NOVA SCOTIA COURT OF APPEAL
Citation: ***AMCI Export Corporation v. Nova Scotia Power Incorporation***, 2010 NSCA 41

Date: 20100511
Docket: CA 317561
Registry: Halifax

Between:

AMCI Export Corporation

Appellant

v.

Nova Scotia Power Incorporated

Respondent

Judges:	Saunders, Hamilton and Fichaud, JJ.A.
Appeal Heard:	March 25, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Saunders, J.A.; Hamilton and Fichaud, JJ.A. concurring.
Counsel:	Craig M. Garson, Q.C., for the appellant David G. Coles, Q.C. , Rebecca Hiltz LeBlanc and Ansley Simpson, Articled Clerk, for the respondent

Reasons for judgment:

Introduction

[1] The parties are engaged in protracted commercial litigation over a contract they signed in 2001. This appeal is one of a series of interlocutory skirmishes. The ultimate battle on the merits is a long way from the front lines. Important discoveries have yet to be arranged. The present dispute concerns only the pleadings, specifically, a single clause in an amended defence.

Background

[2] It will not be necessary for me to describe the background in any detail. The parties have appeared before this Court on an earlier occasion. Reference to our decision reported at 2008 NSCA 2 will provide the reader with a more complete description of the nature of the dispute.

[3] For the purposes of this appeal I can describe the salient features, summarily. The appellant AMCI Export Corporation (AMCI) and the respondent Nova Scotia Power Incorporated (NSPI) entered into a coal supply agreement in 2001, amended in part in 2003. Under the terms of that agreement AMCI was to supply coal through an arrangement of "quarterly options" which NSPI had purchased from AMCI. Briefly, NSPI would inform AMCI that NSPI exercised its option. NSPI would notify AMCI of a "laycan", meaning a range of dates, usually a 10-day period when NSPI proposed to pick up the coal. Then AMCI would notify NSPI of the port where the coal would be available for loading. NSPI would then nominate a vessel, and AMCI would submit that vessel for port approval. Provided all went according to plan, the vessel would load the coal during the laycan.

[4] In April, 2004 NSPI sued AMCI for damages said to exceed $11M spent to acquire replacement coal as a consequence of AMCI's alleged failure to supply coal as contracted. AMCI filed a defence in July, 2004. Both the claim and the defence have been amended. In its second amended defence filed August 3, 2006, AMCI added para. 8 which asserts, in effect, that to the extent that AMCI did not provide coal as required under the contract, nonetheless NSPI should not be entitled to damages as NSPI did not have ships under contract at the relevant times

to be able to take delivery. The impugned paragraph of AMCI's amended defence and which is the focus of this appeal, states:

> 8. As to the whole of the Amended Statement of Claim, the Defendant says that at all of the material times, the Plaintiff was concurrently obligated under the Agreement to provide sufficient ships to load of (sic) all of the South American Low Sulphur A Coal referred to herein at the Option Designated Load Port nominated by the Defendant. In breach of that obligation, the Plaintiff failed to provide sufficient ships to load the coal at the Option Designated Load Port nominated by the Defendant. In addition, therefore, to all of the defences set out herein or as a further alternative thereto, the Defendant says that if it did fail to deliver the coal as alleged by the Plaintiff at paragraph 15 of the Amended Statement of Claim herein, or otherwise, or at all, which failure is not admitted but denied, the Plaintiff, because of its own failure to provide ships to load the coal at the Option Designated Load Port referred to herein, has not sustained and could not have sustained any damages, whether as alleged, or otherwise or at all.

[5] On December 11, 2006, NSPI applied pursuant to **Rule** 13, **Nova Scotia Civil Procedure Rules** (1972) for summary judgment in respect of that clause in the amended defence. In support of its application NSPI relied upon the affidavits of two members of its corporate management team: the first sworn by Mark Sidebottom on January 9, 2006, and the second sworn by Colin Thomson on December 11, 2006. The information contained in those affidavits together with the considerable documentation attached as exhibits were obviously filed in an attempt to refute AMCI's defence that NSPI had not, or could not have, provided sufficient ships to take delivery of the coal.

[6] The matter came on for hearing in Chambers before Nova Scotia Supreme Court Justice Arthur J. LeBlanc on August 9 and 24, 2007. Because of the way certain issues were argued, and subsequently determined, there then ensued a series of events which pushed these proceedings into 2008 and 2009, finally culminating in the present order under appeal being issued on July 31, 2009 and the notice of application for leave to appeal being filed October 15, 2009.

[7] While the parties do not agree on what prompted, or who bears responsibility for the intervening events, that is not something I am obliged to decide. It is enough for me to say that following the hearing before LeBlanc J., NSPI made additional disclosure. AMCI then moved to compel NSPI to deliver

for inspection the “notebooks” of two NSPI employees, Messrs. Colin Thomson and Barrie Fiolek. In the face of further challenges by the parties, LeBlanc J. determined that he was the appropriate judge to conduct a review of the relevance of the contents of the notebooks; that he would establish a process for that review which included a prohibition against counsel for AMCI being present during the hearing; that he would issue an order confirming his earlier decision granting summary judgment in favour of NSPI with respect to the impugned paragraph 8 of AMCI’s amended defence; and that he would award costs to AMCI for its successful disclosure application, and costs to NSPI for successfully defending AMCI’s motion for a mistrial and its bid to have Justice LeBlanc recuse himself from the case.

[8] These principal and collateral issues are all reflected in the allegations made by AMCI in its notice of application for leave to appeal which states the following grounds:

> (1) The Chambers Judge erred in holding that the Respondent's Application for Summary Judgment should be granted with respect to paragraph 8 of the Appellant's Second Amended Defence in that:
>
> (i) he failed to undertake an analysis of the evidence of Colin Thomson which, had he done so, evidences that the Respondent had not, and could not, prove its claim clearly;
>
> (ii) he erred in finding that "the parties obligations were not concurrent" but "rather, ... the [Respondent's] obligation to provide a vessel would only arise upon confirmation that coal would be available to load the vessel";
>
> (iii) he erred in finding that the various steps were "sequential" not concurrent;
>
> (iii) he misapprehended the evidence in failing to understand that a laycan nomination by the Respondent, absent the proven ability to provide a vessel within that laycan, was tantamount to not having nominated a laycan at all; and
>
> (iv) he misapprehended the Appellant's argument on the Summary Judgment Application regarding "credibility" said error being misdirection amounting to non-direction.

(2) The Chambers Judge erred in directing that he, and he alone, was the Justice who should hear the Appellant's Document Production Application, a decision made at the urging of Respondent's counsel and over the objection of the Appellant.

(3) The Chambers Judge erred in the process he directed be used to review the notebooks of NSPI employees Colin Thomson and Barrie Fiolek.

(4) The Chambers Judge erred in refusing to recuse himself after he decided the Appellant's Document Production Application and before determining whether to issue an Order flowing from a Summary Judgment Application.

(5) The Chambers Judge erred in his decision to issue an Order with respect to the Summary Judgment Application.

Standard of Review

[9] In its factum the appellant AMCI has not included a section dealing with standard of review.

[10] By contrast, the respondent NSPI has correctly identified the proper standards of review that ought to be applied to the various issues raised by the appellant. On the principal ground of appeal that the judge erred in awarding NSPI summary judgment by effectively striking out para. 8 of AMCI's second amended defence, his decision had a final or terminating effect on that particular pleading, such that the standard of review is whether there arose an error of law resulting in an injustice. **Milbury v. Nova Scotia (Attorney General)**, 2007 NSCA 52.

[11] With respect to AMCI's other grounds of appeal (2 - 5), these particular actions on the part of the Chambers judge did not have a final or terminating effect. Accordingly, we will not intervene unless wrong principles of law were applied or a patent injustice would result. **Eikelenboom v. Holstein Canada**, 2004 NSCA 103.

[12] For reasons I will now develop I have concluded that the Chambers judge erred in law in granting summary judgment to NSPI with respect to para. 8 of AMCI's second amended defence. That disposition has produced an injustice.

Having reached such a conclusion concerning AMCI's principal ground of appeal, it will not be necessary for me to address its remaining arguments.

Analysis

[13] The case on appeal was initiated when NSPI filed an interlocutory notice (application *inter partes*) on December 11, 2006. NSPI, as plaintiff, gave notice of its intended application "for an Order for Summary Judgment pursuant to **Civil Procedure Rule** 13", returnable February 21, 2007. Obviously NSPI's application was not intended to seek summary judgment for its entire "claim" exceeding $11M. Colin Thomson's affidavit sworn December 11 in support of the application, narrows the focus to the impugned paragraph 8 of AMCI's amended pleading. Mr. Thomson swears:

> ...
>
> 2. I have reviewed the new paragraph 8 contained within the Second Amended Defence filed on behalf of the Defendant, AMCI Export Corporation ("AMCI"). At all material times hereto, I was the person responsible at NSPI for providing sufficient ships to load the South American Low Sulphur A Coal at the Option Designated Load Port... At all material times hereto, pursuant to the Coal Supply Agreement and the Confirmation Letter between the parties, AMCI named the Port of Palmarejo, in Venezuela as the Option Designated Load Port. NSPI did not fail to provide sufficient ships to load the coal at the Option Designated Load Port.

[14] Here, the moving party on the application for summary judgment was NSPI, the plaintiff in this commercial dispute. As the moving party, NSPI had the burden of establishing that there was no genuine or arguable issue in dispute with respect to paragraph 8 which would necessitate a trial, and that therefore entitlement to summary judgment could be properly considered by the Chambers judge. Provided NSPI met this initial burden, then the responding party, AMCI, was required to show a real chance of success in its defence. **Hercules Management Ltd. v. Ernst & Young**, [1997] 2 S.C.R. 165; and **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423.

[15] Accordingly, the first question the judge had to ask himself was whether he was satisfied that there were no matters of fact, or of law, in dispute. Only if he

were persuaded that NSPI had satisfied this initial threshold, would he then go on to ask himself the second question, whether AMCI had demonstrated that it had a real chance of success in advancing the pleading set out in paragraph 8 of its amended defence.

[16] In conducting the requisite analysis, Justice Pugsley's clear directions in **Oceanus Marine Inc. v. Saunders**, [1996] N.S.J. No. 301 (Q.L.), 153 N.S.R. (2d) 267, bear repeating. There, in writing for the Court, Pugsley J.A. said at para. 20:

> 20 It was, with respect, not the function of the chambers judge, on an application for summary judgment, to determine matters of fact or law which were in dispute. Matters of controversy should be left for resolution at trial. (**Irving Oil Ltd. v. Jos A. Likely Ltd.** (1982), 42 N.B.R. (2d) 624)

[17] To like effect, Cromwell, J.A. (as he then was) observed in **Campbell v. Lienaux**, [1998] N.S.J. No. 142 (Q.L.), 167 N.S.R. (2d) 196 (C.A.) at para. 14:

> 14 Summary judgment applications are not the appropriate vehicle for determining disputed facts, difficult questions about the appropriate inferences to be drawn from facts or complex legal questions. This application raised all of these.

[18] In my respectful opinion the Chambers judge erred in concluding that the prerequisites for summary judgment had been satisfied.

[19] The operative portions of the Chambers judge's decision are not lengthy. I will reproduce them here.

> ***Concurrent obligations***
>
> [26] The applicant submits that the respondent does not have an arguable defence in respect of its allegation that the applicant failed to provide vessels to take delivery of coal at the designated ports during the designated laycans. In each case, the applicant says, the respondent failed to acknowledge a laycan nomination, causing the applicant to divert the vessel, or failed to have sufficient coal available at the designated port for the applicant to load the vessel. When the respondent accepted the nomination of a laycan and a vessel and had coal available, the applicant provided a vessel. As such, the applicant says, para 8 of the amended defence does not disclose a defence with a real chance of success and should be struck as a result of summary judgment.

[27] The respondent says the application for summary judgment should fail because the applicant has not proven its claim with respect to para 8 of the amended defence, and because para 8 raises an issue that requires trial. The respondent says there was no confirmation of vessels for the 2004 laycans, particularly the May 15 to 25 and the August 20 to 30 laycans. If indeed there was a failure on the part of the applicant to secure vessels for these laycans, it is submitted, the applicant's assurance that there were vessels available is an issue which should be left to the trial judge.

[28] The respondent's claim to have raised an arguable issue rests on the notion that the legal effect of the Coal Supply Agreement was to create concurrent obligations. By this reasoning, the respondent was obligated, "upon proper exercise by [the applicant] of its quarterly option, to deliver coal that met the contract specifications to the loadport of its designation"; the applicant was obligated "to provide vessels capable of lifting the coal at that loadport and to pay for the coal."

[29] The respondent refers to *Forrestt and Son Limited* v. *Aramayo* (1900), 83 L.T. 335, for the proposition that "[i]n a contract for the sale or manufacture of a chattel, the one party must be ready and willing to deliver; and the other party to accept delivery.... the party who brings the action must show that he was ready and willing to perform his part of the concurrent acts" (pp. 337-338). The respondent says that the applicant's contract with CSL did not ensure that it would have access to self-loading vessels, which were required to load coal at the port of Palmerejo. As such, having purchased the options, it did not have the type of vessels necessary to load the coal, and would be unable to prove at trial that it was prepared to take delivery of the coal it alleges the respondent failed to deliver.

[30] The applicant's position – which I believe to be correct – is that the parties' obligations were not concurrent. Rather, it is clear that the applicant's obligation to provide a vessel would only arise upon confirmation that coal would be available to load the vessel.

[31] With the qualifications noted earlier, I am satisfied that the applicant has proven its case. There appears to be no factual dispute as to the allegation that the respondent failed to deliver coal as required.

[32] The respondent says there is an arguable issue as to whether it would have been justified in terminating the contract had it known at the relevant time that the applicant did not have vessels available to perform its obligations under the contract. The applicant, however, states that it has provided evidence that it had ships available or was ready and willing to do so, and says the respondent has not shown by any evidence that there is an arguable issue on this point. In addition, there were no concurrent obligations. The respondent was required to confirm the load ports and to accept the vessel nominated by the applicant; this would

> necessarily require the respondent to confirm that sufficient coal would be available as well. Until that was done, there was no responsibility or obligation on the part of the applicant to contract for a vessel. These were sequential steps, not concurrent ones.
>
> [33] As a result, I am satisfied that the applicant should have summary judgment with respect to para. 8 of the amended defence. This decision does not purport to speak to issues relating to the applicant's exercise of the options or notification of laycans. It is concerned only with the narrow issue of whether para 8 provides an arguable defence. I have concluded that it does not.
>
> [34] Accordingly, I grant the application for summary judgement and ask counsel to submit their positions on costs in writing within the next three weeks unless they reach agreement in the meantime.

[20] While the Chambers judge accurately describes the positions taken by AMCI and NSPI, he then simply expresses a conclusion without offering any insight as to the reasoning which led to its formation. For example, the judge says:

> [30] ...the parties obligations were not concurrent. Rather, it is clear that the applicant's obligation to provide a vessel would only arise upon confirmation that coal would be available to load the vessel.
>
> [31] ... I am satisfied that the applicant has proven its case. There appears to be no factual dispute as to the allegation that the respondent failed to deliver coal as required.
>
> [32] ... [AMCI] was required to confirm the load ports and to accept the vessel nominated by [NSPI]; this would necessarily require [AMCI] to confirm that sufficient coal would be available as well. Until that was done, there was no responsibility or obligation on the part of [NSPI] to contract for a vessel. These were sequential steps, not concurrent ones.
>
> (Underlining mine)

[21] The very essence of AMCI's defence in paragraph 8 rests with its assertion that NSPI "was concurrently obligated" under the terms of their agreement to have ships available in port to accept the coal, and that because NSPI failed to have its ships there as required, it could not have sustained any damages even if AMCI had failed to live up to its end of the bargain by having coal there to load. There is nothing in the judge's reasons to explain why, as a matter of law and based upon any interpretation of the contractual dealings between these parties, their obligations were sequential rather than concurrent.

[22] Counsel acknowledged that none of the documents executed by the parties contain the express words “sequential” or “concurrent”. One is then obliged to look beyond the paper that passed between the parties in order to resolve the scope and sequence of their duties to one another.

[23] At the appeal hearing in this Court counsel also agreed that the contractual “relationship” between the parties was neither expressed in nor confined to a single document but was in fact comprised of several “sources” which they said would include:

> The original Coal Supply Agreement signed August 3, 2001.
>
> The Confirmation Letter signed March 17, 2002.
>
> All of the email exchanges attached as exhibits to the affidavits of Messrs. Thomson and Sidebottom filed at the hearing.
>
> The so-called “requirements” or “regulations” (counsel for NSPI and AMCI used these terms interchangeably) identified in the record as “Terminal Loading and Nomination Provisions”.
>
> Clause 2.2 of the Coal Supply Agreement (which speaks of audio recording of telephone discussions between the parties as memorializing transactions thereby implying that there may be terms outside the actual written documents, such as emails, phone discussions, and the like) and,
>
> So-called industry practice, custom and usage which would imbue the contractual commitments between the parties.

[24] Unfortunately the Chambers judge makes no reference to this body of information said to constitute the contractual dealings between AMCI and NSPI. Absent is any analysis of the documents, the email exchanges, or the practice within the industry from which one might then discern the reasoning which led the judge to conclude that it was “clear” their responsibilities were “sequential steps, not concurrent ones” and that NSPI’s obligation to provide a vessel “would only arise” after AMCI had verified that it had stockpiled the coal at the designated port.

[25] Evidently the judge was prepared to conclude that it was an implied term of the contract ("necessarily require") that AMCI had to confirm that there was sufficient coal at the port before ("until that was done") there was any responsibility on the part of NSPI to secure a vessel. Yet, he was not prepared to imply a similar contractual term in favour of AMCI. In other words, if AMCI's notification of a port implied a confirmation that coal would be available, then did NSPI's earlier notification of a laycan imply a confirmation that some vessel (to be identified later) would be available to pick up the coal? If so, then by the time AMCI was to supply the coal, there would be in place a concurrent obligation by NSPI. Of course, I am not saying there was any implied obligation. That is an issue entirely for the trial judge. I am merely citing a missing issue in the Chambers judge's reasoning. To illustrate, at para. 30 of his decision (repeated here for convenience) he said:

> [30] ... Rather, it is clear that the applicant's [NSPI's] obligation to provide a vessel would only arise upon confirmation that coal would be available to load the vessel.
>
> (Underling mine)

> These statements are simply outcomes and do not assist me in grasping the basis of the judge's reasoning, or testing the soundness of his conclusion.

[26] Quite apart from the absence of any legal analysis of the questions warranting summary judgment, one cannot tell from this record whether the whole of the contractual arrangements between these parties have been, or can be, satisfactorily proven.

[27] From my review of this record, the extent of the contract and its terms as negotiated and refined by the parties is very much in dispute and will require a trial to sort out. Whether their obligations were sequential or concurrent, and how such a finding may affect the plaintiff's entitlement to damages can only be established once the evidence is subjected to a proper legal analysis and tested in the crucible of cross-examination in a court room.

[28] Deciding liability in this commercial dispute will surely involve the interpretation of the contract, its terms, and any collateral agreements between the parties. Obvious questions to resolve at trial will include: the scope of the initial coal supply agreement, and its interplay with the subsequent confirmation letter; whether, and to what extent, any exchanges between the parties imbued or refined

those terms; whether the sequence and context of NSPI's agreement to purchase coal as described in Section 3.1 of their contract, followed by AMCI's supply and sale obligations as contained in Section 3.2, suggest that these reciprocal obligations involving the delivery and acceptance of a physical substance at a designated delivery point were intended to be seen as concurrent; deciding when title to the coal actually passed and whether the buyer was obliged to have a vessel in port to load the coal in order for these terms to be enforceable; and the extent to which evidence of industry practice may be taken into account when defining the contractual dealings between these parties.

[29] In my view, there are a host of significant, and hotly contested, issues of fact, of proof, of contractual interpretation, of law, and of mixed law and fact, which will require a full trial on the merits.

[30] In addition, there is also a serious issue of credibility which can only be resolved at trial. At the hearing in this Court, counsel for AMCI argued that NSPI's conduct had been grossly unfair. AMCI says that NSPI concocted a ruse. It says NSPI did not have the vessels in port, or could not get them to port in sufficient time, to take on the loads of coal. AMCI says that NSPI "played games" to get AMCI to concede that it would not be able to deliver the coal to port (due to highway washouts, floods, *force majeure*, etc.) and that once it had acquired AMCI's concession, NSPI virtually pounced on that "failure" as an excuse not to honour its own obligations under the terms of the contract.

[31] In support of its assertion, AMCI challenges NSPI's evidence that it "was arranging a swap that would provide a self-loading vessel" to take on the coal (as declared by Colin Thomson at para. 20 of his affidavit sworn December 11, 2006) by referencing a July 30, 2004 email from Marcel van den Berg, a ship broker, to Mr. Thomson in which Mr. van den Berg makes it clear that no swap would occur. AMCI says NSPI sought to avoid its own contractual obligations, recognizing that it did not have a vessel in place to retrieve the coal in any event.

[32] While the Chambers judge averts to AMCI's allegation in his decision, he does so only in passing, without appreciating that it constitutes a critical credibility issue between the parties. Whether NSPI had a vessel available to load the coal is a material fact that is contested by AMCI. Proof of that fact will require an assessment of credibility. Such a determination is a matter for trial.

[33] In summary, the Chambers judge did mention the well-recognized "test" to be applied on a motion for summary judgment. Missing, however, was any

meaningful analysis of those legal principles and their application to the issues and evidence before him. Where there appear to be material issues in dispute, merely stating a conclusion without explaining the reasoning which led to its formation deprives me of the ability to test the correctness of the analysis. With respect, these failings constitute an error of law. On its face, AMCI has pleaded a *bona fide* defence. Whether it will carry the day with the trier of fact can only be decided after a trial. On this record it would be unjust to summarily deprive AMCI of a potentially viable defence.

[34] Having failed to demonstrate that there were no material issues of fact or of law in dispute, summary judgment ought not to have been granted. It would not be necessary to turn to the secondary question, whether AMCI's defence as pleaded in para. 8 had a real chance of success.

[35] Unlike the approach taken by this Court in **Eikelenboom supra**, this is not a case where we ought to undertake the requisite analysis in order to resolve any discrete legal issue(s). The facts in **Eikelenboom** were entirely different, and by all accounts, not in dispute. The question as to whether summary judgment was warranted turned on the application of settled law to undisputed evidence. As this Court observed:

> 30 ... The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in *Gordon Capital, supra,* where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.

[36] By contrast and having regard to the circumstances here, I am not convinced that the full extent of contractual obligations between the parties has been established. To my mind, much will depend upon the documentary evidence and testimony presented at trial. This is not a case where I would be prepared to ferret out the precise contractual terms accepted by AMCI and NSPI; resolve whether they were unambiguous and binding; apply settled law to the point in dispute; and ultimately decide if summary judgment were warranted.

Conclusion

[37] The decision of the Chambers judge granting summary judgment to NSPI constitutes an error of law resulting in an injustice. I would allow the appeal and set aside the portion of his order dated July 31, 2009 which reads:

> 3. Paragraph 8 of AMCI's Second Amended Defence is hereby struck and NSPI shall have its costs of $4,000.00, said costs to be costs in the cause.

[38] For clarity, the effect of my decision will be to restore paragraph 8 of AMCI's Second Amended Defence and permit AMCI to reply upon it. I would quash the Chambers judge's award of costs to NSPI of $4,000 (which were characterized as costs in the cause). I would award AMCI its costs on appeal in the amount of $3,000 inclusive of disbursements.

Saunders, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.