IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Canada (Transport) v. Marineserve.MG Inc., 2002 NSSC 261

Date: 20021120
Docket: SH 173182
Registry: Halifax

Between:

Attorney General of Canada,
in Right of the Minister of Transport

Applicant

and

Marineserve.MG Inc., a body corporate, and **Maritime Harbours Society**,
an incorporated society

Respondent

Judge:	The Honourable Justice Gordon A. Tidman
Heard:	November 20, 2002; in Halifax, Nova Scotia
Written Decision:	December 5, 2002
Counsel:	John P. Merrick, Q.C. and Sean Foreman, for the Applicant George W. MacDonald, Q.C. and Harvey L. Morrison, for the Respondent

By the Court:

Background

[1] This is an application by the plaintiff applicant pursuant to **Civil Procedure Rule 20.02(b)** and **20.06(1)**, seeking production of all financial records and documents relating to the defendant Marineserve's work and operations at the Port of Digby, and relating to the use and expenditure of the portions of the contribution monies paid to it by the defendant, MHS.

[2] The background is this. The main action was commenced on August the 8th, 2001. It is an action in contract and tort against MHS and in tort against Marineserve. Circumstances giving rise to the action as briefly as I can state, are this. The Government of Canada responsible for administering Canadian port facilities decided to transfer that responsibility to the private sector. In doing so, the government offered financial assistance to those undertaking that responsibility. MHS undertook that responsibility in relation to the Port of Digby. MHS and the plaintiff, Minister of Transport, entered into agreements in which existing port facilities were transferred to MHS and payments were to be made by the plaintiff for assuming the plaintiff's responsibility in the operation of the port facilities. There were in the agreements restrictions on the use of those payments.

[3] Shortly before those agreements were signed, an agreement was entered into between the two defendants whereby Marineserve was to carry out certain work for MHS in relation to the Port of Digby. Up to the time of the action the plaintiff, under the agreement with MHS, had advanced to MHS approximately $3,000,000.00. Slightly less than two-thirds of that amount was paid to the defendant Marineserve for its work under its contract with MHS.

[4] Concern arose that MHS was not using the government funds as agreed under the contract between MHS and the plaintiff. An auditor appointed by the plaintiff conducted an examination to determine if that was so. The auditor, in its examination report, stated that it was unable to make a determination as to whether all the expenditures by MHS were in accordance with the agreement. In performing the examination, the auditor did not have full access to the financial records of Marineserve.

[5] The proceedings against MHS have been stayed pending alternate dispute resolution procedures as provided for under the terms of the agreement between the plaintiff and MHS. Since the defendant Marineserve

was not a party to that agreement, the action against Marineserve has not been stayed.

[6] The action against MHS alleges that it expended monies advanced by the plaintiff in violation of the agreement between the parties. The action against Marineserve alleges that it knowingly participated in the breach of the agreement and induced MHS to breach the agreement; in other words, that it was a knowing party to the alleged breach: i.e., the improper use of funds advanced by the plaintiff to MHS and by MHS to Marineserve.

[7] The defendant Marineserve has filed its list of documents, but not including its financial documents in relation to the Port of Digby. It is those financial documents to which the plaintiff now seeks access.

Civil Procedure Rules

[8] **Civil Procedure Rule 20.02(b)** in part provides as follows:

> The court may at any time,...(b) order any party to make discovery, limited to certain documents or classes of documents only, or of documents related to the matters specified in the order;

Civil Procedure Rule 20.06(1) reads:

> The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just.

[9] There is no question that the documents sought relate to the matter in question in the proceedings and under that term of **CPR 20.06**, must be produced. However, the respondent properly points out that the Court has some discretion in determining whether to order production under **CPR 20.02** which provides in part under subsections **(c)** and **(d)**:

> (c) where it appears that any issue or question in the proceeding should be determined before the discovery of all or any of the documents is made, order that the issue or question be determined;
>
> (d) where satisfied that discovery of all or any of the documents is not necessary at that time or later, dismiss or adjourn the application or make such other order as is just.

Rule 20.06 is repeated with a different emphasis and that is that,

> The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding [and points out that that could be done] at such time, place and manner as it thinks just.

And subsection **(3)**:

> An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest.

Decision

[10] Mr. MacDonald, for the respondent, submits that the applicant by this application seeks the remedy before establishing that a wrong has been committed and that it would be unfair to grant relief for an unproven wrong.

[11] Mr. MacDonald says that he could find no Nova Scotia cases dealing with an application similar to this, but likened the issue here to a severance issue where, in the typical case, a party seeks to have the issues of liability and damages tried separately. Mr. MacDonald, however, did find what he says seems to be the leading Ontario case dealing with the Ontario **Civil Procedure Rules** which deal more specifically than do our **Rules** with the issue before the Court.

[12] In that case, **L.C.D.H. Audio Visual Ltd. v. ISTS Verbatim Ltd.** (1986), 54 O.R.(2nd) 425, the Ontario **Civil Procedure Rules** considered provide as follows:

> 30.04(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined.
>
> 31.06(5) Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold the information until after the issue has been determined.

Although the Ontario **Rules** are predicated upon serious prejudice to the party from whom production is sought, I agree with Mr. MacDonald that the six principles enunciated by Henry, J. in applying the Ontario **Rules** in **L.C.D.H. Audio** are helpful in dealing with the issue now before the court.

[13] The six principles are as follows:

> *(1) The decision to postpone disclosure of information and documents to a later stage, which inevitably postpones the consequential issue to a later stage and a further trial, is ultimately a matter of the discretion of the court having regard to all the circumstances.*
>
> *(2) The modern philosophy which is inherent in the new Rules of Civil Procedure is that there should be the fullest disclosure of information on all issues to be tried with a view to the speedy and efficient resolution of those issues at one time in one trial.*
>
> *(3) Postponement of production and discovery under rules 30.08 and 31.06 should be resorted to only in the clearest of cases; full disclosure before trial is the norm and indeed, the prima facie right of both parties.*
>
> *(4) Where the threshold issue is not clearly severable from the consequential issue, in the sense that information sought to be withheld is not relevant to determination of the threshold issue, leave to divide discoveries and productions ought not to be granted since that could deprive the party of information necessary to establish or fortify its case; this is not a matter of discretion. In considering whether the information may become relevant only after the threshold issue is determined, the court ought to consider any possible relevance that the information sought to be withheld may have in determining the threshold issue, including questions of credibility.*
>
> *(5) Once the court concludes that the issues are severable within the sense described, the test to be applied is serious prejudice to the moving party; that is the only test prescribed by the rule where the threshold and consequential issues are severable. Determination of serious prejudice to the party is not a matter of discretion but is a finding of fact for the court to make. If the court is unable to find serious prejudice by immediate disclosure of the information, the rule does not permit disclosure to be postponed. If, on the other hand, the court finds that serious prejudice to the party will result, the court must then consider how to exercise its discretion.*

> *(6) The decision to exercise the court's discretion must then be made on the usual basis - judicially, in accordance with proper principles, on a case-by-case basis, according to all the circumstances of the case.*

[14] Those principles overlap the four factors considered in severance applications in Nova Scotia as espoused by Gruchy, J. in **Fraser v. Westminer Canada Ltd.** (1998), 168 N.S.R.(2d) 84 *at p. 87*; namely, that severance should be granted only:

> 1) in extraordinary and exceptional cases;
>
> 2) or where the issue to be tried is simple;
>
> 3) or when the issue to be tried separately is not interwoven with other issues in the action;
>
> 4) or when there is some evidence which makes it at least probable that the trial of the separate issue will put an end to the action.

[15] In this case on the face of the application the **Civil Procedure Rules** entitle the applicant to the relief sought; that is, the information sought is clearly relevant to the issues in the action. Thus the relief will be granted unless the Court exercises its discretion in favour of the respondent as stated by the sixth principle of Henry, J. in **L.C.D.H.**:

> *(6) The decision to exercise the court's discretion must then be made on the usual basis - judicially, in accordance with proper principles, on a case-by-case basis, according to all the circumstances of the case.*

In exercising the Court's discretion here, I must consider the adverse effect the order sought may have on the respondent and also on the administration of justice generally.

[16] Mr. MacDonald alludes to a number of reasons why I should exercise my discretion in favour of the respondent. I believe they can be summarized thusly:

1. The respondent is negotiating with other parties to do port facility work and to produce the sought-after information to the plaintiff may prejudice those negotiations.

2. To gather and produce all of the information sought would be an expensive exercise for the respondent.
3. An order for the production of the information sought would provide the remedy in the action before a determination that the plaintiff committed the tort alleged; in other words, no damages should be awarded before liability is established.
4. There can be no liability established since the contract alleged to be breached by a conspiracy of the two defendants was not in existence at the time the two defendants contracted with one another.
5. Whether the respondent induced or participated in MHS's alleged breach of contract is a simple issue, not interwoven with other issues in the action. Thus, argues Mr. MacDonald, the issue would be relatively inexpensive to try and its determination may put an end to the action.

[17] I deal with each of those reasons:

1. With respect to the third party port facility negotiations of the respondent, the negotiations referred to commenced some time ago and may now be completed. Mr. MacDonald did not press this reason and no up-to-date information regarding such negotiations was provided to the Court. Thus, I cannot accept this reason; and even if such were the case, there is an implied undertaking by the parties and counsel that the information provided will not be used for purposes other than those related to the proceedings. To do otherwise would be a contempt to the Court.

2. I accept that finding, marshalling and providing the information sought may be expensive for the respondent. That is only one of the criteria that I should consider in exercising my discretion.

3. An accounting is not the only remedy sought by the plaintiff and as Mr. Merrick for the applicant points out, an accounting may entail more than merely providing information. What the plaintiff ultimately seeks is damages for breach of the contract between MHS and the plaintiff which the plaintiff alleges was induced or participated in by the respondent. Those damages are not being sought before liability has been established.

4. It is true that the contract between MHS and the plaintiff which the plaintiff alleges was breached by the provisions of the contract between the defendants, postdated the latter. However, the former was executed only a short time after the latter, and the plaintiff alleges that the provisions of the contract to be executed by MHS and the plaintiff were well known to the respondent when it contracted with MHS. That may be and if so, could possibly alter the usual legal principle that a breach of contract cannot be induced by conduct occurring after the contract was made. In any event, that is an issue for determination by the trial judge and cannot now be determined on the evidence before me.

5. In my view the issue of the defendant's liability is not a simple one and is inextricably interwoven with the issue of how the respondent used funds provided to it by MHS. The Plaintiff alleges that the respondent participated with MHS in breaking the contract between the plaintiff and MHS. The specific breach alleged is that MHS used the funds advanced by the plaintiff in a manner and for a purpose contrary to the provisions of the contract. Nearly two-thirds of the total funds advanced by the plaintiff to MHS were in turn advanced by MHS to the respondent. How those funds were used by the respondent will directly bear on the breach of contract issue. In my view, and as expressed by Mr. Merrick, the issues are so interwoven that it would indeed be very difficult and potentially confusing to deal with them separately.

[18] Mr. MacDonald also submits that a separate trial on liability could put an end to the action and thus obviate the need to provide the financial information sought. As stated however, the information sought is closely related to the issue of liability and will assist in determining liability. Indeed, the provision of the information sought could, as even Mr. MacDonald suggests, be the end of the matter. For instance, it could satisfy the plaintiff that the respondent's use of the funds was in compliance with the agreement between it and MHS and thus, there may be no need to pursue the matter against the respondent or indeed, even against the defendants.

[19] Upon a consideration of all of the circumstances here, I have decided not to exercise the Court's discretion in favour of the respondent and thus, will grant the sought-after order for production.

Costs

[20] I'll hear the parties as to costs.

[21] Since the parties do not disagree as to amount, I will set the amount of costs at $800.00.

[22] It seems to me that here the respondent may have legitimate reasons for not wanting to give up what it obviously considers very sensitive; whether the sensitivity has to do with something about the outcome of this trial or other matters is something that remains to be seen. But I think that there was some entitlement on the respondent to defend its own personal financial information. Who is right in this action will ultimately be determined so I think that this is an appropriate situation where costs should be in the cause. So I will order costs in the cause and that those costs be set at $800.00.

Tidman, J.

Halifax, N. S.