SUPREME COURT OF NOVA SCOTIA

Citation: *Oxford Frozen Foods Ltd. v. Leading Brands, Inc.*, 2014 NSSC 249

Date: 20140423
Docket: Hfx No. 305790
Registry: Halifax

Between:

Oxford Frozen Foods Limited, a body corporate

Plaintiff

v.

Leading Brands, Inc., a body corporate, and Leading Brands of Canada Inc., a body corporate, collectively carrying on business as Leading Brands

Defendants

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Heard: March 27, 2014

Counsel: Robert G. Grant, Q.C. and Jessica Morrison, for the plaintiff
John P. Merrick, Q.C. and Kelly Buffet, for the defendants

Moir J.:

Introduction

[1] Leading Brands secured two discovery subpoenas just after the finish date. The case is to be tried in May.

[2] Oxford Frozen Foods moved to set aside the subpoenas on the grounds that the witnesses had little to offer by way of useful evidence and the discoveries would be held well after the *Civil Procedure Rules* require. One subpoena was withdrawn, and I dismissed the motion pertaining to the other.

[3] Counsel requested that I publish my reasons. Wanting to do more than a grammatical edit, I asked counsel to hold off submitting an order until I provided these supplemental reasons.

The Claim and a Contentious Clause

[4] Leading Brands, a manufacturer of bottled juices and other beverages, was a customer of Oxford Frozen Foods. It bought blueberry concentrate from Oxford in 2006 and 2007.

[5] In April of 2008, the parties made a contract for continuing supply and purchase of blueberry concentrate. The contract is in writing. Oxford claims that Leading Brands breached the contract by refusing delivery.

[6] The contract is a one-page "Sales Contract Confirmation" of a kind regularly used by Oxford. It provides for sale and shipment to Leading Brands at Vancouver of 131,760 pounds of blueberry concentrate. The concentrate was to be shipped in stages or under a shipping forecast. The contract contains this contentious clause: "Contract volumes are subject to the lowest of +/- % or 40,000 lbs".

[7] Leading Brands takes the position that the contentious clause limits the volume of concentrate Oxford was bound to ship and Leading Brands was required to pay for. Oxford claims the clause is standard for only some products and it gives Oxford a discretion about shipping less than full loads of some shipments of those products. Also, it pleads that the clause was included in error and it claims alternatively for rectification.

The Discovery Subpoena

[8] The discovery subpoena is for Mr. Alberto Wareham. He was Oxford's Director of Sales and Marketing, Food Division until June of 2007. He was

involved in the initial sales of blueberry concentrate to Leading Brands, but he had no involvement with the April 2008 contract.

[9] When discoveries were being organized, Leading Brands named Mr. Wareham as one of the witnesses it required. Oxford repeatedly questioned the need for his discovery. Leading Brands made no reply, and the discoveries went ahead without Mr. Wareham.

[10] A date assignment conference was held last fall. Counsel advised the court that all discoveries were complete. The Associate Chief Justice set trial dates in May, with February 7, 2014 as the finish date.

[11] When the finish date drew near and counsel for Leading Brands prepared for trial, the potential that Mr. Wareham might provide valuable testimony was revisited. Counsel made contact, but Mr. Wareham refused an interview. He even refused to be interviewed over the telephone.

[12] On the finish date, Leading Brands filed for a discovery subpoena to compel Mr. Wareham. The prothonotary issued it on the next business day.

[13] The trial readiness conference was held on March 7, 2014. Justice LeBlanc certified that the parties were ready for trial, but he noted that pretrial procedures had not been completed by the finish date.

The Relevance of Mr. Wareham

[14] Mr. Wareham provided Oxford with an affidavit in support of the motion to set aside his subpoena. I am told that he co-operates with Oxford in this litigation.

[15] Mr. Wareham held his position as Director of Sales from May of 2001 until June of 2007. He met with the CEO of Leading Brands in 2006, but recalls little else about the dealings. He has no information concerning Oxford during the 2007 or 2008 crop seasons.

[16] E-mails show that Mr. Wareham had dealings with Leading Brands during 2006, well before the contentious 2008 contract. Ms. Louise Brown, Oxford's present sales manager, gave evidence on discovery that Mr. Wareham managed the Leading Brands account before he left in June of 2007, and that he negotiated the 2006 contract.

[17] Ms. Brown said that she first saw the words of the contentious clause in the fall of 2006. Mr. Wareham provided the wording in a handwritten note, for Ms.

Brown to incorporate into a template. The template was used for every kind of product sold by Oxford. That is how the clause found its way into the 2008 contract between Oxford and Leading brands.

[18] Leading Brands' pleadings put forward its interpretation of the clause. The vice-president of Leading Brands who negotiated the 2008 contract with Oxford was unable to recall any discussion of the contentious clause. Ms. Brown was examined on discovery as to her understanding, as was Oxford's president.

[19] Oxford refers to the comprehensive review of principles of contractual interpretation by Justice Warner in *Gates v. Croft*, 2009 NSSC 184. The meaning of the contentious clause is not to be ascertained from the subjective intent of the drafter, let alone the subjective intent of a person who drafted a clause for a template and had no involvement with the specific contract at issue.

[20] Leading Brands argues that Mr. Wareham can speak to the exterior context of a contract that may not be clearly worded.

[21] I am not sure whether Mr. Wareham can provide evidence about external context that would have to be considered for interpretation of the contract. I need not make that determination because it is clear to me that Mr. Wareham is a witness to events relevant to the alternative claim.

[22] Mr. Wareham drafted the clause for introduction into Oxford's sales contracts. Oxford now pleads that inclusion of it in the 2008 contract with Leading Brands was an error, and it claims rectification. If there was an error, Mr. Wareham was the source of it.

Lateness

[23] Oxford refers me to the decision of Associate Chief Justice Smith in *Garner v. Bank of Nova Scotia*, 2014 NSSC 63. After a date assignment conference, after the finish date, and after the trial readiness conference the parties discovered that both had undisclosed, relevant documents. Trial dates were adjourned briefly.

[24] The plaintiff moved for an order requiring the defendant to provide a new affidavit of documents, providing for a review by the court of documents claimed to be privileged, requiring further documentary disclosure, and allowing amendments to the plaintiff's witness list. The motions were heard two business days before the trial was to begin. All motions were dismissed.

[25] The Associate Chief Justice discussed the trial readiness approach taken by the court under the 1972 Rules for setting trial dates. Under that system, a party required permission of the court to initiate or continue an interlocutory proceeding

after a notice of trial had been filed. Permission was granted only in "exceptional circumstances". See para. 22 of *Garner v. Bank of Nova Scotia*.

[26] The Associate Chief Justice contrasted the approach under the 1972 Rules with that taken by the 2008 Rules. She said, at para. 23 and 24:

> 23 Our present *Civil Procedure Rules* contain a different regime. Trial dates are now provided much earlier in the process, before the parties are ready for trial. At the Date Assignment Conference, the court fixes a Finish Date which is the date by which **all** pretrial procedures are to be completed (see Rule 4.16(6)(c)). A party who intends to make a pretrial motion that may materially affect a forecast of trial readiness, must, before the Date Assignment Conference, fully inform themselves regarding how much time it will take for the motion to be presented and must, at the Date Assignment Conference, advise the judge of the nature of the intended motion, the intended evidence in support of the motion, the plan for proceeding with the motion and a proposed deadline by which all documents will be filed (see Rule 4.16(4)). Counsel then have an obligation to insure that the case is trial-ready by the time the Finish Date arrives.
>
> 24 There will be occasions when an unexpected issue arises which may require a motion after the Finish Date and prior to the trial. Examples include a motion for an adjournment due to unexpected circumstances or a motion to amend a witness list. In my view, these motions should be the exception rather than the rule. Our present system is designed so that **all** pretrial procedures are completed by the Finish Date. When that date arrives, counsel should be ready for and prepared to proceed to trial without further pretrial motions.

Associate Chief Justice Smith also took into account the philosophical shift away from overuse of procedure encouraged by *Hryniak v. Mauldin*, 2014 SCC 7. She said at para. 34:

> In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see para. 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see para. 28). While these comments were made in the context of a summary Judgment motion, in my view, they are applicable to all civil cases in Canada.

[27] The post-finish date procedures proposed in *Garner* would have caused an adjournment of the trial (see para. 35).

[28] In my view, Rule 1 – Purpose supports the proposition at para. 34 of *Garner* that process has to be "accessible, proportionate, timely and affordable". To say "These Rules are for the just, speedy, and inexpensive determination of every proceeding" is to imply proportionality while keeping to the exact language of the ideal expressed by the Supreme Court of the United States when a majority adopted the *Federal Rules of Civil Procedure* in 1937.

[29] With that purpose and ideal in mind, we go to the Rules about trial dates. We see, as the Associate Chief Justice said, dates are now assigned before trial readiness: Rules 4.13 to 4.16. However, a judge has to be "able to forecast trial readiness and estimate the length of a trial": para. 4.16(6). The move from readiness to forecasting allowed the parties to know much sooner when they would

go to trial, and it corrected an anomaly in the readiness system caused by increasing litigation and longer trial dockets. Parties had to do everything required to be ready for trial, then wait a long time for the trial itself.

[30] The forecasting solution to the readiness problems serves the interests of accessibility and timeliness, and it is helpful with affordability, but the solution has its own problems. The judiciary owes an obligation to the public to keep judges and court staff efficiently employed, so as to both protect public finances and promote justice. It also owes an obligation to the public, but more directly to the parties, to provide trial dates as soon as the resources of the court and the means of the parties allow and to try cases at the assigned time.

[31] The system of setting trial dates by forecasting means that far more cases get booked for trial. Hence, there was a serious risk that the dockets would get booked too far into the future. In other words, there was a serious risk of greater delay. Further, there was a risk that settlements in the increased book of trials would cause more judicial downtime. There was a serious risk of costly inefficiency. Furthermore, as forecasting is less exact than ascertaining actual readiness, the new system entailed a risk that more cases would turn out to be unready when the trial

dates arrived. Again, judicial downtime and costly inefficiency troubled the proponents of a forecast system.

[32] The solution to these problems in a forecast system was a kind of compromise. The judiciary, and particularly our schedulers, undertook some obligations and, through the *Civil Procedure Rules*, the judges imposed other obligations on the parties, which is to say onto counsel.

[33] The judiciary, and particularly our schedulers, undertook careful overbooking. The judges undertook to step into the breach when overbooking would otherwise cause a trial to be cancelled. On the imposed side of the "compromise" are two safeguards. Parties are obligated to alert the court when it appears that the forecast cannot hold. And, the trial dates for an unready case are taken away sufficiently in advance to allow for their further use through artful overbooking.

[34] When a judge is satisfied at the date assignment conference that she or he is able to forecast readiness for trial and the length of the trial, the judge is required to set trial dates: Rule 4.16(6)(a). The judge must also schedule a trial readiness conference two months before the trial and a finish date a month before that: Rule

4.16(6)(b) and (c). The finish date is "when all pre-trial procedures are to be finished": Rule 4.16(6)(c).

[35] At a trial readiness conference, the judge is required to "ascertain whether all pre-trial procedures were completed by the finish date and confirm that the parties are ready for trial": 4.19(1). Rule 4.19(2) is crucial to the discussion about flexibility after the finish date: "A trial readiness conference judge who finds the parties are not ready for trial must cancel the trial dates, unless justice requires otherwise."

[36] Note that Rule 4.19(2) pertains to the second subject in Rule 4.19(1), "the parties are ready for trial", and not to the first, "pre-trial procedures were completed by the finish date". Rule 4.19(3) addresses that subject. The judge has a discretion to "order quick completion of a pre-trial procedure the judge finds is not complete".

[37] Rules 4.20 and 4.21 round out the approach to avoiding judicial downtime caused by a failure in trial forecasting. Adjournments are possible before the finish date: Rule 4.20(1). After that, a judge must consider the public interest and there is a presumption against adjournment: Rules 4.20(3)(c) and 4.20(4). Rule 4.21 provides possible sanctions for causing an adjournment.

[38] It is evident from these provisions that two months is thought to be enough time for scheduling to slate other duties for a judge and court staff tentatively assigned to an unready trial. In a system of artful overbooking, that defines the purpose of the trial readiness conference. It is to weed out unready cases enough in advance that the assigned dates can be used for a trial that is booked and ready, or be devoted to other judicial duties.

[39] The finish date serves the trial readiness conference. The deadline occurs a month in advance of the conference so the parties cannot leave the question of readiness to the last minute. Thus, the main purpose of the finish date is to protect against late adjournments. I am not saying the deadline serves no other purpose. A party has an interest in the other party's compliance with the deadline, and the public has an interest that is inconsistent with tying up the courts with last-minute motions such as may undermine the forecast system.

[40] After a date assignment conference, "Counsel … have an obligation to insure that the case is trial-ready by the time the Finish Date arrives", *Garner* at para. 23, and "When that date arrives, counsel should be ready for and prepared to proceed to trial without further pretrial motions", para. 24. In my view, that includes a motion to the prothonotary for a discovery subpoena. See Rule

30.01(1). Obviously, it does not include one of the motions routinely made to the presiding judge. See Rule 29.

[41] The observations at para. 23 and 24 of *Garner* apply with special force when procedural relief sought after the finish date would cause the parties to lose their trial dates. "Delay will be warranted in situations where it is necessary to do justice between the parties", para. 35. Consequential delay is a strong factor against procedural relief after the finish date.

[42] As I said before, neither the finish date nor the trial readiness conference "implies that pre-trial preparation stops on the happening of either": *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 310 at para. 109. Sometimes, the intense preparation right before trial uncovers the "unexpected" (*Garner*, para. 24). However, any motion after the finish date, whether granting it will cause an adjournment or not, "Should be the exception rather than the rule" (*Garner*, para. 24).

[43] The burden is on the proponent to show the justice of a departure from "all pre-trial procedures are to be finished" when the finish date arrives. The burden is easier to discharge when the proponent shows that "quick completion of a pre-trial procedure" will avoid cancellation of trial dates, but it will be exceptional.

Whether Justice Requires Discovery of Mr. Wareham?

[44] The discovery is tentatively arranged. It will not compromise the trial dates.

[45] Mr. Wareham may be an important witness. He is co-operative with Oxford Frozen Foods, his former employer. He will not co-operate with Leading Brands. Oxford will not call him as a witness. Leading Brands is left to wonder what Oxford can discover that Leading Brands cannot. I anticipate a brief discovery, a small expenditure to create a level playing field without doing much damage to the requirement that practice conform to the stringency expressed in *Garner*.

[46] Leading Brands' desire to have discovery after the finish date was brought to the attention of the trial readiness conference judge. He did not cancel the trial dates, but he was not moved to "order quick completion" either.

[47] Leading Brands does not attempt to justify having left this issue to the last minute. It got left, and the intensity of pretrial preparation revived it. *Garner* was decided this past February, and it is possible that, before *Garner*, not all counsel appreciated the stringency of the requirement to be finished with interlocutory processes before the finish date.

[48] Considering all the circumstances, I am satisfied that it is just to maintain the discovery subpoena.

Conclusion

[49] The motion respecting the subpoena against Mr. Wareham is dismissed.

[50] Despite success on that motion, I ordered costs against Leading Brands. The discovery should have been held before the finish date.

Moir J.