

SUPREME COURT OF NOVA SCOTIA

Citation: Secunda Marine Services Ltd. v. Caterpillar Inc., 2010 NSSC 392

Date: 20100927

Docket: Hfx No. 178147

Registry: Halifax

Between:

Secunda Marine Services Limited

Plaintiff

v.

Caterpillar Inc. and Puckett Machinery Company

Defendants

- and -

Halter Marine, Inc.

Third Party

Judge: The Honourable Justice C. Richard Coughlan

Heard: September 27, 2010 (in Chambers), in Halifax, Nova Scotia

Decision: September 27, 2010 (Orally)

**Written Release
of Decision:** October 26, 2010

Counsel: W. Wylie Spicer, Q.C., Jane O'Neill and Daniel Watt, for
the plaintiff
Thomas M. Macdonald and Justin Adams, for the
defendants

Coughlan, J.: (Orally)

[1] Caterpillar Inc. moves for an order adjourning the trial dates. This proceeding arises out of a fire on a ship, Thebaud Sea, which occurred on February 3, 2001. An originating notice and statement of claim was issued March 26, 2002, which was served on Caterpillar Inc. on or about May 24, 2004. Caterpillar filed a defence October 13, 2004.

[2] A date assignment conference was held on June 26, 2009 before the Honourable Justice John D. Murphy. The finish date was set for August 31, 2010 and the trial scheduled to commence on December 6, 2010. Ten days were set aside for the trial. At the date assignment conference, the defendants took the position the trial could not proceed until after August, 2010 because of issues concerning discovery to be conducted, expert reports and the fact Gordon McKee, Caterpillar's lead trial counsel in the action, had a trial in Ontario scheduled for five months commencing in January, 2010.

[3] Since the date assignment conference, additional discovery has been conducted by the plaintiff and expert reports were exchanged in February and March, 2010. The trial in Ontario was scheduled for five months and commenced February 8, 2010. The plaintiffs in Ontario completed their case in July, and it is anticipated the defence evidence will commence in September, 2010.

[4] The Ontario trial is scheduled for defence evidence through the end of February, 2011, with some days off in the fall that will be fully occupied by trial preparation; and then a one month break in January, during which Mr. McKee states he will be preparing witnesses; and at the trial judge's request be preparing a written closing argument, with a view to completing the written portion of the argument and then have closing oral submissions, which could be after April, 2011.

[5] Caterpillar requests the trial be adjourned to September, 2011, so that they can have counsel of their choice, Mr. Gordon McKee, represent them. Mr. McKee's affidavit sets out in para. 20:

I have been the Defendants' lead counsel in this action since it was commenced, and my involvement has been direct and continuous including attendance at all discovery examinations except the most recent one when I was

in trial in Ontario, and other lawyers in my firm and our Nova Scotia counsel have only been involved intermittently.

[6] The first trial dates available for a ten day trial after April, 2011 are in January, 2012. Mr. McKee knew by at least December, 2009 the Ontario trial was going to carry over into the fall of 2010. The dates for the Ontario trial were set on the availability of the Court - sitting days were scheduled for whenever the Court is available for a continuous period from the start of the trial. Mr. McKee did not advise the Court in Ontario that since June, 2009 he had a trial scheduled for hearing in Nova Scotia in December, 2010.

[7] Civil Procedure Rules 4.17 and 4.20 provide:

Reconsideration

4.17 A party who becomes aware, after the date assignment conference, of information that materially affects the forecast of trial readiness or the estimate of the length of trial, must immediately request a conference to reconsider the trial dates.

....

Adjournment of trial dates

4.20 (1) A judge may adjourn trial dates before the finish date, if all parties agree the party seeking the adjournment would suffer a greater prejudice in proceeding with the trial than other parties would suffer by losing the trial dates.

(2) A motion for an adjournment after the finish date must be made to the trial judge, unless a judge has not been assigned or the trial judge is not available.

(3) A judge hearing a motion for an adjournment after the finish date must consider each of the following:

- (a) the prejudice to the party seeking the adjournment, if the party is required to proceed to trial;
- (b) the prejudice to other parties, if they lose the trial dates;

- (c) the prejudice to the public, if trials are frequently adjourned when it is too late to make the best use of the time of counsel, the judge, or court staff.

[8] The motion for adjournment was filed September 9, 2010, after the finish date. In Rule 4.20(3), the factors a judge must consider in dealing with a request for an adjournment after the finish date are set out.

[9] In *Moore v. Economical Mutual Insurance Company* (1999), 177 N.S.R. (2d) 269, Cromwell, J.A., as he then was, stated at para. 35:

There are many considerations relevant to the granting or refusing of an adjournment, but they all flow from one principle. I would adopt the following statement of the British Columbia Court of Appeal in *Sidoroff v. Joe* (1992), 76 B.C.L.R. (2d) 82, at p. 84 which I think succinctly and accurately summarizes it:

... The settled principle is that the interests of justice must govern whether to grant an adjournment. The interests of justice always require a balancing of interests of the plaintiff and the defendant. (emphasis added)

[10] In this case, Mr. McKee is lead counsel for Caterpillar Inc. He has had carriage of the file from its inception. Caterpillar has specifically requested he be lead counsel in this proceeding. Caterpillar agreed to the trial date at the date assignment conference held June 26, 2009. The trial date was scheduled in December, 2010 to allow time for the Ontario trial to take place. In December, 2009, Mr. McKee knew the Ontario trial would continue into the fall of 2010. Mr. McKee did not mention the Nova Scotia proceeding trial dates when scheduling the Ontario trial.

[11] On August 12, 2010, Mr. McKee wrote to the plaintiff's counsel advising of the continuation of the Ontario trial, stating he had instructions to seek an adjournment. On August 20, 2010, Mr. McKee was advised the plaintiff intended to expand its witness list to add three or four additional witnesses and will be serving another expert's report shortly. That expert report was a rebuttal report which was filed before the finish date, and no issue has been made as to its date of filing.

[12] If the trial proceeds in December, 2010, the defendants will not have their counsel of choice, Mr. McKee. He is involved in the Ontario trial. Mr. McKee has

had carriage of the file from its inception; however, Mr. McKee is a partner in a large firm with many experienced counsel who would have in excess of two months to prepare for trial. The defendants consented to the trial date and since December, 2009 knew the Ontario trial date would be going into the fall of 2010, and yet did not raise the issue of adjourning the Nova Scotia case until August 12, 2010. There is no evidence before me that Mr. McKee has put into place a contingency plan to deal with the scheduling problem, although he knew of the scheduling problem for many months. The prejudice to Caterpillar is that it would not have the counsel of its choice at the trial.

[13] Secunda Marine Services Limited filed an affidavit of Tim Morgan deposed to September 20, 2010 and an affidavit of Robert Simlett deposed to September 21, 2010. Both Messrs. Simlett and Morgan were cross-examined on their affidavits. In his affidavit, Mr. Morgan states there are two witnesses, Derek John and Ken Miller, who were respectively the Chief and Second Engineers of the Thebaud Sea when the fire which caused the loss in question took place. Mr. John is currently a crew member on the Thebaud Sea and Mr. Miller a crew member on the vessel North Ocean 102.

[14] Both Messrs. John and Miller are scheduled to give evidence at the trial in December, 2010 and it is unknown what their schedules will be at the time of any possible future trial date. Mr. Miller is resident in Cape Breton and works in Saudi Arabia; Mr. John resides in River John, Nova Scotia and is employed in Saudi Arabia. Mr. Morgan testified it can be difficult to obtain a replacement for a chief engineer working on vessels in Saudi Arabia as are Mr. John and Mr. Miller. This does cause prejudice to Secunda Marine Services Limited, in that, it would have to make arrangements for the witnesses' attendance.

[15] When adjournments are requested shortly before the trial date there is a prejudice to the public, in that, court facilities have been booked and there could be problems in scheduling other matters, resulting in wasted time. An adjournment request made after the finish date is on short notice.

[16] The regime of scheduling trial dates established by the Civil Procedure Rules currently in force allows for obtaining trial dates based on the premise that all steps necessary to trial will be completed by the finish date.

[17] Rule 4.16 deals with date assignment conferences and rule 4.16(6)(c) provides:

4.16 (6) The judge who is able to forecast trial readiness and estimate the length of a trial may give directions about the course of the proceeding and the conduct of the trial, and must do each of the following:

....

- (c) fix a finish date at no less than twenty days before the day set for the trial readiness conference, as the date when all pre-trial procedures are to be finished;

[18] Request for adjournments after the finish date do cause prejudice to the operation of courts and the use of judicial resources by the adjournment of trials too late to allow for scheduling other matters, thereby causing prejudice to the public.

[19] Considering the facts of this case, including the balancing of the prejudices to be suffered by the various parties and the public, I find this is not an appropriate case for an adjournment of the trial dates. The motion is dismissed.

[20] I award costs to the plaintiff in the amount of \$750.00 in any event of the cause.

Coughlan, J.