SUPREME COURT OF NOVA SCOTIA

Citation: Roué v. Nova Scotia, 2013 NSSC 102

Date: 20130315
Docket: Hfx No. 407754
Registry: Halifax

Between:

Joan Elizabeth Roué and Lawrence James Roué

Applicants

v.

Her Majesty the Queen in Right of the Province of Nova Scotia,
Lengkeek Vessel Engineering Inc.,
Lunenburg County Shipwrights Incorporated, carrying on business as
Covey Island Boatworks, Lunenburg Foundry & Engineering
Incorporation, Lunenburg Shipyard Alliance Limited, MHPM Project
Managers Incorporated, and Snyder's Shipyard Limited

Respondents

Corrected Decision: The text of the original decision has been corrected according to the erratum dated March 20, 2013. The text of the erratum is appended to this decision. This decision replaces the previously released decision

Judge: The Honourable Justice Peter P. Rosinski

Heard: Motion for Directions
March 5, 2013, in Halifax, Nova Scotia

Counsel: Robert G. Belliveau, Q.C., and Michelle Awad, Q.C., for the Applicants

Edward Gores, Q.C., Steven B. Garland and
Kevin K. Graham (not appearing), for the Respondents

By the Court:

Introduction

[1] My earlier decision *Roué v. AGNS*, 2013 NSSC 45, sets out the background to this decision, which deals with the setting of procedural steps and filing deadlines arising from a March 5, 2013 Motion for Directions hearing.

[2] In summary, the Roués initiated their copyright related claims as an application in court, which the Respondents argued against.

[3] I decided that the dispute will be better resolved by way of application in court rather than as an action.

[4] In my earlier decision, I had estimated that the dispute could likely be heard in eight days or less.

[5] At the hearing, the parties agreed that:

I. Disclosure pursuant to *Civil Procedure Rules* [*CPR*] 15, 16 and 17 could be concluded by April 8, 2013.

ii. Exchanges of updated lists of anticipated witnesses (fact and expert) known to date could be concluded by May 8, 2013.

[6] The Roués argued that ten days should allow enough time to hear the dispute as an application in court. Having argued against the suitability of the application in court process, the Respondents were reluctant to adopt a specific number of days as capable of hearing this dispute as an application in court. Nevertheless, Mr. Garland did concede that, while he was pessimistic that the hearing could be completed within ten days, it might be possible.

The Parties' Positions

[7] At this juncture, I will set out the parties' positions. The most significant differences are their conception of the proper order of procedural steps; which steps are appropriate; and, consequently, at what point in the future would the

matter be ready for hearing, and how many days would be required to hear the matter.

The Applicants

[8] The Roués proposed that the application in court process would normally involve the following procedural steps (the associated time lines are unique to this case):

Document Disclosure	April 5, 2013
Filing of Applicants' Affidavits	May 6, 2013
Filing of Respondents Affidavits [premised on filing by the 7 persons identified in Kevin Graham's December 21, 2012 letter to Mr. Belliveau]	June 17, 2013 [No specific date for the Applicants' rebuttal affidavits is mentioned]
Completion of discovery examinations [The parties have all stated that at a minimum they wish to discover the adverse parties herein]	October 11, 2013
The filing and disclosure of expert reports could be set with more precision at a future date, possibly by a case management judge to ensure a smooth transition to the hearing dates.	No date set

The Roués estimate however that expert reports could be filed by December, 2013, and that they preferred a hearing commence no later than the Spring of 2014 as that will be at least 12 months from now.

The Respondents

[9] The Respondents propose a fundamentally different time line:

Document Disclosure	April 8, 2013
Exchange of updated list of anticipated witnesses, to the extent possible (fact and expert)	May 8, 2013
Fact discovery to be completed (including any motions to compel answers and re-attendances)	November 30, 2013
Applicants' Fact Affidavits	2 months after November 30, 2013
Respondents' Fact Affidavits	2 months later (March 31, 2014)
Applicants' Rebuttal Fact Affidavits	1 month later
Applicants' Experts Affidavits	2 months later
Respondents' Experts Affidavits	2 months later
Applicants' Rebuttal Experts Affidavits	1 month later
End of filings	September 30, 2014

Resolving the Order of Procedural Steps and Timing Thereof

[10] As is apparent from these contrasting schedules, the parties differ regarding whether discovery or the filing of the parties fact affidavits should come first.

[11] The Roués emphasize that the Respondents are requesting the Court to approach the procedural order of steps and timing issues as if the matter were an action, rather than an application in court.

[12] They say that, although CPR 5.09 allows the Court wide latitude, affidavits should not be considered as "will say" statements as in actions, but rather if filed first they will ensure that the discoveries are limited, more focussed and therefore efficient.

[13] Moreover, the Roués say that since fact discovery may be limited to the parties, involving seven affiants for the Respondents and two affiants for the Applicants, surely then the time requirement therefore will be even shorter than the Respondents suggest.

[14] The Respondents in contrast argue that it is not efficient to file affidavits before discoveries are completed, and that the order will not materially affect the total length of time it will take to get to a hearing date in any event.

[15] They say that having the affidavits filed before discoveries would amount to the parties cross examining the affiants out of court at those discoveries, with the consequence that supplemental affidavits will need to be filed - CPR 5.11. Moreover, they argue that the pleadings, not affidavits, should define the extent of discoveries, and therefore, the content of affidavits filed should not be available before discoveries.

[16] Ultimately, the objective of the *Rules* is to achieve "the just, speedy, and inexpensive determination of every proceeding" - CPR 1.01.

[17] My involvement herein to date strongly suggests to me that this matter can, and should, be heard within 12 months of the Motion for Directions date. Moreover, if the entire matter ultimately cannot be completed within that time frame, more days can always be made available to complete it.

[18] At the motion for directions hearing, I canvassed available dates with counsel. I started looking for nine days and longer slots of hearing dates starting in the Spring of 2014, as requested by the Roués.

[19] The first slots, available for court **and** counsel were for hearing dates starting March 31, 2014, (12 days) or possibly others of 15 days duration between February 27 and March 25, 2014.

[20] The next available slots that the **court** had available were 11 days in October 14, 2014, and later. Thus, effectively no dates were available between May 1 and October 14, 2014.

[21] Counsel for the Roués advised that he will not be available for October as he has a six to nine-month trial commencing in October, 2014.

[22] Thus, the available dates in 2014 for the court and counsel are limited to 12 to 15 days in March/April, 2014, or some time in mid-2015 and onward.

[23] Before concluding the motion for directions hearing, I fixed the hearing dates as March 31, April 1, 2, 3, 7, 8, 9, 10, 14, 15, 16 and 17, 2014. Thus, the hearing will start 18 months after the Roués filed their Notice of Application in Court. To my mind, those dates represent a reasonable balancing of the "just" and "speedy" objectives stated in CPR 1.01.

[24] Turning back to a consideration of the procedural steps intervening between now and the hearing dates, given that the hearing date is 12 months hence, and while the Applicants and Respondents arguments regarding the order of discoveries and filing of party affidavits both have merit, I consider that there is greater value in having the affidavits of the parties filed before discoveries are conducted. In my opinion, the discoveries will be more focussed, further aspects of the case to meet will be known earlier and more precisely by all parties, and this will focus attention on the core aspects of the disputed claims, which will also allow more serious consideration to be given to earlier retention of, and report filings from expert witnesses.

[25] I observe here that although the Respondents' counsel stated at the hearing that they "reserve the right" to discover the Applicants' expert witnesses, there is no longer a right of oral discovery for expert witnesses in Nova Scotia (CPR 18.13(5) and 55.11 - written questions are permitted) even in actions, and that in applications in court, the judge hearing a motion for directions has discretion to allow discovery of any witness (CPR 55.06 and CPR 5.09 (2)(d) and (h)). To ensure that this avenue remains open for this purpose and others such as permitting witnesses to give *viva voce* evidence in direct examination to supplement their affidavits (eg. experts) I will order that the motion for directions be adjourned *sine die*, and remain available to consider such issues, though I do

not consider myself seized since CPR 5.09(2)(m) allows these matters to be considered by other Justices as well.

Conclusion

[26] I conclude that to effect an efficient and fair procedure I should, and do, order the following:

I. All parties to effect disclosure in accordance with CPR 15, 16 and 17 regarding applications in court by 4:30 p.m. AST, April 8, 2013;

ii. All parties to exchange and file with the court updated fact and expert witness (affiants) lists in accordance with CPR 5.07 and 5.08 by 4:30 p.m. AST, May 8, 2013. I specifically order that leave of the Court or the agreement of counsel will be required to present affidavits from, or to call as witnesses at the hearing, any persons who are not on this list - including expert witnesses;

iii. Initially only the parties will file their own affidavits and by:

Applicants - May 8, 2013;

Respondents - July 8, 2013;

iv. I specifically direct that Marius Lengkeek will be treated as an individual party insofar as he will be required to file his affidavit as if a party fact witness, even if it should contain any expert opinion evidence on his part - i.e. by July 8, 2013; and he will be subject to discovery to be completed by October 7, 2013;

v. Discoveries of only the parties (in accordance with CPR 18.09) will be completed by October 7, 2013 (which is six months after disclosure is to be completed);

vi. All non-party fact witness affidavits to be filed by [no discovery permitted except per CPR 18.09 and 18.11]:

Applicants - October 7, 2013;

Respondents - November 1, 2013;

Applicants' Rebuttal - November 15, 2013;

vii. Applicants' Rebuttal to Respondents affidavits filed for the July 8, 2013, deadline - November 15, 2013;

viii. Expert Affidavits/Reports filed [CPR 55.06]:

Applicants - December 2, 2013;

Respondents - February 3, 2014;

Applicants' Rebuttal - March 3, 2014; and

ix. Briefs to be filed [CPR 5.09]:

Applicants - March 3, 2014;

Respondents - March 24, 2014; and

Applicants' Reply - March 31, 2014.

[27] While the timetable ordered is shorter than the Respondents suggested, I am satisfied that these steps need not necessarily be cumulative, one awaiting completion of the other. Moreover, the parties' own affidavits (evidence in chief) will have been filed since at the latest by July 8, 2013. That permits ample time to prepare for a hearing in April, 2014.

[28] I will not hear the application in court, nor do I believe that a "case management" judge should be appointed. Nevertheless, I will adjourn the motion for directions *sine die* pursuant to CPR 5.09(2) and I will consider any requests that any one of the parties may make to have me hear any motions associated with this matter.

Rosinski, J.

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Erratum:

[29] At page 7, paragraph [26](ii), the word “(affined)" should read “(affiants)”.