IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *NYK Line (Canada) Inc. v. Canapak Seafoods,* 2002 NSSC 251

Date: 20021122
Docket: S. H. 170135
Registry: Halifax

Between:

NYK Line (Canada) Inc., a body corporate

Plaintiff

v.

CANAPAK Seafoods, a division of Canadian Crab Packers Associates Limited, a body corporate

Defendant

Judge: The Honourable Justice David W. Gruchy

Heard: November 14 and 15, 2002, in Halifax, Nova Scotia

Counsel: Steven G. Zatzman, for the Plaintiff
Eugene Y. S. Tan, for the Defendant

By the Court:

BACKGROUND

[1] This is an action for compensation for detainer charges of a refrigeration container and chassis owned by the plaintiff and "hired" by the defendant and used by another party.

[2] With significant exceptions, the facts giving rise to this action are not in dispute. The parties presented the following agreement at the opening of trial:

> The following are facts that are already agreed between the parties and are in no way intended to be exhaustive of all relevant facts arising from the evidence in this matter.

1) The Plaintiff, NYK (Canada) Inc. is a body corporate carrying on business as an ocean carrier providing the transportation of goods from point to point;

2) The Defendant, Canapak Seafoods, a division of Canadian Crab Packers Associates Ltd. ("Canapak"), as (sic) a body corporate carrying on business in Halifax. It is in the business of purchasing seafood from the Atlantic Provinces for resale in other markets as well as brokering the sale of seafood;

3) On or about November 14, 1997, a 40-foot refrigerated container and chassis was delivered to Oceanis Seafoods in New Brunswick at the request of Canapak;

4) The container and chassis remained at Oceanis Seafoods for 174 days;

5) During that time, some damage occurred to the container.

[3] The defendant's principal is Hiro Inoue. Mr. Inoue obtains orders in Japan for frozen snow crab and herring roe. He buys those products in the Maritime Provinces for Japanese customers and then arranges the shipment of them to Japan. During the period in question the ultimate decision with respect to the choice of a transportation company of the goods were made by the defendant's customers.

[4] In effect, the defendant was the middleman between the customers in Japan and the producers in the Maritimes. The producers looked to the defendant to find the customers, and the customers looked to it to find the products. When that was accomplished the customer approved the shipping company, which company then made arrangements to have a refrigerated container on a chassis made available for delivery to the producer's plant. The producer then arranged to have it transported from Halifax to the plant. After the container had been filled by the producer, it was then returned to Halifax where the container and product were trans-shipped to Japan.

[5] The plaintiff says that on or about November 14, 1997, it received an order for a container consigned to a producer, Oceanis, in New Brunswick. The defendant's related company, a forwarding company, telephoned the plaintiff and ordered a refrigerated container and chassis for delivery to the producer, Oceanis Seafoods, of New Brunswick. The plaintiff recorded the order on a computer generated "booking note". Oceanis arranged for the

equipment to be picked up in Halifax and transferred to its plant in New Brunswick by a trucking company, Rondeau Enterprises Limited.

[6] The equipment was duly delivered. Instead of loading the container with product, however, Oceanis kept it for a total of 174 days and used it during that period for the refrigerated storage of bait. The plaintiff's local manager and only witness, Allison Watson, said that in December he attempted to call Hiro Inoue by telephone but learned that he had returned to Japan for the winter season. Mr. Watson knew where the equipment was, but beyond the attempts to reach Mr. Inoue locally, made no attempt either to contact Oceanis or to arrange return of the equipment.

[7] In March, 1998, the plaintiff arranged to transfer the equipment to another producer near Oceanis. Prior to the transfer, the refrigeration equipment was checked by Mr. David MacDonald of RDMD Inc. It is the plaintiff's practice to have its equipment inspected prior to any trip and it is usually inspected every 30 days. Upon inspection, Mr. MacDonald found a problem with the refrigeration equipment which had to be repaired prior to the transfer. That repair cost a total of $1,184.00.

[8] On June 22, 1998, the plaintiff invoiced the defendant for the detention charges of 169 days ("174 days less 3 days free time less 3 days weekend") at U.S. $50.00 per day or U.S. $8,450.00, plus the repair cost of U.S. $793.91, a total of U.S. $10,257.91.

[9] The defendant admits the equipment was at the Oceanis plant for the period claimed. It says, however, it had made that arrangement with the plaintiff in November, 1997. Mr. Inoue testified that he had been approached by Maurice McGraw of Oceanis to see if he could arrange for the equipment to be left for the winter. Mr. Inoue testified that he had spoken to Mr. Watson who agreed to the arrangement. Mr. McGraw explained that it is expensive to operate refrigeration equipment in a closed plant all winter for the purpose of storing bait and that it was much cheaper to have a refrigerated container for that purpose. Mr. McGraw said he had noticed the plaintiff had allowed refrigerated containers to remain at other fish plants over the winter. Mr. Watson denied such a practice. Another witness, Paul Boudreau, testified that the plaintiff had a practice of allowing its equipment to stay on site for periods up to two or three months, without detainer charges, but that the equipment loaded was always eventually returned to the plaintiff for shipment.

[10] Mr. Watson testified he had no conversation with Mr. Inoue wherein he agreed to allow equipment to remain at Oceanis. He said he had never

allowed any equipment to be used in that manner and further, that he had no authority to do so. The plaintiff is not in the equipment leasing business and its prime objective is to keep its equipment in constant transportation use.

CONTRACT

[11] The plaintiff's claim is for the detainer charges and for the costs of the repairs to the refrigeration unit. The claim is based on contract or alternatively, for quantum meruit/unjust enrichment. I will examine each of these bases of the claim.

[12] There is a noticeable lack of clarity in the terms of the relationship between the parties. The documentary evidence adduced does not seem to address terms or conditions of the contract, if any, which the parties reached. According to Mr. Inoue, he contacted the defendant by telephone and requested that a unit be left with Oceanis for the coming winter. He said that Mr. Watson agreed. There is no documentary evidence to substantiate Mr. Inoue's testimony in this regard.

[13] The first documentary evidence concerning this matter is a self-generated "booking note" produced from the plaintiff's archives. It is dated November 13, 1997 and purportedly refers to a telephone order by an employee of Canapak. It does not refer to any relevant terms and conditions, such as the period of time which the defendant could detain the equipment, where the container would be loaded and a price for using or detaining the equipment. It contains no reference to breakdown or maintenance of the equipment. It shows a "pickup place" and a "pickup date". It has references to "cutoff date" and "pod eta date", but these are not completed. The form is not helpful in ascertaining essential terms of an agreement between the parties.

[14] When the equipment was picked up in Halifax for Oceanis on November 14, 1997 by its trucker, Rondeau Enterprises Limited, the trucker was probably required to sign a "equipment interchange receipt and safety inspection report". No signed copy of this document was produced in evidence, but I am satisfied that the copy before me was authentic. Again, it was not helpful in determining the terms and conditions of any contract between the parties. It does refer to "Contract or B/L HALN4492", which is the number of the "booking note" mentioned above, but which does not assist me. The rest of the form deals with the condition of the container, but makes no mention of the refrigeration unit.

[15] The plaintiff produced a copy of "Rule No. 21" of a Canada Westbound Rate Agreement. I gather this was an agreement among various transportation

companies, including the plaintiff. The particular rule specifies "detention charges" for refrigerated containers of U.S. $50.00 per day and U.S. $6.00 per day for the chassis, with exceptions referred to as free time. The tariff, according to counsel, is no longer in effect, but was in effect at the time in question. There is no evidence the defendant was aware of the contents of this tariff or had agreed to it in any manner. The plaintiff says, however, in the event I should find there is no enforceable contract, the tariff is a measure of reasonable charges in determining quantum meruit.

[16] The container and chassis were eventually transferred from Oceanis during the week prior to March 30, 1998. Mr. Watson had realized the equipment was being detained some time in December, 1997, when, as he testified, he attempted to call Mr. Inoue and learned he had gone to Japan for the season. The plaintiff sent an invoice to the defendant on June 22, 1998. On July 2, the plaintiff exchanged self-serving correspondence wherein the defendant claimed to have had the plaintiff's permission to detain the equipment and referred especially to telephone conversations he said he and Mr. McGraw had with Allison Watson. Mr. Watson replied immediately and denied the conversations and the permission.

[17] I find as a fact that Mr. Inoue did call and speak to Mr. Watson in the fall of 1997 and did discuss the possible detention of the equipment. I doubt, however, that the conversation was very precise. I infer and conclude that there was no precise meeting of the minds of Mr. Inoue and Mr. Watson concerning the period of detention permitted.

[18] There was evidence before me from Paul Boudreau and Maurice McGraw from which I conclude it was a practice of the trade for a shipping company to allow fish producers free periods of up to two and a half months between the various fishing seasons. Although Mr. Watson testified equipment is usually left for the customer two or three days or a week, the plaintiff would only charge if the period was excessive - a couple of weeks.

[19] I also accept that Mr. Watson did attempt to contact Mr. Inoue in December, 1997 by telephone. But that attempt is best described as desultory. Beyond that he made no attempt to retrieve the equipment. He knew where it was and could have contacted Oceanis any time, as he eventually did in March, 1998. The fact he made so little effort to obtain the equipment leads to the inference that he had realized there was an apparent misunderstanding between him and Mr. Inoue. I also accept the evidence of Mr. McGraw that he had telephoned Mr. Watson to thank him for the cooperation extended by the plaintiff for the use of the equipment during the season, but again, that

conversation was probably not precise. In accepting the thrust of Mr. McGraw's testimony, I must remark that there were considerable discrepancies in his evidence in relation to dates and events, but the overall effect of his evidence was truthful.

[20] I have concluded that two essential terms of a contract between the parties with respect to this matter were: firstly, the period during which the plaintiff could detain the equipment; and secondly, compensation to the plaintiff for that detention. I do not have sufficient evidence before me to reach any conclusion with respect to these terms.

[21] In addressing the first of these terms, I refer to what appears to have been an accepted practice: the defendant could expect to detain the equipment for up to two months without charge provided it was eventually used for the contemplated transportation of goods by the plaintiff. In fact, Mr. Watson testified that in his experience the occasion had never arisen to invoice a customer for detention, but I am satisfied that detention for such a period was not uncommon. There was no contractual term binding upon the defendant for compensation to the plaintiff for detention. The tariff (if it had any legal effect) did not bind the defendant. There is no practice in trade to which I may look for guidance.

[22] I conclude that the plaintiff cannot recover the detention charges pursuant to contract.

QUANTUM MERUIT

[23] The plaintiff, therefore, says it should recover on the basis of unjust enrichment/quantum meruit. The plaintiff has cited the dissenting opinion of Cromwell, J.A. in *Polem v. Data General (Canada) Inc.* (1998), 172 N.S.R. (2d) 201 commencing at para. 87. The plaintiff says, and I agree, that notwithstanding the opinion is in dissent, Justice Cromwell's explanation of the law of quantum meruit is apt and accurate with which the majority of the court did not disagree. The relevant portion of the opinion is as follows:

> It is helpful to recall the basic principles. I adopt the following from the judgment of Reed, J., in **Jesionoski v. Gorecki and Ship Wa-Yas**, [1993] 1 F.C. 36; 55 F.T.R. 1 (T.D.), at 51 and 52-3, affd. (1993), 159 N.R. 238 (F.C.A.):
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> > 'Quantum meruit' literally translates 'as much as he deserves'. It is an equitable doctrine based on the principle that one who benefits from the labour and materials supplied by another should not be unjustly enriched thereby. Under circumstances where contracts are not enforceable because of uncertainty or where there has been no contract (e.g., the

> voluntary provision of goods and services under certain circumstances), the law implies a promise to pay a reasonable amount for the materials and labour which have been furnished. ...
>
> ... As I understand the law an award based on quantum meruit is assessed by reference to all the circumstances surrounding the situation under which the obligation arose.

This judgment was cited with approval by the British Columbia Court of Appeal in **Palethorpe v. Bogner**, [1997] 8 W.W.R. 147; 35 B.C.L.R. (3d) 128 (C.A.), where Cumming, J.A., repeated at p. 151 (W.W.R.) that "Any award based on quantum meruit must be assessed by examining all the circumstances surrounding the particular situation." (emphasis added) Cumming, J.A., at p. 152 (W.W.R.) also referred, with approval, to these comments of Lord Wright in **Way v. Latilla**, [1937] 3 All E.R. 759 (H.L.) at p. 766: "... the court must do the best it can to arrive at a figure which seems to it fair and reasonable to both parties, on all the facts of the case." (emphasis added)

The amount of money to be awarded on a quantum meruit claim is, generally, the market value of the services rendered. In considering what that market value is, attention must be paid to all the circumstances of the particular work in question.

In summary, quantum meruit is an equitable doctrine to be applied in light of principles of justice and reasonableness in all of the circumstances of the case. Given the nature of this exercise, appellate courts should be particularly reluctant to interfere with the trial judge's award. The breadth of the circumstances to be considered makes it especially difficult to dismiss certain factors as "irrelevant" and the equitable nature of the award means that it is most appropriately determined by the trier of fact who is alive to all the factual nuances of the case. This court should not interfere unless there are findings by the trial judge that are clearly wrong or the award is unreasonable.

[24] To like effect was the opinion of Chipman, J.A. in *Turf Masters Landscaping Ltd. v. T.A.G. Developments Ltd.* (1995), 143 N.S.R. (2d) 275 at p. 286:

> As G.H.L. Fridman points out in **Restitution** (2nd Ed. Carswell) at p. 286, recovery in quantum meruit may be had for work and services performed by one person for another in the absence of a valid enforceable contract between them. A number of situations have been recognized by the courts as warranting recovery and are reviewed by the author at pp. 300-349. Instances discussed by the author include work done under contracts that are unenforceable, void, voidable, affected

by incapacity, illegal, and work which has been done after a contract has been frustrated or work done outside the scope of the contract or extrinsic to it.

In cases involving unjust enrichment, quantum meruit is distinct from the law of contract or tort, and assumes the character of a restitutionary remedy, to prevent an injustice. As Fridman points out (pp. 286-287), a series of decisions of the Supreme Court of Canada ultimately laid down general principles governing recovery for unjust enrichment by an action for restitution. Actions of this type may be successful - whatever the fact situation - as long as the plaintiff establishes the element of unjust enrichment of the defendant, a corresponding deprivation suffered by the plaintiff and the absence of a juridical reason justifying such enrichment.

The element of injustice is at the heart of the right to recover. In **Nicholson v. St. Denis** (1975), 57 D.L.R. (3d) 699 (Ont. C.A.), MacKinnon, J.A., said at pp. 701-702:

> ... The law of unjust enrichment, which could more accurately be termed the doctrine of restitution, has developed to give a remedy where it would be unjust, under the circumstances, to allow a defendant to retain a benefit conferred on him by the plaintiff at the plaintiff's expense. That does not mean that restitution will follow every enrichment of one person and loss by another. Certain rules have evolved over the years to guide a Court in its determination as to whether the doctrine applies in any particular circumstance.
>
> It is difficult to rationalize all of the authorities on restitution and it would serve no useful purpose to make that attempt. It can be said, however, that in almost all of the cases the facts established that there was a special relationship between the parties, frequently contractual at the outset, which relationship would have made it unjust for the defendant to retain the benefit conferred on him by the plaintiff - a benefit, be it said, that was not conferred 'officiously'. This relationship in turn is usually, but not always, marked by two characteristics, firstly, knowledge of the benefit on the part of the defendant, and secondly, either an express or implied request by the defendant for the benefit, or acquiescence in its performance.

[25] Having examined "all the circumstances surrounding the particular situation", I am unable to discern or quantify the enrichment of the defendant. Clearly, the beneficiary of the detention of the refrigeration equipment was Oceanis. Arguably, that may have resulted in the benefit of

good relations between it and the defendant, but I have no means of quantifying it.

[26] Mr. Watson testified that he could not quantify the loss of revenue suffered by the plaintiff by reason of the deprivation. He also testified that the plaintiff during the period in question had always had on hand an inventory of containers and he did not recall that there had been a shortage of equipment.

[27] Even if the plaintiff has established that it is entitled to be recompensed on a quantum meruit basis, as is set forth in *Goldsmith on Canadian Building Contracts* (4th ed) at p. 4-26, it is up to the plaintiff "... to establish, by proper evidence, what a reasonable remuneration for the work done would be in the particular case". No such evidence was put before me. I reject the tariff as a proper measure; it is merely a unilateral statement of rates to be charged, established by agreement which did not involve the defendant in any manner. The plaintiff will not recover on the basis of quantum meruit.

MITIGATION

[28] Finally, with respect to quantification of damages, I keep in mind my conclusion that the plaintiff failed to mitigate its damages, if any were incurred. (The defendant did not plead that the plaintiff had failed to mitigate damages, but as the statement of claim was amended at the opening of the trial, if it were necessary, I would allow for an amendment to the defence to include this plea.) The acceptable period of detention was, by Mr. Watson's evidence, up to 2 or 2½ weeks. That period would end about when Mr. Watson tried to contact Mr. Inoue. After that time the plaintiff was obliged to mitigate by contacting Oceanis and obtaining return of the unit. He failed to do so.

REPAIR COSTS

[29] With respect to the claim for repair damages, Mr. Inoue testified at discovery (and acknowledged it at trial) as follows (at p. 51):

> Q. Who was responsible for looking after the container?
>
> A. Who responsible? I think Canapak, I think.
>
> Q. Why would Canapak be -- oh, Cana -- you were responsible.
>
> A. Because we booked the container, right?

Q. Okay. You booked the container.

A. Yes.

Q. So that you were responsible for maintaining and seeing that it was operating okay?

A. Yeah, that's my function, yes.

Q. Okay. So what did you do to maintain the container from the time that it was there?

A. "Maintain" meaning –

Q. Look after the container. You said it was Canapak's responsibility.

A. Yes, normally we -- after we ship out the container from the Halifax to fish plant, we always watching that container is okay or ship out or something.

[30] While Paul Boudreau testified that ordinarily the plaintiff would be responsible for a malfunction of the equipment, in view of Mr. Inoue's testimony and the extraordinary length of time Canapak allowed Oceanis to keep the equipment, it was incumbent upon the defendant to see that the equipment was properly maintained. Mr. MacDonald, who repaired the generator unit testified he could not say that its failure would not have occurred in any event. He also testified that if it had been properly maintained, it would not have been as bad as it was. I accordingly find that the plaintiff is entitled to recover from the defendant the sum of $1,184.52.

PREJUDGMENT INTEREST

[31] The parties have not addressed the matter of prejudgment interest. I fix the rate at four percent and allow recovery of that interest for a period of two years.

COSTS

[32] I will be pleased to receive written submissions from the parties on the matter of costs if they are unable to agree.

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David W. Gruchy, J.