SUPREME COURT OF NOVA SCOTIA

Citation: *C&C Technologies International, Inc. v. McGregor GeoScience Ltd.*, 2014 NSSC 440

Date: 20141205
Docket: Hfx No. 430818
Registry: Halifax

Between:

C&C Technologies International, Inc. and C&C Technologies, Inc.
Applicants

and

McGregor GeoScience Limited and Superport Marine Services Limited
Respondents

Decision

Judge:	The Honourable Justice Gerald R. P. Moir
Heard:	December 3, 2014, in Halifax
Written Decision transcribed and released on:	December 15, 2014
Counsel:	Daniela Bassan and Laura Rhodes, for the applicants Tim Hill QC and Allison Reid, for the respondent McGregor GeoScience Limited Ezra van Gelder and Caitlin Regan-Cottreau, for the respondent Superport Marine Services Limited

Moir J. (Orally):

Introduction

[1] The C&C company started a proceeding by application in court. One of the respondents, Superport Marine Services, moved for summary judgment on the claim. I was to hear that motion, but C&C and Superport got into a dispute about what documents C&C is entitled to from Superport in advance of the hearing. So I heard a motion for production on the understanding that we would reschedule the summary judgment hearing as soon as possible.

[2] I also agreed to determine a motion for summary judgment on pleadings, and I am prepared to make that determination today. This is my decision on the motion for productions.

[3] In issue is a written contract purporting to have been signed by McGregor GeoScience and C&C Technologies International just a year ago. McGregor denies the written contract is the one that governed its dealings with C&C. Superport denies that it is bound by the written contract and, as yet, adopts no position on whatever contract McGregor says had application.

[4] According to the written contract, C&C Technologies International was to provide McGregor with seabed survey services for proposed pipelines going offshore in British Columbia. The C&C companies claim they provided the services and McGregor failed to pay $2.5 million due under the contract.

[5] The contract says:

> This agreement is made…by and between McGregor GeoScience Limited….and its parent, subsidiary and affiliated companies…and C&C Technologies International, Inc. …and its parent, subsidiary and affiliated companies…".

The execution page has the name "McGregor GeoScience Limited" and the signature of Rick Hunter as "General Manager", and the name C&C Technologies International, Inc. and a signature of a "Vice President, General Manager".

[6] C&C Technologies, in addition to C&C Technologies International, sued Superport, in addition to McGregor. The notice of application claims that the additional C&C company and Superport are "parent, subsidiary and affiliated companies" of C&C International and McGregor. They are "therefore parties to and bound by the Contract." Nothing more is pleaded for liability of Superport under the contract, but C&C argues that it is implicitly pleaded that McGregor was an agent for Superport and bounded through McGregor's signature.

[7] Whatever may be said of the need for C&C to plead material facts about implied agency, Superport seems to have anticipated the concept in both its pleadings and summary judgment evidence.

[8] Superport's grounds of contest plead primarily that it is not a party to the contract. It also pleads it is not "a parent, subsidiary, or affiliate" of McGregor, and it pleads that Superport "did no acts and made no representations from which the Applicants could reasonably infer McGregor was authorized" to enter into the contract on behalf of Superport.

[9] There is a claim of unjust enrichment, and Superport also pleads that no benefit came to it from C&C and C&C suffered no corresponding deprivation.

[10] In support of the summary judgment motion, Superport filed an affidavit of Leslie MacIntyre. He is president of Superport. He is also president of McGregor, but he leaves the general management to Mr. Hunter.

[11] The affidavit provides evidence suggesting McGregor is sometimes a customer for Superport's science vessel services, but it contracts those services on an independent basis. The two companies negotiated a charter for the same project in which C&C were involved.

[12] Mr. MacIntyre says he did not speak to representatives of C&C about the contract with McGregor. He says he made no contract with C&C on behalf of Superport.

[13] Others at Superport did have communications with C&C about technical issues, but they have told Mr. MacIntyre that they did not discuss terms. In any case, he says he is the only one authorized to bind Superport.

[14] Mr. MacIntyre was aware of the C&C/McGregor contract, but he was not personally involved. "In my view, Superport was a contractor to McGregor and therefore had no interest in McGregor's contracts with C&C." Paragraph 11 of the affidavit reads:

> Mr. Hunter handled all of McGregor's negotiations with C&C. Mr. Hunter is not and has never been an employee of Superport and has never been authorized to act on Superport's behalf. McGregor and Superport operate entirely independently and for this reason I never would have agreed to Superport being a party to any contract with C&C or guaranteeing C&C's account with McGregor.

The affidavit includes several McGregor documents concerning the C&C contract and its performance, none of which mention Superport.

[15] Superport's pleadings and affidavits indicate that the summary judgment motion judge will be confronted with questions about material facts requiring a hearing on these broad subjects:

- Is Superport a parent, subsidiary, or affiliate of McGregor?
- If so, did Superport authorize McGregor to bind it to the contract?
- Was McGregor an implied agent of Superport?
- Was Superport unjustly enriched at the expense of C&C?

[16] Superport holds all the cards on these issues in the sense that the findings depend on communications between Superport and McGregor to which the C&C companies were not privy, and of which C&C have not had discovery, and the findings also depend on corporate documents of Superport and McGregor that have not yet been disclosed to C&C.

[17] The C&C companies demand production of nineteen categories of documents restricted, with two exceptions, to 2013 and 2014. They are:

(a) Listing of shareholders (companies and/or individuals) of McGregor;
(b) Listing of shareholders (companies and/or individuals) of Superport;
(c) Copies of all organizational charts showing McGregor and any of its parent, subsidiary, or affiliated entities;
(d) Copies of all organizational charts showing Superport and any of its parent, subsidiary or affiliated entities;
(e) Listing of officers/directors of McGregor;
(f) Listing of officers/directors of Superport;
(g) Listing of senior employees of McGregor;
(h) Listing of senior employees of Superport;

(i) Listing of any individual consultants or contractors working jointly for, or providing services to both of, Superport and McGregor;

(j) History of Rick Hunter's employment, consultant, or contractor status with any of McGregor or Superport since 2007;

(k) Listing and schedule of all revenues and/or profits earned by, transferred to, or otherwise allocated to Superport in connection with the use of STRAIT HUNTER for the Work under the Contract;

(l) Listing and schedule of all direct or indirect payments, including any charter payments, rental fees, etc., made to Superport in connection with the use of STRAIT HUNTER for the Work under the Contract.

(m) Listing of all projects involving services performed by McGregor in connection with the STRAIT HUNTER and pursuant to a time charter with Superport (third party competitor names can be redacted);

(n) Listing all substantial equipment, assets, or cash transferred from McGregor to Superport since March 2014 (or *vice versa*);

(o) Copies of all charters, leases, or other contracts between McGregor and Superport involving the STRAIT HUNTER, including the charter for the Work under the Contract;

(p) Copies of all loan agreements between McGregor and Superport (and/or between their respective shareholders);

(q) Copies of financial statements of McGregor;

(r) Copies of financial statements of Superport;

(s) Copies of tax returns of McGregor; and

(t) Copies of tax returns of Superport.

C&C say these documents are relevant to the issues of fact under the following headings: "Relationship and Affiliation of Respondents"; "Corporate Operations of Respondents"; "Vessel Charters for STRAIT HUNTER"; "Financial/Tax Documents"; "Implied Agency – Rick Hunter"; "Agency by Ratification – Benefits"; "Unjust Enrichment – Benefits".

[18] The C&C companies also say they require discovery of Mr. Hunter in light of McGregor's pleading that some other and unparticularized contract governed the relationship between C&C International and McGregor. What were the terms? More importantly for the present issue, who were the parties?

[19] In *Coady v. Burton Canada Co.*, 2013 NSCA 95 Justice Saunders said, for a majority of the Court of Appeal, that the mandatory language of Rule 13.04 is to be respected, such that a judge on a motion for summary judgment no longer has a discretion to dismiss the motion on the basis of prematurity. However, in the right circumstances, the judge may adjourn the motion to allow for disclosure, discovery, or expert evidence. Justice Saunders said at paragraph 86:

> If the motions judge is satisfied that the responding party reasonably requires disclosure, production or discovery, or an opportunity to present expert or other evidence before he is in a position to "put his best foot forward", then the judge should adjourn the motion so that those steps may be taken. Whether the adjournment is without day, or to a fixed date, or attaches conditions and a schedule for production, discovery, and the like, will turn on the judge's appreciation of the circumstances in each case. Of course, if the judge is satisfied that the responding party does not reasonably require further information, and is just procrastinating to forestall summary judgment, then an adjournment should be denied.

[20] In my assessment, C&C's demands for disclosure and discovery are reasonable. Either McGregor executed a contract with a term about parties that was nonsensical and unenforceable, or it had authority to bind an affiliate. In the

latter case, corporate records are likely to be the definitive evidence on whether McGregor and Superport were affiliates.

[21] The relationship between McGregor and Superport as affiliates, or otherwise, is not to be determined solely on the say-so of the president of both. The evidence in Superport's summary judgment affidavit does not encompass all that will tell of what, if anything, McGregor was authorized to do on behalf of Superport. Findings of fact on these issues will depend on the evidence of officers or employees of both McGregor and Superport, on internal corporate records, and on communications between the two companies. One thing is clear: they are not arm's-length.

[22] As I said, Superport holds all the cards on these issues. In addition to the principle in *Coady*, Rule 14.08(1) records a principle that puts disclosure ahead of any final order in a contested proceeding: "Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding." That presumption sets the stage for a discretion to achieve proportionality under the rest of Rule 14.08, but it is generally informative for a construction of the Rules, including Rule 5 – Application and Rule 13 – Summary Judgment.

[23] The position adopted by Superport would see a final order granted against the C&C companies without their having disclosure of evidence in possession of Superport relevant to Superport's pleadings and to assertions made by the president of Superport in his affidavit. That would not serve justice.

[24] I am satisfied that a significant level of disclosure, and some discovery, are necessary before a judge can hear Superport's motion for summary judgment. Therefore, the summary judgment motion will be adjourned for discovery and disclosure.

[25] There is a difference between the considerations for adjournment of a summary judgment for disclosure in an action and those for disclosure in an application. Disclosure is achieved by agreement or imposition of rigid procedures in an action. It is achieved under directions of a judge in an application.

[26] Justice Wright will resume directions on December 19, 2014. I must defer to him as to how much disclosure or discovery is necessary before the summary judgment motion is resumed. It is also possible that the schedule he sets for the proceeding as a whole will affect the utility of the summary judgment motion. So, I am prepared to set a hearing date on the understanding that Justice Wright is the judge giving directions, and he may have to set a new date.

[27] That is my decision.

[Discussion about available dates.]

Adjourned for summary judgment motion to January 21, 2015 at 9:30 a.m.

THE COURT: So, I was prepared to hear submissions on summary judgment on pleadings. I see that you're looking to amend the pleadings to avoid that.

Ms. Bassan: Yes.

THE COURT: Do you have a problem, Mr. van Gelder, with the proposed amendment?

Mr. van Gelder: I have a problem with … to some of the particulars on the agency tickets which I can deal with, with my friend. If you want to address the amendment dealing with unjust enrichment, that would …. I do object to that amendment. It's paragraph 22 of the amended pleadings.

THE COURT: I didn't notice it.

Mr. van Gelder: Does Your Lordship … to read through it?

THE COURT: Yes, please.

[Pause]

THE COURT: Yes, okay.

Mr. van Gelder: My sense is you can anticipate what I'm about to say?

THE COURT: I think so, but, but let's not leave it all to ESP.

Mr. van Gelder: Certainly. My Lord, you have here an allegation that there has been essentially misappropriation … fraudulent … preference, if you will. The Rules are quite clear on the particulars that need to be pleaded for that allegation. But, more to the point, that allegation has nothing to do with unjust enrichment. And in addition to that, you have, as I read the pleading, the claim that the misappropriation occurred when McGregor paid Superport under a charter which is a separate contract altogether. My Lord, by virtue of there being a separate contract, a claim of unjust enrichment simply can't succeed.

There is a juristic reason, that being, the contract … refers to the law that exists upon … . So you have here two aspects of the pleading which, one, I object to because it hasn't been properly pled and there is a … preference, and if that is the allegation that there has been some sort of profit … we'd be seeking summary judgment on that as well. But as to the whole of the unjust enrichment claim, our

position remains that it simply cannot succeed. There is nothing in this pleading to say that Superport received any benefit or any payment from McGregor other than by way of contract. And paragraph 22 essentially is an admission that that's what C&C understands.

So on that basis, our view is that summary judgment certainly can be granted on the pleadings with respect to unjust enrichment. And, even if not, paragraph 22 we object to that amendment.

THE COURT: Thank you. Mr. Hill?

Mr. Hill: I'm just going to … my friend.

THE COURT: Right, Ms. Bassan?

Ms. Bassan: Thank you, My Lord, the intention of the pleadings was to address the concern by my friend that there wasn't enough particulars provided as to unjust enrichment. We have already pled the elements of unjust enrichment, so in terms of adding paragraph 22, the intention was to direct what we thought was being sought in terms of further particulars of the actual benefits.

The concept of unjust enrichment, to get into some of the case law I believe my friends are relying on, some of the case law where there are cases going both

for and against whether or not you can have an indirect recipient of the benefits of a contract and whether that means you're actually trying to avoid the contract. So, it's a little bit circular in this case because, of course, we have the parties with opposite positions on whether or not they're bound to the contract. So the unjust enrichment does remain in the alternative. The position on the benefit regarding the allegation that's been put forward, the position on the benefit is that if there were payments made … it's believed that payments were made prior to payments being made to the Applicant. And on that basis, there's a benefit that's occurred: not the fact of a payment but the timing of the payment being creating a benefit in favour of the Respondent. And … the entitlement to that has not yet been demonstrated. In other words, was it a term of the charter that payment be made first and foremost to Superport before any payments be made to the Applicants, for example.

So we were really trying to respond to the benefits. I take the points from our friends. Perhaps we ought to reconsider the precise wording if that would make it better, but the intention really was to get at the particulars of the benefits that we say … come within the deprivation without any entitlement to it. Of course, if we had the charter and the terms of the charter, we might to be able to plead it a little bit more specifically perhaps, but that really was the intention there

and, as I didn't know my friend's objection, and I realize we just sent this yesterday, I didn't have time to really consider exactly what else we could have done better there to improve it.

I think on the case law, and again because there is inconsistency in that case law dealing with the indirect recipients, I believe that by actually putting forward the position that it is outside the contract and we believe that there would not be a term allowing entitlement under the charter, that that is a valid position under unjust enrichment. In other words, by virtue of the fact that there may be contracts floating around, that does not preclude an unjust enrichment claim. If that were the case, the many of the unjust enrichment cases that have gone forward would never have succeeded. And I think that's why there … is some inconsistency in the case law on unjust enrichment, being this whole concept of the indirect recipients. And I believe Fridman, I think my friends actually included in one of their authorities some of the passages from Fridman on this saying that there, you know, was some disagreement in the cases.

THE COURT: Yes.

Ms. Bassan: About all of that. So if my friend is saying they would rather us be more specific in that pleading. … And to be honest, My Lord, when we

come down to looking … at that actual pleading, it would actually be particulars as opposed to material facts. On our view, paragraph 21 was sufficient, but we did try, in all honesty, to try and satisfy and to move this matter forward. I thought we would save some time today in terms of the pleadings and not have to deal with the technicalities of what is or is not alleged in the actual pleadings. So if I have not properly pled that, I'm prepared to go back … and come up with some wording that's particularized to everyone's satisfaction for Monday, if that would work. If not, my submission would be that paragraph 21 should stand. We're prepared to remove paragraph 22 and just go on the basic elements of unjust enrichment.

The latest case from the Supreme Court of Canada on unjust enrichment was the … . It's the *Alberta Elder Society* case. That's from 2011, I do believe that's the … very last decision of the Supreme Court of Canada on unjust enrichment. And, they reiterate that it was actually a pleadings decision … where what was coming forward was whether or not the pleadings were sufficient. And they went through and reiterated from the *Consumers' Gas* decision, which was the other one from the Supreme Court of Canada on unjust enrichment, saying that the three elements are pleading enrichment of a defendant, corresponding deprivation, and absence of juristic reason. So, in my view, actually paragraph 21 ought to stand on

that and then if we are to provide further particulars, we could that or deal with it through evidence … summary judgment motion as well.

THE COURT: Thank you. Anything further, Mr. van Gelder?

Mr. van Gelder: My Lord, just to be clear on the authorities that were referenced, I'm looking at tab 13 of the Book of Authorities … . On November 18, which is the citation from *McLaughlin*, his language here when he's talking about the inconsistent cases which my friend has just referred to, is this: "By their very nature the type of three-party situation on consideration frequently consists of restitution, the proper explanation that underlies the claimant's inability to escape from a contractual application of risk rather than the lack of a corresponding deprivation." So, the authority is not that there is any dispute over whether … the existence of a contract creates or satisfies a juristic reason. It simply comes down to … if there are cases that go both ways, it's because the reasoning does not capture that principle. And as I say, in the pleadings as we see it, there is only reference ... in all of the pleadings. There were two … of contest in the Notice of Application. The only reference to Superport's benefit under its contract with McGregor, My Lord, this is a case for … on the unjust enrichment pleadings certainly … is suitable for summary judgment on pleadings in our submission.

THE COURT: Thank you, Mr. van Gelder. I am not satisfied that the unjust enrichment claim is clearly unsustainable. It may be a difficult claim to sustain, but it seems to me that there is sufficient argument to be made over it that … it should not be dismissed on the pleadings as clearly unsustainable. And therefore, I am not prepared to grant summary judgment on pleadings on the unjust enrichment.

As regards paragraph 22, I'm satisfied the unjust enrichment claim can go forward with paragraph 21 and without the addition of paragraph 22. If Mr. van Gelder wants particulars, then they should be provided as particulars rather than an amendment that is guesswork at how you're going to attack a difficult argument. So I suggest there be no amendment to the unjust enrichment portion, but I am prepared to let it go forward … for hearing.

As regards the rest of the amendments, you can work them out between the two of you I think … take it to Justice Wright, who's in charge of all of this. I'm doing my best to draw a line between what I'm doing ... and his role.

I will get this decision transcribed just so that there's something for Justice Wright to see what I've done, or failed to do … and to assist him … when he sets directions. Anything else we can do today?

Mr. Hill: No, My Lord, I think that's everything.

Ms. Bassan: Thank you.

THE COURT: Want a finding on costs, anybody?

Mr. van Gelder: I would take the position it should be in the cause.

Ms. Bassan: I would take the position it should be in the cause…(inaudible) fundamental on the summary judgment motion.

Mr. Hill: I'd agree with that, My Lord, I wouldn't make any submissions on costs.

Moir J.