

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Scotia Innovators Inc. v. Bartlett Plastic and Precision Machining Ltd.,
2004 NSSC 219

Date: November 1, 2004

Docket: SH 203311

Registry: Halifax

Between:

Scotia Innovators Inc.

Plaintiff

v.

Bartlett Plastic and Precision Machining Limited, a body corporate, Pump & Fill
Incorporated, a body corporate, and Barry E. Bartlett

Defendant

Judge: The Honourable Justice Arthur J. LeBlanc

Heard: October 5, 2004 in Halifax, Nova Scotia

Written Decision: November 2, 2004

Counsel: William L. Ryan, Q.C. & Daniella Bassan, for the
plaintiff
Robert Pineo & Dennis James, for the defendant

By the Court: (Orally)

INTRODUCTION

[1] The defendant seeks an order under Rule 19.04 compelling the plaintiff's director and officer to answer interrogatories, an order under Rule 20.02(a) compelling the plaintiff to file and serve a supplementary list of documents, and an

order under Rule 20.02(c) directing that a mechanism be put in place to determine the relevance of certain documents in the hands of the plaintiff. The plaintiff has seeks an order severing the issues of liability and damages for trial and an order setting aside interrogatories.

BACKGROUND

[2] This proceeding is the second action between these parties. The plaintiff is a developer and marketer of hand-held devices that are used to transfer liquid between containers. It and the defendant Bartlett Plastic discussed the potential manufacture of the plaintiff's product out of moulded plastic. The plaintiff subsequently alleged that the defendants misused and converted information that was subject to a confidentiality agreement in order to put their own competing product onto the market. A prior proceeding in which the plaintiff sought an injunction to restrain the defendants from making and distributing the competing product was ended by a settlement agreement in April 2003. The defendants agreed that they would not "directly or indirectly distribute the Pump & Fill or any other product that competes with the Plaintiff's Flo 'n Go product" until July 1, 2003 (outside Canada) or December 31, 2003 (in Canada).

[3] Subsequently the plaintiff alleged that the defendants had breached the terms of the settlement agreement by distributing the product, or one substantially similar, inside and outside Canada. This claim gave rise to the present action, commenced by Originating Notice (Action) and Statement of Claim dated June 30, 2003. The plaintiff claims that the breach removed or spoiled its opportunity to develop markets without interference, causing it irreparable harm, as well as depriving it of the benefit of the settlement agreement. As such, it seeks to enjoin the defendants from competing with its product contrary to the terms of the settlement agreement. It also seeks delivery of all records in the hands of the defendants relating to the production and shipping of any competing products, as well as a request that the defendants be required to hold in trust any profits arising from a breach of the settlement agreement. The statement of claim alleges, at paragraphs 15 and 16:

15. Contrary to the terms of the Settlement Agreement the Defendants have distributed the Pump & Fill product or a substantially similar product which they call the “E-Z-Fill” both inside and outside Canada. The extent of the distribution is known to the Defendants.

16. Scotia Innovators agreed to permit the Defendants to distribute the Pump & Fill during the time frames set out in paragraph 1 and 2 of the Settlement Agreement as a compromise to the relief claimed in the Prior Proceeding as this would allow Scotia Innovators the opportunity to develop its markets without

interference from the Defendants for the stipulated periods. The breaches by the Defendants have removed or spoiled this opportunity and have caused Scotia Innovators irreparable harm.

[4] The defendants responded with a Demand for Particulars seeking further and better particulars of the allegations in paragraphs 15 and 16. They subsequently filed a Statement of Defence in which they denied breaching the Settlement Agreement and a Counterclaim alleging that the plaintiff had attempted to induce them into technical breaches of the Settlement Agreement. The plaintiff defended against the Counterclaim, denying the allegations.

THE PRIOR APPLICATION

[5] By an earlier application before Scanlan J. the defendants sought an order pursuant to Rules 18.15 and 20.06 and (alternatively) 18.15(2) and 20.09(1) directing the plaintiff to fulfil undertakings given at discovery in the present action. Scanlan J. concluded that two of the undertakings (numbers 9 and 12) had been answered, and that the other (Undertaking No. 15) was in fact not a specific undertaking to provide the requested information, that being “a copy of Ron Chisholm’s file of any marketing records he has in relation to the Flo & Go.” (see

Scanlan J.'s decision at paras. 5-9). Mr. Chisholm is an officer, director and salesperson for the plaintiff company.

[6] In considering whether to make an Order with respect to Undertaking No. 15, Scanlan J. first commented (at para. 15) that “there was no specific undertaking to provide the requested information. The issue was stated to be under advisement; ‘Relevancy is still being considered’.” He went on to consider whether the requested documents should be ordered produced.

[7] Scanlan J. concluded that disclosure of the information requested “could be highly prejudicial to the plaintiff” and would “provide an unfair competitive advantage to the defendants in the marketing of their product” (para. 11). While the defendants insisted that Mr. Chisholm’s file was relevant on the issue of whether the defendant’s actions had injured the plaintiff or caused it to lose market opportunity, Scanlan J. held:

... I am satisfied the issue of whether there has been a breach of the settlement agreement will be a narrow factual issue at trial. The answer in relation whether the defendant breached the settlement agreement will be found in the defendant’s files not the plaintiff’s. Whether the defendant breached the settlement agreement is not at all affected by the plaintiff’s marketing strategy. I am satisfied that none of the materials in Mr. Chisholm’s marketing files are

relevant to the issue of whether there has been a breach of the settlement agreement. [para. 13.]

[8] Scanlan J. expressed a concern that their production could cause irreparable harm to the plaintiff, and his conclusion that the court could do nothing “to effectively prevent the defendants from using the information requested so as to gain an unfair competitive advantage as against the plaintiff” (para. 14). Further, in view of the fact that much of the information in the files was subject to confidentiality agreements with third parties, Scanlan J. accepted the commercial necessity to protect it (paras. 14-15).

[9] On the other hand, Scanlan J. was

not convinced the plaintiff would be able to prove damages without providing some information as to profit per unit and lost sales opportunities. I am satisfied that at some point some of the information in Mr. [Chisholm’s] files may have to be disclosed to the extent necessary to prove damages. In the same vein one would expect the defendant would have to disclose similar information so as to allow the plaintiff to recover damages if the plaintiff succeeds. I ask therefore whether there is a process by which the information may be vetted so as to limit the information provided? Alternatively can there be a process whereby the parties can get the information indirectly without disclosure to a direct competitor? [para. 16.]

[10] This was the type of case, Scanlan J. said, that “cries out for a confidentiality order.” He exercised the Court’s “inherent discretion to grant a protective confidentiality order” and invited counsel to make representations as to its terms (para. 19). He concluded, at paras. 20-21:

... I am fully convinced that disclosure of pricing information, marketing strategies, etc., to the defendant would cause permanent, irreparable harm to the plaintiff. I urge counsel to make further submission on a process that would still enable the defendant to have all the information necessary to defend on the issue of damages.

I might also suggest to counsel that the matter may be dealt with by first determining the issue as to whether there was a breach of the settlement agreement. Then at an adjourned hearing the parties may have an adjudication on the issue of damages.

[11] Scanlan J.’s decision was released on May 27, 2004 as 2004 NSSC 113 and can be found at [2004] N.S.J. No. 223 (QL). There was no appeal, and there has been no Order taken out in respect of this decision.

[12] Shortly after Scanlan J.’s decision was released, on June 15, 2004, counsel for the defendants wrote to counsel for the plaintiffs, setting out the defendants’ interpretation of the decision and suggesting that “the fears expressed by Justice Scanlan will be allayed by simply clarifying the request contained in Undertaking

No. 15...”. The suggested clarification involved the defendants stating that they were not seeking disclosure of “any pricing, promotional or technical information contained in Mr. Chisholm’s marketing files” but that they did seek “the disclosure of any and all documents that provide instances of damages pursuant to the alleged breach of the confidentiality order” including “any letters, e-mails, memoranda or notes, or any other ‘document’ as defined in the Nova Scotia *Civil Procedure Rules* showing any loss of market advantage to the Plaintiffs” (Affidavit of Daniela Bassan, August 6, 2004, Tab A). On June 24, 2004, counsel for the plaintiff replied that he would “see instructions from our client and be back to you as soon as I can with respect to our position on your request” (Affidavit of Daniela Bassan, August 6, 2004, Tab B). On July 13, 2004, the defendant served interrogatories upon Mr. Chisholm (Affidavit of Daniela Bassan, August 6, 2004, Tab C).

THE PRESENT APPLICATIONS

[13] The defendant requests an Order directing Mr. Chisholm to answer the interrogatories served in July 2004, as well as Orders requiring the plaintiff to file a supplementary list of documents and an order directing “that a mechanism be put in place for the issue of relevance to be determined concerning certain specific

documents within the control of the Plaintiff.” The plaintiff asks the Court to sever the issues of liability and damages for trial and to set aside the interrogatories as *res judicata* or an abuse of process in light of the decision of Scanlan J.

The Interrogatories

[14] The defendant requests an Order directing Mr. Chisholm to answer the interrogatories served on July 13, 2004, pursuant to Rule 19.04. The plaintiff claims that the interrogatories “seek to revisit, either directly or indirectly, the issues already decided in the Earlier Application” and as such are *res judicata* or an abuse of process, as well as being oppressive under Rule 19.02(2), which provides that the number of interrogatories is unlimited “[u]nless the court otherwise orders to protect a party or person interrogated from annoyance, expense, embarrassment or oppression....” Specifically, the plaintiff says the interrogatories seek:

- (a) information and documents falling within the scope of the Earlier Application and therefore previously adjudicated upon by Scanlan J.;
- (b) information and documents for which relevance has not been established in accordance with the Earlier Application;
- (c) information and documents from a witness (Mr. Chisholm) already examined extensively on discovery and whose undertakings have been fulfilled in accordance with the Earlier Application;
- (d) information and documents without considering the “process” required to comply with the findings of Scanlan J.; and

(e) information and documents without considering the need for a Confidentiality Order in accordance with the findings of Scanlan J.

[15] The defendants submit that the doctrines of *res judicata* and abuse of process have no application here because “the questions raised in the interrogatories are not the same, in any way, as the undertakings dealt with by Justice Scanlan in his decision” (Defendants’ Brief, p. 5). The plaintiff replies by comparing the memoranda filed by the defendants on the two applications, which, according to the plaintiff, “reveals the following:

(a) the *same* authorities are relied upon by the Defendants regarding their requests for alleged information and documents... ;

(b) the *same* Civil Procedure Rules are relied upon by the Defendants regarding their requests for alleged information and documents, namely Rules 18.09, 18.15, 20.06, and 20.09... ;

(c) the *same* request for relief is made by the Defendants, namely, for a Supplementary List of Documents to be provided by Scotia Innovators....;

(d) the *same* request is made by the Defendants for alleged “e-mail correspondence” or “internal correspondence” from the Plaintiff...; and

(e) the *same* arguments are advanced by the Defendants regarding the “liberal” interpretation of the discovery Rules, the production of documents, and the “relevance” of documents....

Moreover, the present application, as was the case with the earlier application before Scanlan J., fails to provide any evidence to support the Defendants’ bald allegations regarding information and documents from the Plaintiff. More specifically, in both applications, the Defendants rely upon a merely formal Affidavit of counsel to attach correspondence and pleadings. The lack of evidentiary support further disentitles the Defendants from

obtaining any relief at bar. [Plaintiff's Reply Brief, pp. 2-3; emphasis in original.]

[16] The defendants argue that the interrogatories comply with the requirements of Rules 19.01(1), 19.02(1) and (by incorporation) 18.09(1), being relevant to the issues of liability and damages and also being investigatory and thus potentially leading to further evidence to advance the defendants' case. The applicant argues that the threshold for establishing relevance under Rules 18, 19 and 20 is a low one: "a semblance of relevance".

[17] Additionally, the defendants suggest that the plaintiff has departed from the procedure set out in Rule 19.03(2), which provides that an objection to answering an interrogatory may be taken on the grounds of privilege or relevancy, but not that the question is outside the scope of the pleadings, with the objection to be made in the affidavit in answer. The defendants say this Rule creates a "mandatory burden upon the deponent to answer the interrogatory and note his or her objection ... in his or her answer." Thus the application to set aside the interrogatories is premature, in the defendants' view (Defendants' Brief, pp. 5-6).

Supplementary List of Documents

[18] The defendants say Justice Scanlan did not deal with the issue of a Supplementary List of Documents; “although Justice Scanlan notes in the decision that the Defendants brought the application pursuant to Rule 20,” they argue, “he did not deal with that issue in any way. Therefore, the Defendants are justified in raising this issue in the present application” (Defendants’ Brief, p. 7). Stating that the plaintiff’s list of documents contains no “e-mail correspondence or other internal memoranda or correspondence” and that any such documents that are relevant must be provided in a supplementary list, the defendants concede that “while the potential value of the documents not disclosed is obviously unknown at the present time, the disclosure of such documents could well bear upon both the issues of liability and damages” (Defendants’ Brief, p. 8).

Severance

[19] The plaintiff seeks severance of the issues of liability and damages on the grounds that

(a) the issue of liability is a “narrow” one (as found by Scanlan J. In the Earlier Application), namely, whether or not the Defendants breached the Settlement Agreement made in April, 2003;

(b) the issue of liability involves a straightforward question of contractual interpretation, namely, whether there was “distribution” by the Defendants contrary to the terms of the Settlement Agreement;

(c) the issue of damages is likely to be more complex involving, among other things, expert evidence;

(d) the issue of liability could be decided sooner than the issue of damages, taking into account the examinations for discovery that have already occurred;

(e) the issue of liability does not require further production of documents, as found by Scanlan J. in the Earlier Application;

(f) a trial that determines whether or not the Settlement Agreement has been breached could put an end to the within action; and

(g) an unnecessary expenditure of time and resources will be avoided by deciding the question of liability first.

[20] The defendants that this case is too complex to order severance: it involves multiple actions and parties and severance “would surely increase both the judicial resources and litigant’s costs”. The defendants note the presumptive rule that all issues should be tried together and say the plaintiff has not offered sufficient evidence to support its requested order for severance (Defendants’ Brief, p. 10).

The action, says the defendant, is procedurally complex, as it involves a counterclaim and a claim by the defendants against a director of the plaintiff company. The defendants also say that Scanlan J.'s comment regarding the desirability of severance is *obiter*.

Mechanism for determining relevance

[21] The defendants propose the following process for determining the relevance of “certain specific documents within the control of the Plaintiff”:

1. The Plaintiffs provide to Your Lordship the marketing files requested in Undertaking No. 15;
2. Your Lordship review the entire marketing file and determine what information and/or documents are relevant to the issues of liability or damages;
3. Your Lordship redact any information contained in the documents that does not meet the requirement of relevance; and,
4. Your Lordship order disclosure of the relevant material and non-redacted portions of the material.

ANALYSIS

[22] I have serious concerns about the propriety of deciding this application, as I have concluded that it would be more appropriately heard by Scanlan J. In my view the issues raised here are closely linked with the arguments he addressed in the earlier decision. Any decision I make on these issues runs the risk of

contradicting Scanlan J. In these circumstances the proper course for the parties is to return before Scanlan J. to seek clarification of his decision or to make further argument, as he invited them to do.

[23] If my reading of Scanlan J.'s decision is correct, there is no need to conduct any review of the plaintiffs' documents or records until the issue of liability has been determined. If there is a finding of liability, then the judge would be charged with the responsibility of, firstly, reviewing the documents to determine if they have a semblance of relevance to the issue of damages and, secondly, establishing a procedure to deal with the confidential documents in such a manner that the defendants can adequately prepare. Therefore, any decision by me to embark upon a determination of relevance or confidentiality at this stage would be premature.

[24] I have already addressed the question of whether Scanlan J. made a ruling on whether the issue of liability should be tried first, thereby in effect severing the issues of liability and damages. Although these comments might have been *obiter*, severance flows naturally from his ruling. To give effect to his determination that liability should be tried before damages, there would have to be an effective severance. I share Scanlan J.'s reasoning entirely, but any decision on the issue at

this stage may simply complicate any “fine tuning” by Scanlan J., as well as any potential appeal from that decision.

[25] The issues before Scanlan J. are still outstanding, or at least awaiting counsels’ return before him so that he might recommend a procedure for addressing confidential documents. The parties have not addressed this issue before Scanlan J.

[26] In view of the Court’s inherent jurisdiction to control its own proceedings, and in concluding that I should exercise my discretion not to decide the issues raised in this application, I refer to *Halifax (Regional Municipality) v. Ofume* (2003), 218 N.S.R. (2d) 234 (C.A.) at para. 40, where Saunders J.A. said:

... In the instant case the discretion exercised by Justice MacAdam derives from the Court’s inherent jurisdiction to control its own proceedings. I see this control as fundamental to a court that derives its power and existence not from statute but from the Constitution. The operation of the court is a necessary function of our society. The inherent jurisdiction which helps to maintain the efficiency and fairness of such a court is something far greater than the jurisdiction to correct substantive problems, as was considered in [*Baxter Student Housing Ltd. et al. v. College Housing Co-operative Ltd. et al.*, [1976] 2 S.C.R. 475]. The inherent jurisdiction exercised by the Chambers judge here is the kind of jurisdiction spoken of by Lord Morris in [*Connolly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401], quoted in [*Montreal Trust Co. v. Churchill Forest Industries (Manitoba) Ltd.* (1972), 21 D.L.R. (3d) 75 (Man. C.A.)], which gives rise to the “powers which are necessary to enable [a court] to act effectively”.

CONCLUSION

[27] In the result, I decline to decide these applications, which would better be heard by Scanlan J.

J.