them on same.

Bryson, J.