SUPREME COURT OF NOVA SCOTIA

Citation: Maritime Steele and Foundries Ltd. v. Economical Mutual Insurance Company, 2011 NSSC 151

Date: 20110418
Docket: Hfx 340921
Registry: Halifax

Between:

Maritime Steel and Foundries Limited and
Cameron Corporation Limited

Plaintiffs

v.

Economical Mutual Insurance Company, Wawanesa Mutual Insurance Company, Lloyd's Underwriters and Zive Insurance Limited

Defendants

Judge: The Honourable Justice Patrick J. Duncan

Heard: April 6, 2011 in Halifax, Nova Scotia

Counsel: Kevin Latimer, Q.C. for the plaintiffs
David Cameron, for the defendants, Economical Mutual Insurance Company, Wawanesa Mutual Insurance Company, Lloyd's Underwriters
Nancy Murray,Q.C. for the defendant, Zive Insurance Limited

By the Court:

Introduction

[1] The plaintiff Maritime Steel and Foundries Limited (Maritime Steel) is the owner and operator of a steel foundry located at 379 Glasgow St., New Glasgow, Nova Scotia (the Foundry).

[2] On December 30, 2010, BDO Canada Limited was appointed as receiver and manager of the assets, property and undertakings of Maritime Steel pursuant to section 243 (1) of the **Bankruptcy and Insolvency Act,** R.S.C. 1985, c. B-3.

[3] The co-plaintiff, Cameron Corporation Limited (CCL), is the parent company of Maritime Steel.

[4] The defendants Economical Mutual Insurance Company, Wawanesa Mutual Insurance Company and Lloyd's Underwriters (collectively, the Insurers), are subscribing insurers to a policy which insures CCL's business operations at locations owned by CCL, its subsidiaries or affiliates, including the Foundry. The Policy provides coverages against all risks of direct physical loss or damage to the

property insured, as described in the Policy. It was effective from March 1, 2010 to March 1, 2011.

[5] The defendant, Zive Insurance Limited (Zive), acted as broker at the time the Policy was initially issued in February 2006, and for each renewal thereafter.

[6] On or about May 28, 2010 a fire destroyed a storage building and its contents which were located at the Foundry. The building has been identified as "Location 1 - E" in the Schedule of Commercial Property Insured which forms part of the Policy. The defendants take the position that the Schedule specifies the amount available under the Policy for the property at that location as $400,000. This amount has been paid out pursuant to the proof of loss filed by the plaintiffs following the fire.

[7] The plaintiffs allege that there was approximately $3.8 million worth of contents at that location. They claim that the defendant insurers are responsible to pay any difference between $400,000 and the proven value of the contents. They rely on the provisions set out in the Declarations Page of the Policy, where at *"Section 1-Property, Glass, Boiler or Miscellaneous"*, coverage for Property of

Every Description (POED), is available in the amount of $19,077,307. The insurers have denied liability for any amount in excess of $400,000 arguing that this coverage does not apply to the loss.

[8] The plaintiffs filed an action for breach of contract against the insurers on December 10, 2010. They seek a declaration of entitlement to indemnity for the full amount of the loss under the Policy, together with damages.

[9] The action also names the broker, Zive Insurance Limited, as a defendant and claims damages against it on the basis of breach of contract and negligence in failing to ensure, among other things, the sufficiency of the coverages in respect of the equipment at the Foundry.

[10] The plaintiffs now present a motion pursuant to **Nova Scotia Civil Procedure Rule 12** for an order:

a) separating a question of law from other issues in the proceeding, namely, whether the insured loss is subject to a coverage limit of $400,000 under the Policy;

b) appointing a time, date, and place for hearing at which the question of law is to be determined.

The defendants oppose the motion.

Law

[11] **Rule 12** embodies a different approach to resolution of questions of law on a preliminary basis, from that employed under the **Nova Scotia Civil Procedure Rules (1972)**. The Nova Scotia Court of Appeal has recently considered the rule in *Mahoney v. Cumis Life Insurance Company*, 2011 NSCA 31. Fichaud J.A. writing on behalf of the unanimous court held:

> [13] Before considering the circumstances of this case, I will discuss the ambit of **Rule 12.**
>
> [14] **Rules 12.01** and **12.02** and **12.03(1)** say:
>
> Scope of Rule 12

12.01 (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.

(2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.

Separation

12.02 A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:

(a) the facts necessary to determine the question can be found without the trial or hearing;

(b) the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;

(c) no facts to be found in order to answer the question will remain in issue after the determination.

Determination

12.03 (1) A judge who orders separation must do either of the following:

(a) proceed to determine the question of law;

(b) appoint a time, date, and place for another hearing at which the question is to be determined.

[15] Under **Rule 25.01** of the former Civil Procedure Rules, the practice was that the chambers judge could decide a preliminary issue of law only if the parties filed an agreed statement of fact: e.g. *Seacoast Towers Services Ltd. v. MacLean* (1986), 75 N.S.R. (2d) 70 (S.C.A.D.), paras. 18-23, and various other authorities.

[16] The new **Rule 12** does not require an agreed statement for the determination of a preliminary question of law. This is clear from **Rule 12.01(1)** - a party may "in limited circumstances, seek the determination of a question of law ... even though the parties disagree about the facts relevant to the question".

[17] **Rule 12.02** recites those "limited circumstances": (a) "the facts necessary to determine the question can be found without the trial or hearing", (b) the determination will reduce the length or expense of the proceeding, and (c) "no facts to be found in order to answer the question will remain in issue after the determination". Conditions (a) and (c) contemplate that the Chambers judge, on a Rule 12 motion, may find facts, but only (1) the facts necessary to determine the pure legal question before him and (2) if all those facts, necessary to decide the pure legal question, can be determined without a trial.

[18] So the first step with **Rule 12** is to identify the pure legal question to be determined. **Rule 12.01(1)** permits a motion for determination of "a question of law". **Rule 12.03(1)** permits the judge either to determine "the question of law" or appoint a time to determine that question of law. The Rule does not authorize a determination of a question of fact or mixed fact and law, excepting only those facts that scaffold the point of pure law under **Rule 12.02(a)** as I have discussed.

[19] The second step is to identify all the facts that are necessary to determine that question of pure law. Nothing in **Rule 12** permits a judge to decide facts that are unnecessary to determine the question of pure law in the motion. A party who wishes an assessment of evidence on other matters, leading to a judgment by interlocutory ruling, should make or join a summary judgment motion under **Rule 13.04** ("Summary judgment on evidence").

> [20] The third step under **Rule 12** is to decide whether all those facts necessary to determine the issue of pure law in the motion "can be found without the trial or hearing".
>
> [21] This third step generates the question - What does **Rule 12.02(a)** mean that those facts "can be found without the trial or hearing"? In my view, it does not mean that a judge under **Rule 12** can assess evidence in the same fashion as in a motion for summary judgment on the evidence under **Rule 13.04.** Under **Rule 13.04**, a responding party must "put his best foot forward" with evidence or risk a determination that there is no genuine issue of material fact requiring trial, or that its claim or defence has no real chance of success, and a consequent dismissal of the action or defence: *Aylward v. Dalhousie University*, 2011 NSCA 20, para. 11, affirming *Dalhousie University v. Aylward*, 2010 NSSC 65, paras. 20-25; *Ristow v. National Bank Financial Ltd.*, 2010 NSCA 79, paras. 5-9; *Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, para. 173. **Rule 12** does not give the chambers judge that power. A judge under **Rule 12** may not determine contested facts that might hinge on testimony at a trial. That is the point of Rule **12.02(a)**'s condition that "the facts...can be found without the trial".

[12] I have been referred to the following Nova Scotia decisions, all which predate *Mahoney*, as examples of the application of this Rule to varying fact situations.

- *Amarantunga v. Northwest Atlantic Fisheries Organization* 2009 NSSC 260;

- *Benjamin-Harvie v. Nova Scotia Public Service Long-Term Disability Trust Fund (Trustees of)* 2009 NSSC 201;

- *Cangra National Stones Inc. v. Snair's White Eagle Bakery Limited* 2009 NSSC 252;

- *Thorburn Wharf Fisheries Ltd. v. ING Insurance Company of Canada* 2010 NSSC 181

- *Thornton v. The Economical Insurance Group* 2010 NSC 355

I have reviewed these authorities and while instructive they are fact specific.

[13] The question of law to be addressed in this case may be framed as follows:

> Is the loss incurred at Location 1 E subject to the coverage limits for that location in the Schedule of Commercial Property Insured, or is it subject to the coverage limits provided for as POED in Section 1 of the Declarations Page?

The law of contract, and in particular insurance contracts, is at issue.

[14] **Rule 12.02** sets out three prerequisites to granting of the motion. I will address them in order.

(*a*) *[whether] the facts necessary to determine the question can be found without the trial or hearing;*

[15] The parties agree that there was a valid contract of insurance in place that provided coverage on the place of loss and on the property lost. The defendant insurers have honored the plaintiffs' claim to the extent of coverage that is acknowledged. i.e., $400,000. While the insurers are now voicing concern as to whether they may have overpaid, there is no dispute as to the liability of the defendant insurers under the contract of insurance.

[16] The remaining issues as between the plaintiffs and the insurers are the quantum of the loss, whether the plaintiffs have the right to claim for certain of the property destroyed due to ownership questions, and whether the contract terms provide coverage in excess of $400,000.

[17] The first two issues, the quantum of loss, and ownership of the contents claimed for, are matters for trial and will be live issues irrespective of whether the insurers or the broker are responding. The court does not need to decide these matters in order to answer the question of law.

[18] The plaintiff says that the remaining issue, interpretation of the coverage limits clauses in the Policy, requires a limited amount of affidavit evidence to enable the court to answer the question of law.

[19] The insurers submit that it is premature to separate out the issue of coverage since there has been no disclosure by the parties and no discoveries. (The Affidavits of Documents were due April 15, 2011.) They suggest that there "may" be facts relevant to the coverage issue that "may" be uncovered; that disclosure "may" be complicated by the receivership of Maritime Steel and that there "may" be "significant disagreement" between the parties as to the formation of the contract.

[20] In oral argument, these were identified as concerns that the property lost may not have been owned by the plaintiffs and that the amount payable under the policy may be less than that amount already advanced.

[21] At this point, these assertions are speculative and offer no evidence that undermines the argument for a determination of the legal question in a separate

hearing. An examination of the pleadings and the affidavit evidence presented on this motion supports the position adopted by the applicants.

[22] The insurers also submit that evidence of subjective intention of the parties' negotiations in forming the contract are part of the factual matrix and therefore necessary to the determination of the coverage issue. They submit that:

> ... the reasonable expectation of the parties to the contract may be a relevant issue to be considered, and evidence of the parties' respective intentions and negotiations are useful in that determination. ... the court may need to examine extrinsic evidence to determine the parties' true intent".

[23] The plaintiffs submit, and I think correctly so, that this position is not sound in law. The authors of **Canadian Contractual Interpretation Law**, 1st ed. (Hall) (Markham: LexisNexis Canada Inc., 2007) discuss and reject such a proposition, at pp. 20-22:

> ... the courts have consistently held that the factual matrix does not include evidence of the negotiations leading up to a final agreement ... the ability to use the factual matrix as a mechanism to get evidence about negotiations into evidence is limited.

> Consistent with the principle that contract interpretation is an objective rather than a subjective exercise, the courts have also consistently held that evidence of a party's subjective intentions is not admissible as part of the factual matrix. Indeed, *Eli Lilly* (*Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at para. 54) held that evidence of a party's subjective intention "has no independent place" in the determination of a contract's surrounding circumstances.

[24] The defendant insurers have referred to legal authorities that set out the circumstances in which there may be extrinsic evidence required. Those authorities provide that the factual context may be relevant and admissible to clarify some ambiguity of the words used in the contract.

[25] In *Wingtat Game Bird Packers (1993) Ltd. v . Aviva Insurance Co. Of Canada* 2009 BCCA 343, the Court of Appeal, writing at para. 19 set out the principles that are to be applied in interpretation of an insurance contract:

> 19 In my view, the interpretation principles may be summarized as follows:
>
> (a) the factual matrix existing at the time the parties enter into the contract may be considered in interpreting the words of the contract, but the words of the contract must not be overwhelmed by a contextual analysis;
>
> (b) the plain meaning of the words used should be given effect unless it would bring about an unrealistic or commercially unreasonable result;

> (c) one must search for an interpretation from the whole of the contract that promotes the true intent of the parties at the time they entered into the contract;
>
> (d) in the event of an ambiguity in the meaning of the words, the *contra proferentem* rule of interpretation will be applied in favour of the insured unless it will bring about an unfair result by way of the insured achieving an unanticipated recovery; and
>
> (e) coverage provisions should be construed broadly, while exclusion clauses should receive a narrow interpretation.

[26] No ambiguity in the language of the Policy has been identified by the pleadings or in the material offered in consideration of this motion. There is a discretion to admit some evidence that speaks to the "factual matrix", but it is clear from this judicial statement that if admitted, such evidence will be very limited in its scope and effect.

[27] **Rule** 12 permits the parties to adduce evidence relevant and necessary to answering the question of law. Under the old Rules, this was not possible, but **Rule 12.01** acknowledges that such motions can proceed where the relevant facts are in dispute.

[28] **Rule 12.02(a)** circumscribes the evidence that may be called on the separated hearing to that which is relevant and necessary to answer the question of law. While the evidence is limited to the discrete question before the court, there is no restriction on the amount of evidence that may be necessary to determine the question of law. So there is a potential that the hearing may be lengthy.

[29] Separating out the question of law for preliminary determination is, in my view, a mechanism that when utilized appropriately will "... assist the just, speedy, and inexpensive determination" of a proceeding, which is the stated objective of the Rules. *see,* **CPR 1.01.**

[30] The question may be posed as to how a lengthy hearing that does not provide a final determination of the litigation could achieve this goal. **Rule 12.02(a)** is read together with **(b)** and **(c)** in making the determination as to whether it is appropriate to resolve such disputes in a pretrial hearing, or in a trial. For example, while it is within the discretion of the court to hear the evidence necessary to answer the question of law, **Rule 12.02(b)** dictates that it is not appropriate to embark on separated hearing if it will not mitigate the cost and duration of the proceeding, hearing or trial.

[31] Similarly, **Rule 12.02(c)** requires that if the motion is to succeed then the court must be satisfied that the hearing will enable a final determination of all necessary facts to answer the question of law. If this is not achievable, then again, the request for determination by a separated hearing fails and the question is left to the trial or hearing.

[32] In summary, the applicant submits that a limited amount of evidence is necessary to resolve the proposed question of law. The insurers say that it is too soon to know that to be so. They speculate as to a number of possible difficulties that could be encountered which would render the separated hearing a waste of time and money.

[33] I do not accept the respondents' arguments. The decision I am asked to make must be based on the evidence before me. It would be an error to deny the motion on the basis of possibilities. Those possibilities, as presented, speak to the quantification of damages, not the coverage question. If I accede to the respondents' position, it would create a precedent that would substantially undermine the very objectives of this new Rule.

[34] The respondents' concerns that, having regard to the early stage of the disclosure in this case, legitimate issues of fact may arise that could undermine the utility of a hearing to resolve the separated question of law, can still be addressed. First, the judge presiding has a residual discretion to refuse to hear the separated question of law. This may result when the affidavit evidence filed for the separated hearing demonstrates that it is no longer possible to answer the question without a trial, or for other appropriate reasons that may appear to the court at that time. Second, any "waste of time and money" can be addressed ultimately in costs.

[35] Having reviewed the pleadings and the evidence presented, I conclude that the applicant has satisfied the first step, that is, that the facts necessary to answer the question of law can be found without a trial.

(b) [whether] the determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;

[36] The plaintiffs submit that the determination of the question of law will focus the trial on the correct defendant(s) and thus reduce the length and expense of the

proceeding. If it is determined that, as a matter of law, the Policy coverage for the loss, is limited to $400,000 then the plaintiffs' action will be as against the broker. If it is determined that, as a matter of law, the Policy coverage for the loss is governed by the POED limits, then it is the insurers who will be called upon to respond.

[37] The defendant insurers say that there are three possible outcomes to the separated motion, none of which will save "... cost or time sufficient to justify the exercise of the court's discretion to fragment this litigation." They posit the following outcomes:

i. The court will be unable to answer the question without further evidence and so it will have been a "waste of time and expense";

ii. Determination that the coverage exceeds $400,000 will not answer the questions of quantum of the loss, or ownership of the items claimed for;

iii. Determination that the coverage is limited to $400,000, which will trigger an analysis of fault for the insufficient coverage.

[38] I have considered these representations and do not find them compelling. The first of these scenarios is speculative and unsupported by the evidence presented.

[39] The second and third scenarios reinforce the plaintiffs' arguments that resolution of the question of maximum coverage available under the Policy will narrow the issues, focus the issues on the appropriate defendant(s), and shorten the proceeding.

[40] The plaintiffs submit that the separated hearing will require two days of court time, and save substantial time by focusing the trial issues on the appropriate defendant(s) and those issues which are fact dependant. They also submit that an early determination of the question will shape the pretrial steps taken by the parties thus providing a more expeditious disclosure and discovery process.

[41] I agree with the plaintiffs' position and conclude that "the determination will reduce the length of the proceeding, duration of the trial or hearing" and may reasonably result in a reduction of the overall expense of the proceeding.

(c) no facts to be found in order to answer the question will remain in issue after the determination.

[42] Justice Fichaud, in *Mahoney v. Cumis, supra,* in considering what this clause means, says that: "A judge under **Rule 12** may not determine contested facts that might hinge on testimony at a trial."

[43] The facts necessary to answer the proposed question of law should readily be determined in the separated hearing. There is no basis to conclude that there will be unresolved facts needing to be determined at trial, or that the hearing judge will be called upon to make findings of fact that will hinge on testimony in the trial.

[44] Counsel for the broker submits that the broader bases of liability alleged against Zive opens the door to a determination of the coverages under the policy to a different, and possibly inconsistent ruling in a trial focused on Zive, than that which might be arrived at in the separated hearing as to the question of law. It is suggested a separated question of law hearing will not hear the additional facts that will be necessary in a trial to resolve the coverages issue as it applies to Zive.

[45] I can see no basis, on the material before me, to support this proposition. Zive is entitled to participate in a separated question of law hearing which should eliminate any possible later arguments on the point.

[46] I reiterate that, in my view, the court retains a residual discretion to decline to hear the separated question of law, if the circumstances as they present now are so different by the time of hearing as to negate the efficiencies intended to be achieved by the **Rule 12** procedure. It is not tenable to suggest that the court will forge ahead to the detriment of a party or parties under materially different facts.

Conclusion

[47] I am satisfied that the requirements of **Rule 12.02** have been met and I grant the motion. I will hear the parties with respect to scheduling the hearing of the motion pursuant to **Rule 12.03(1)(b).**

Duncan J.