SUPREME COURT OF NOVA SCOTIA

Citation: *Argyle (Municipality) v. ABCO Industries Limited*, 2021 NSSC 367

Date: 20210727
Docket: HFX498075
Registry: Halifax

Between:

Municipality of the District of Argyle

Plaintiff

v.

ABCO Industries Limited and
ABCO Industries Holdings Ltd.

Defendants

DECISION

Judge: The Honourable Justice Jamieson

Heard: July 27, 2021, in Halifax, Nova Scotia

Oral Decision: July 27, 2021, in Halifax, Nova Scotia

Counsel: Richard Norman, for the Plaintiff

Christopher Madill and Sarah Walsh, for the Defendants

By the Court (Orally):

Background

[1] On April 21, 2021, the Municipality of the District of Argyle ("Argyle") filed this motion for a preliminary determination under *Civil Procedure Rule* 12, of the following question:

> Does the contractual language in the contract between the parties exclude claims made pursuant to the *Sale of Goods Act*?

[2] The Court is being asked to determine whether the warranty clause excludes or limits ABCO Industries Limited and ABCO Industries Holdings Ltd.'s (collectively as "ABCO") liability for alleged breaches of the implied conditions of fitness for purpose and merchantability in s. 17(a) and (b) of the *Sale of Goods Act*, RSNS 1989, c 408.

[3] In 2020 Argyle commenced an action against ABCO, alleging that a mobile dewatering truck ("MDT") it purchased from ABCO in 2018 was defective. Among other claims, Argyle asserts that ABCO breached the implied conditions of merchantable quality and fitness for purpose in the *Sale of Goods Act*.

[4] In its defence, ABCO relies on a detailed warranty provision in the proposal it submitted to Argyle, as limiting ABCO's liability.

[5] Prior to the tender and proposal that was accepted by Argyle on February 28, 2018, ABCO (in January 2018) responded to a Request for Proposal for a "New Sludge Dewatering Centrifuge System – Detailed Design" for waste water treatment, which Argyle had issued on January 10, 2018. ABCO advised Argyle that it had a used mobile dewatering truck on hand, which could be offered at a discounted rate. ABCO submitted a Proposal on January 12, 2018, for supply of a used mobile dewatering truck.

[6] On February 6, 2018, Argyle put out a new tender for a mobile dewatering System-Supply and Training. On February 7 and 16, 2018, Argyle issued two addendums to that tender.

[7] On February 16, 2018, ABCO responded to the new tender and indicated it could meet the various requirements in the tender package by providing a mobile dewatering truck, designed and manufactured by ABCO. ABCO's proposal attached Terms and Conditions of Sale/Performance of Services.

[8] The Terms and Conditions include the following warranty wording, along with an exclusion of liability clause:

> 2. WARRANTY
>
> ABCO warrants that products manufactured by ABCO will be free from defective workmanship under normal use and service, for a period of one year from the date of delivery of said products or services. ...
>
> It is expressly understood that – in no event – shall ABCO be liable for indirect or consequential damages resulting from breach of this warranty or such defective material or workmanship including, but not limited to, buyer's loss of material or profits, increased expense of operation, downtime or reconstruction of the work and – in no event – shall the ABCO obligation under this warranty exceed the original contract price of equipment supplied. ...
>
> This warranty is in lieu of any other warranty or obligation, and no liability is assumed by ABCO except as expressly stated above. ABCO does not authorize any person to create for it any other obligation or liability in connection with the work performed. This warranty is not transferrable.
>
> [Emphasis Added]

[9] The ABCO proposal was accepted by Argyle on February 28, 2018, and a purchase order was issued by Argyle on the same date. Argyle signed the first page of the ABCO proposal and returned it to ABCO.

Evidence on the Motion

[10] Argyle filed the affidavit of Hans Pfeil, Director of Public Works, for Argyle.

[11] ABCO filed the affidavit of Anthony Purcell, Product Manager, for ABCO.

Issues

[12] The issues to be determined on this motion are as follows:

1. Is the proposed question appropriate for a *Rule* 12 preliminary determination?
2. If so, does the contractual language in this proceeding exclude liability under the *Sale of Goods Act*?

Parties Positions

Issue No. 1: Is the Proposed Question appropriate for a *Rule* 12 preliminary determination?

Argyle's Position

[13] Argyle says the question posed is appropriate for determination under *Rule* 12. It says the proposed question is appropriately characterized as a question of law, as it involves the interpretation of a contract of adhesion or standard form contract. It further says the proposed question engages the first branch of the test formulated in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4. *Tercon* is the leading case on interpretation of clauses which limit or exclude liability. The first branch of the *Tercon* test asks whether the limitation clause applies to the present circumstances. Argyle says that kind of question is well suited to a *Rule* 12 motion and refers to this Court's decision in *Smith v. Asaff*, 2021 NSSC 16, where Justice Arnold determined that it was appropriate to determine the first branch of the *Tercon* test on a *Rule* 12 motion involving, what he found to be, a standard form contract.

[14] In relation to the second stage of the *Rule* 12 analysis, Argyle says that the Court has the factual scaffolding necessary to answer the proposed question of law. Argyle says the third stage of the *Rule* 12 analysis requires the motion judge to ask whether the facts necessary to answer the question of law require a trial. Argyle says the facts it intends to rely upon for the purpose of this motion do not require a trial. It says here they are akin to an agreed statement of facts, as there is no dispute. It says those facts are undisputed and do not hinge on credibility/reliability findings or trial testimony.

[15] Argyle says that a determination of the question will reduce the length of the proceeding and expense. It says this issue is the main issue, and in their opinion may well promote early resolution if it is determined now.

ABCO Position

[16] ABCO says the motion fails at the first step of the *Mahoney v. CUMIS Life Insurance Co.*, 2011 NSCA 31, analysis, which involves identifying a pure legal issue to be determined. It says the question is more appropriately characterized as one of mixed fact and law.

[17] ABCO further says that interpreting the limitation clause in this case cannot be done in isolation from the factual matrix. ABCO says while the Terms and Conditions, including the warranty clause, came from ABCO, the contract must be interpreted as a whole and in light of its "surrounding circumstances." It says the surrounding circumstances include:

- the inclusion of a one-year warranty in ABCO's Proposal submitted on January 12, 2018, in response to the RFP;
- the cancellation of the initial RFP for a detailed design in favour of a revised call that would be more receptive to ABCO's product;
- the publication of the subsequent "Tender" on February 22, 2018, which required a two-year warranty program;
- Argyle's February 28, 2018, agreement to, and signature on, ABCO's proposal, which contained a one-year warranty (with multiple references to the warranty contained in the document), along with an entire agreement clause; and
- the fact that Mr. Purcell drew the one-year warranty to Mr. Pfeil's attention.

[18] ABCO says the surrounding circumstances demonstrate the contract was not a "contract of adhesion". ABCO further says the Court does not have all of the facts necessary to make a determination. It says, for example, if the one-year warranty is effective, ABCO's liability for defective workmanship would be limited to the 2018/2019 period and additional evidence would still be required to determine the alleged defects. It says in terms of the law of tendering, that the warranty clause, with its one-year warranty, formed part of "Contract B" and, therefore, overrode Argyle's request in the call for tenders for a two-year warranty program.

[19] ABCO further says the *Sale of Goods Act* might also be found to be inapplicable for reasons other than the warranty clause, and refers specifically to s. 17(b) of the *Act* which provides that:

> (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, <u>if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed.</u>
>
> [Emphasis Added]

[20] It says, therefore, if the warranty clause does not exclude the *Sale of Goods Act*, there is still a question to be decided under s. 17(b). Finally, ABCO says that determining the proposed Question will not necessarily "reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding". It says liability under the *Sale of Goods Act* is only one of the issues in this action and refers to the other claims it has advanced and says that it relies on the warranty clause in defence of these claims.

Law and Analysis

[21] *Civil Procedure Rule* 12 permits a party to seek a preliminary determination of a question of law under limited circumstances. It states:

> **Question of Law**
>
> **12.01 Scope of Rule 12**
>
> (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.
>
> **12.02 Separation**
>
> 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.
>
> **12.03 Determination**
>
> **(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.
>
> **(2)** A judge who appoints a time, date, and place for a separated question to be determined may give directions on any of the following:
>
> (a)whether the hearing will be held in chambers or court;

(b) the wording of the question to be determined;

(c) dates for filing a further affidavit, statement of agreed facts, or brief;

(d) cross-examination on an affidavit;

(e) any other direction to organize the hearing.

[Emphasis Added]

[22] Section 12.02 is conjunctive and all three items listed must be met before the Question is appropriate for determination. The Nova Scotia Court of Appeal in *Mahoney*, *supra*, set out the necessary steps in determining whether a Question is appropriate for consideration under *Rule* 12. It said:

> 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: *Dalhousie University v. Aylward*, 2011 NSCA 20 (N.S. C.A.), para. 11, affirming *Dalhousie University v. Aylward*, 2010 NSSC 65 (N.S. S.C.), paras. 20-25; *Barthe v. National Bank Financial Ltd.*, 2010 NSCA 79 (N.S. C.A.), paras. 5-9; *Brill v. Nova Scotia (Attorney General)*, 2010 NSCA 69 (N.S. C.A.), 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".
>
> [Emphasis Added]

[23] I now turn to the first question for determination – is the proposed question for determination a pure question of law? In the context of standard of review, the Supreme Court of Canada has stated that some contract interpretation can be a pure question of law. In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, the court held that:

> 24. …where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as question of law subject to a correctness review.

[24] The Court referred to its prior decision in *Sattva Capital Corp v. Creston Moly Corp.*, 2014 SCC 53, where they gave two reasons for concluding contractual interpretation is a question of mixed fact and law and concluded that while contractual interpretation is generally a question of mixed and fact and law, in situations involving standard form contracts it is more appropriately classified as question of law in most circumstances. The Court said:

> 27 The first reason is that the surrounding circumstances of the contract, or the factual matrix in which it was formed, are important considerations in contractual interpretation: *Sattva Capital Corp.*, at para. 46. Rothstein J. stated that determining the intention of the parties is a "fact-specific goal" that requires a trial court to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": paras. 47 and 49.

> 28 While a proper understanding of the factual matrix is crucial to the interpretation of many contracts, it is often less relevant for standard form contracts, because "the parties do not negotiate terms and the contract is put to the receiving party as a take-it-or-leave-it proposition": *MacDonald*, at para. 33. Standard form contracts are particularly common in the insurance industry…
>
> …
>
> 32 In sum, for standard form contracts, the surrounding circumstances generally play less of a role in the interpretation process, and where they are relevant, they tend not to be specific to the particular parties. Accordingly, the first reason given in *Sattva Capital Corp.* for concluding that contractual interpretation is a question of mixed fact and law — the importance of the factual matrix — carries less weight in cases involving standard form contracts.
>
> *(2) The Definitions of "Question of Law" and "Question of Mixed Fact and Law"*
>
> 33 In *Sattva Capital Corp.*, this Court gave a second reason for concluding that contractual interpretation is a question of mixed fact and law: contractual interpretation does not fit within the definition of a pure question of law. Questions of law are "about what the correct legal test is": para. 49, quoting *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. For instance, the content of a particular legal principle of contractual interpretation is a question of law. However, in interpreting contracts, courts apply the legal principles of contractual interpretation to determine the parties' objective intentions: *Sattva Capital Corp.*, at para. 49. Therefore, according to *Sattva Capital Corp.*, contractual interpretation is a question of mixed fact and law, which is defined as "applying a legal standard" (the legal principles of contractual interpretation) "to a set of facts" (the words of the contract and the factual matrix): para. 49, quoting *Housen*, at para. 26.
>
> 34 In my view, however, while contractual interpretation is generally a question of mixed fact and law, in situations involving standard form contracts, it is more appropriately classified as a question of law in most circumstances. ...
>
> [Emphasis Added]

[25] The Supreme Court's rationale in *Ledcor, supra*, was specific to the need for consistent precedent in interpreting standard form contracts as the interpretation could affect many people who are subject to such standard form contracts:

> 39 These teachings, however, do not necessarily apply in cases involving standard form contracts, where a review on the standard of correctness may be necessary for appellate courts to fulfill their functions. Standard form contracts are "highly specialized contracts that are sold widely to customers without negotiation of terms": *MacDonald*, at para. 37. In some cases, a single company, such as a bank or a telephone service provider, may use its own standard form contract with all of its customers: *Monk*, at para. 23. In others, a standard form agreement may be

> common throughout an entire industry: *Precision Plating Ltd.*, at para. 28. Either way, the interpretation of the standard form contract could affect many people, because "precedent is more likely to be controlling" in the interpretation of such contracts: Hall, at p. 131. It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts — "ensuring the consistency of the law" (*Sattva Capital Corp.*, at para. 51) — is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness.
>
> 40 Indeed, consistency is particularly important in the interpretation of standard form insurance contracts. …
>
> …
>
> 48 Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As Iacobucci J. recognized in *Southam*, the line between questions of law and those of mixed fact and law is not always easily drawn. Appellate courts should consider whether "the dispute is over a general proposition" or "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future" (para. 37).
>
> [Emphasis Added]

[26] Whether contracts, such as the current contract, could be considered to be standard form contracts, is in my mind highly questionable. This was a tender with specific requirements and a specific proposal received in response with a page of terms and conditions attached. It was not the usual adhesion contract drafted by one company without negotiation and presented on a "take it or leave it" basis. Argyle issued a tender with specific requirements along with two addendums. Argyle accepted ABCO's proposal in response to the tender on February 28, 2018, and issued a purchase order. The proposal directly responded to the requirements in the tender. The evidence indicates there were multiple discussions between the parties. The tender itself at p. 5 reserved for Argyle the right to modify the terms, cancel or reissue the tender at any time, in its sole discretion.

[27] While the terms and conditions attached to the proposal were drafted by ABCO they do not represent the entirety of the contract. In order to interpret the contractual provisions it is necessary to understand the words of the contract in their

full context of the entire contract. As the Supreme Court of Canada said in *Sattva*, *supra*, at para. 48:

> … the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

[28] This primary rule of contract interpretation has been stated in these oft-quoted words:

> [T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.*, 1979 CarswellQue 157, (*sub nom. Exportations Consolidated-Bathurst Ltée c. Mutual Boiler & Machinery Insurance Co.*) [1980] 1 S.C.R. 888 (S.C.C.) at para. 26.

[29] I find the contract in issue is not a standard form contract. It is not the type of contract envisioned in *Ledcor*, *supra*, as a standard form contract. It is a contract that must be interpreted from the whole of the contract in light of the surrounding circumstances. In the current circumstances, the exercise is of necessity one of mixed fact and law. The Question posed is not a pure question of law.

[30] Although, having made this determination, I need not consider the remaining requirements of *Rule* 12, I do intend to address them briefly.

[31] The parties agree that the proposed question engages the test formulated in *Tercon*, *supra*. *Tercon* is the leading case on interpretation of clauses which limit or exclude liability. Argyle says the first branch of the *Tercon* test (being whether the exclusion clause in fact applies to the circumstances) is well suited to a *Rule* 12 motion.

[32] As cases have noted since *Tercon*, if a contractual provision purports to exempt a party from normal liabilities or responsibilities, the court will closely scrutinize such a provision to ensure that it truly applies to the activity in question. In *Tercon*, the Supreme Court of Canada set out the criteria for the enforcement of exclusion clauses. A contractual condition that limits or excludes liability or the remedy which may be granted, will be enforced if it meets the following criteria: (a) as a matter of contractual interpretation, the exclusion clause in fact applies to the circumstances; (b) the clause was not unconscionable at the time the contract was entered into; and (c) the exclusion clause is not contrary to overriding public policy.

[33] Applying *Tercon* would necessarily mean that all of the criteria listed would have to be considered. While it may be unlikely that the "unconscionable" or "contrary to public policy" criteria are applicable here, they are still part of the consideration and cannot simply be disregarded. While I question whether the test could be applied without reference to "unconscionable" or "contrary to public policy", I draw a distinction with the case of *Smith v. Asaff*, 2021 NSSC 16.

[34] Argyle submitted that as in the case of *Smith, supra*, here it is appropriate to determine the first branch of the *Tercon* test on a *Rule* 12 motion. That case is distinguishable. For example, in *Smith* the court held that the contract in question was a standard form contract. Here I am being asked to interpret a contract that is not standard form or adhesion contract.

[35] I agree with ABCO's submissions that the contract must be interpreted as a whole in light of its surrounding circumstances. I refer to the SCC comments in *Sattva Capital Corp., supra*:

> 46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 26 and 31-36.
>
> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning: No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know

> the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> 48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.): The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
>
> 49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam Inc*. Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam Inc.*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).
>
> 50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
>
> [Emphasis Added]

[36] The surrounding circumstances as I have noted, are the factual matrix. As our Court of Appeal said in *Mahoney*, *supra*, *Rule* 12 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. I cannot determine contested facts that might hinge on testimony at a trial. Under *Rule* 12, I must come to a conclusion that the facts can be found without a trial. I am not satisfied that this is the case in the current circumstances. This is not a situation where a standard form contract, without negotiation or input from the other party, was presented on a take it or leave it basis and accepted on those terms. There was a history between these parties starting in

January 2018, after the initial tender was issued through to a second tender being issued in February 2018, and ultimately the acceptance of ABCO's proposal by Argyle on February 28, 2018. As ABCO appropriately points out, the surrounding circumstances include the inclusion of a one-year warranty in ABCO's proposal submitted on January 12, 2018; the publication of a subsequent tender on February 6, 2018, by Argyle which required a two-year warranty program; and then ABCO's February 21, 2018, proposal again containing a one-year warranty. This February proposal was ultimately accepted by Argyle on February 28. The surrounding circumstances also include Mr. Purcell in his affidavit indicating he drew the one-year warranty to Argyle's (Mr. Pfeil's) attention. Argyle says there are no additional facts that will make a difference here, as this is close to an Agreed Statement of Facts. I am not convinced.

[37] A quick review of the ABCO proposal illustrates to me that I do not have the entire factual matrix before me and that testimony at trial will be necessary. For example, without further evidence, it is not clear to me that I have the entire contract before me. For example, what the purpose or meaning of the following introductory statement in ABCO's February 2018 proposal, when read with the separately listed Terms and Conditions, is not clear:

> As requested we are pleased to offer the following proposal for a deluxe model ABCO mobile dewatering unit with approximately 12,000 km on odometer including warranties (expires upon the date or mileage whichever comes first) (see chassis full features list):
>
> 1. Extended vehicle coverage (C 9603A)-August 7, 2020/160,000 kms
>
> 2. Engine after treatment (D 3004E)-August 7, 2022/7200 hours/325,000kms
>
> 3. Engine warranty (N4804F) as outlined in item (2) above
>
> 4. Towing (T4101E)-August 7, 2020 up to $500.00/time.
>
> If you have any questions or require further information please contact us.
>
> [Emphasis Added]

[38] The parties appear to recognize that I may not have the entire contract before me. The proceeding is early in process, there have been no discovery examinations, and disclosure of documents has just been completed.

[39] There is no evidence before me as to what these references on the first page of the proposal represent. The Terms and Conditions at number two of the attachment to the proposal say "this warranty is in lieu of any other warranty or

obligation" and it refers to a warranty of one year. However, these references appear to talk about warranties, for example, to August 7, 2020, or 160,000 km.

[40] I have no evidence before me to explain these warranty references. There is no evidence before me to indicate what the references represent, what the numbers signify, how many kms were on the MDT at relevant junctures, what are the relevant junctures, and what is the significance of the August 2020 and August 2022 dates. I note that at August 2020 it was more than two years past the purchase order of February 28, 2018. What impact, if any, might this have is unknown. Argyle says it is of no consequence, however, not having the entire contract before me is of consequence when being asked to interpret contractual provisions.

[41] *Rule* 12 can only be utilized in limited circumstances including that the facts necessary to determine the question can be found without a trial or hearing. I am not confident this is the case, as I have set out above.

[42] A further necessary criterion for use of *Rule* 12 is that determination of the question will reduce the length of the proceeding, duration of the trial or hearing or expense of the proceeding. First of all, even if I were to determine the *Sale of Goods Act* conditions are excluded by the exclusion clause, this does not necessarily end the inquiry regarding the Terms and Conditions at trial. The Plaintiff also claims ABCO was negligent, "misrepresented the quality and nature of the MDT" and "fundamentally breached the contract". ABCO states in its brief, it will rely on the warranty clause in its defence of these claims as well (this is set out fully in para. 11 of ABCO's defence). Therefore, even if I were to determine the question under *Rule* 12, the trial judge is likely to have to conduct a somewhat similar interpretive exercise to determine whether the language of the Terms and Conditions impacts or limits any potential finding of liability with regard to the Plaintiff's other claims.

[43] I question whether a s. 12 determination of the Question posed would other than nominally reduce the length or expense of trial. I am of the view any impact would be minimal.

[44] I now turn to s. 17 of the *Sale of Goods Act* to further emphasize that a determination of the Question posed is unlikely to reduce the length or expense of this proceeding. Section 17 states:

Quality or fitness for particular purpose

17 Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:

(a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the sellers skill or judgement and the goods are of a description that it is in the course of the sellers business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose;

(b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;

(c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

(d) an express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith. R.S., c. 408, s. 17.

[Emphasis Added]

[45] Argyle says there is no evidence before me on this point (s.17(b) examination), and would expect it to be in Mr. Purcell's affidavit. However, Mr. Purcell's affidavit does contain numerous emails between the parties. There is an email dated January 12, 2018, referring to a demonstration of the MDT, and emails of January 18 and 19, 2018, referencing a presentation taking place.

[46] What this evidence means in light of s. 17(b) is not for me to decide. Even if I were to find the *Sale of Goods Act* applicable after a determination of the posed Question, the *Sale of Goods Act* could be found at trial to be inapplicable under the second part of s. 17(b), quoted above. Such a determination can only be made after a trial where there is a full opportunity for both parties to lead evidence relating to this issue. This further highlights the need for additional facts.

[47] Given my determination that in the circumstances of this matter the Question is not appropriate for determination under *Rule* 12, there is no need to consider the arguments advanced with regard to the question of whether the language of the contract excludes liability under the *Sale of Goods Act*.

Conclusion

[48] In conclusion, I find that the question posed by Argyle is not an appropriate question for determination pursuant to *Civil Procedure Rule* 12. It is not a question of pure law but is a question of mixed fact and law. For the reasons stated above I find that the contract in question is not a standard form contract but requires:

> … a reading of the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."
>
> (*Ledcor* at para. 27 quoting from *Sattva* at paras. 47 and 49)

[49] I am not satisfied that I have the necessary factual scaffolding to answer the proposed Question, the surrounding circumstances require factual findings that are best left for a trial judge. As the Court of Appeal pointed out in *Mahoney*. I can only identify the uncontested evidence necessary for the factual matrix, I cannot assess and weigh the evidence and then build the factual matrix from my factual findings, based on the evidentiary record, in making a *Rule* 12 determination. That is for the trial judge. In any event, there is not a sufficient factual record before me.

[50] The motion is dismissed with costs in the amount of $750 in the cause.

Jamieson, J.