SUPREME COURT OF NOVA SCOTIA
Citation: Bull Run Productions Inc. v. Wild TV Inc.,
2016 NSSC 315

Date: 20161220
Docket: Hfx. No. 451108
Registry: Halifax

Between:

Bull Run Productions Inc. and Peter Roderick MacIsaac

Plaintiffs

v.

Wild TV Inc.

Defendant

Decision	
Judge:	The Honourable Justice Robert W. Wright
Heard:	November 10, 2016 in Halifax, Nova Scotia in Chambers
Written Decision:	December 20, 2016
Counsel:	Melissa MacAdam for the Plaintiffs Michelle Chai for the Defendant

Wright, J.

FACTS

[1] The plaintiff Bull Run Productions Inc. ("Bull Run") is the producer of a television program known as "Best of Bull Run". The program is an outdoors show consisting of 34 episodes which were filmed in the four Atlantic provinces over a three year period between 2009-2012.

[2] Bull Run is a federally incorporated company and maintains its office and base of operations in Nova Scotia. The principal of the company is Mr. Peter MacIsaac who resides in Bedford, Nova Scotia.

[3] The defendant Wild TV Inc. ("Wild TV") is an Alberta incorporated company which owns and operates a video programming network known as "Wild TV", along with video on demand services and an associated website. It offers its services by providing selected programming through affiliated distributors and television providers, both nationally and internationally. Although that geographic scope includes Nova Scotia, Wild TV has no direct connection or relationship with this province.

[4] Between 2009 and 2012, Bull Run entered into three successive licensing agreements with Wild TV to have the Best of Bull Run episodes aired on its media network through affiliated distributors. Pursuant to those agreements, under which Wild TV was paid the prescribed fee, Best of Bull Run episodes were aired on Wild TV's network across Canada and in certain European countries. The last of those three agreements expired in mid 2012.

[5] Some time in January of 2016, Mr. MacIsaac attests that he became aware that the Best of Bull Run episodes were being aired by Wild TV through the television video sharing platform known as Roku as well as through its website. Mr. MacIsaac then complained to Wild TV in an e-mail sent January 19th that the airing of these episodes was well beyond the expiration of the licensing period under the Agreements and demanded its removal.

[6] The response from Wild TV was that if Best of Bull Run episodes (or excerpts) had aired on Roku, it was done erroneously and without intent, and that as of January 20, 2016, there were no episodes (or excerpts) on Roku.

[7] The ensuing discussions between the parties did not lead to a resolution of the matter and so it was that on May 9, 2016 Bull Run commenced this action in the Supreme Court of Nova Scotia. The cause of action is framed as a copyright infringement on the part of Wild TV by having aired, offered for sale or otherwise distributed the episodes after the end of the licensing period. Bull Run seeks the recovery of damages for copyright infringement and a permanent injunction restraining Wild TV from further distributing the episodes without consent in any manner. The Statement of Claim makes reference to the licensing agreements having expired but does not plead breach of contract as a cause of action.

[8] On September 15, 2016 the present motion was filed by Wild TV under Civil Procedure Rule 4.07 seeking an order dismissing this action for want of jurisdiction or, in the alternative, staying this proceeding against the defendant. This motion is predicated upon a three pronged argument:

1. That the forum selection clause in the agreements should be upheld which specifies that the jurisdiction and venue of any legal proceeding involving or arising out of the agreements is to lie solely and exclusively in the appropriate court located in Edmonton, Alberta;

2. In the alternative, that this court lacks territorial competence under the provisions of the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA"), and

3. In the further alternative, if this court does have territorial competence, it should decline to exercise it pursuant to s.12 of the CJPTA on the ground that the court in Alberta is a more appropriate forum in which to hear this proceeding.

THE LICENSING AGREEMENTS

[9] The three successive Licensing Agreements entered into by Bull Run and Wild TV, spanning from 2009 to 2012, followed the same standard form. By virtue of those agreements, Bull Run as Producer granted to Wild TV the right to distribute and publicly perform on its "Committed Services" a minimum of 13 original episodes of Best of Bull Run (per each agreement for a total of 39) during the specified License Period. Wild TV also agreed to air 13 repeat episodes during the same term. The right so conferred was to be exclusive in Canada and non-exclusive everywhere else. Bull Run further covenanted to pay a license fee to Wild TV for its services under a specified payment schedule.

[10] All three of the licensing agreements also contain the same forum selection clause. It reads as follows:

> 15. Applicable Law and Venue. The jurisdiction and venue of any legal proceeding involving or arising out of this Agreement shall lie solely and exclusively in the appropriate federal and provincial courts located within Edmonton, Alberta, Canada, unless such proceeding is required to be brought in another court to obtain subject matter jurisdiction over the matter in controversy. This Agreement shall be governed by and constructed in accordance with the laws of the Province of Alberta, as if executed and performed by the parties entirely within the Province of Alberta, and the applicable federal laws of Canada …

[11] These agreements also contain a limitation of liability clause. It reads in part that "in no case shall either party be liable under the terms of this Agreement or otherwise for any indirect, special, incidental, consequential, or multiple damages arising out this Agreement regardless of the legal theory on which such claim is based …".

[12] In turn, it is specified that both these clauses, among others, shall survive the termination of the agreements in accordance with their terms.

POSITION OF THE PARTIES ON FIRST ISSUE

[13] The critical first issue to be decided is whether this proceeding is one "involving or arising out of" the licensing agreements such that the forum selection clause applies.

[14] The main thrust of the position argued by counsel for Wild TV is that although a defence has not yet been filed in these circumstances, it is anticipated that a number of defences will be advanced in contesting the claims of Bull Run that involve or arise out of the licensing agreements. Two of these potential

defences are based on specific clauses in the licensing agreements which are to survive their termination.

[15] The first such clause relied upon by Wild TV is the limitation of liability clause above referred to. That clause circumscribes the kinds of damages for which either party could be liable under the terms of the agreements or otherwise.

[16] The second such clause is one concerning promotion or publicity rights of the Best of Bull Run series. The clause permits Wild TV to extract, and use in perpetuity, excerpts from each episode up to 90 seconds long for advertising or promotion of Wild TV services in all forms of media. It should be pointed out that the affidavit evidence of Mr. MacIsaac clearly states that it was episodes, and not excerpts, that were aired by Wild TV in early 2016, a factual point that was fudged in the reply affidavit of Mr. Scott Stirling on behalf of Wild TV. Neither affiant was cross-examined on the hearing of this motion, however, and counsel for Wild TV maintains that whether full episodes or only excerpts of the program were aired in 2016 remains a fact in issue which might bring this further clause in the agreements into play.

[17] Beyond those two clauses in the agreements, counsel for Wild TV indicates that her client may also have a counter claim against Bull Run insofar as only 34 episodes were produced as compared to the 39 episodes contemplated by the three agreements combined. Whether such a counter claim has any substance, or indeed will even materialize, remains to be seen but it is pointed out that if it does, such a counter claim would clearly involve or relate to the agreements and be governed by the forum selection clause.

[18] In light of these potential defences and/or counterclaim, counsel for Wild TV contends that whether certain clauses of the licensing agreements continue to apply is a live question.

[19] Counsel for Bull Run, on the other hand, argues that this proceeding does not involve or arise out of the licensing agreements and therefore the forum selection clause does not apply. It is pointed out that these agreements do not form any legal basis for the claim being made where the pleadings, which define the issues, are limited to a claim for copyright infringement. It has been emphasized that the airing of these episodes in 2016 was done outside the scope of the licensing agreements such that even if those agreements were disregarded, this action for copyright infringement would still stand independently.

ANALYSIS AND CONCLUSIONS

[20] The threshold question to be decided is whether the language of the forum selection clause chosen by the parties is sufficiently broad to include the copyright infringement claim in question.

[21] As articulated in *Canadian Contractual Interpretation Law* (LexisNexis Canada, Second Edition, 2012) authored by Geoff R. Hall, interpretation of a choice of law or a choice of forum clause simply involves, for the most part, an application of the normal rules governing the interpretation of contracts (see pg. 236). Accuracy in interpretation requires consideration of two things, namely, the words selected by the parties to set out their agreement, and the context in which those words have been used (see pg. 9). In applying these ordinary rules, courts seek an objective interpretation that is also mindful of commercial efficacy.

[22] From an objective viewpoint, the wording of the forum selection clause here is written in very broad language. It speaks in terms of any legal proceeding "involving or arising out of " the licensing agreements as being within the exclusive domain of the courts in Alberta. The clause does not contain any restrictive wording about the type of disputes covered; only that they involve or arise out of the licensing agreements.

[23] Counsel for Bull Run makes a forceful argument that the dispute here does not arise out of the performance of the licensing agreements but rather arises from the airing of the episodes outside the terms of those agreements which prescribed the authorized licensing periods.

[24] While Bull Run has attempted to circumvent the forum selection clause in the agreements by framing its cause of action only in copyright infringement, that ignores the significant fact that the potential defences and counterclaim anticipated to be raised by Wild TV are linked to those agreements. Whether or not any of those defences have any merit is not for this court to examine at this stage. In any event, the reality is that those licensing agreements will constitute a material piece of evidence in the factual matrix underlying this litigation. Certain clauses will be relied upon by the defendant as above noted. I am thus persuaded that at the very least, this legal proceeding can safely be said to <u>involve</u> the licensing agreements such that the forum selection clause encompasses the present dispute.

[25] Having answered that threshold question in favour of the defendant, the court must now go on to consider two special aspects of the interpretation of a choice of forum clause. Those are succinctly summarized in the *Hall* text above cited as follows (at pg. 240):

> In the case of a choice of forum clause, there are two elements of the interpretive endeavour which differ from the normal case of contractual interpretation, driven by principles of private international law. First, enforcement of such a clause is discretionary, not mandatory. Second, the interpretation of such a clause is affected by the "strong cause" test which is applied when determining whether a court's discretion ought to be exercised in favour of or against enforcement of the clause. Both points are well illustrated in the leading Canadian decision on forum selection clauses, *Z.I. Pompey Industrie v. ECU-Line N.V.*

[26] The governing principles set out by the Supreme Court of Canada in **Pompey** (cited as 2003 SCC 27) are conveniently summarized in the recent decision of the Ontario Court of Appeal in **Novatrax International Inc. v. Hagele Landtechnik GmbH**, [2016] O.J. No. 5410. The summary reads as follows (at para. 5):

> (i)The law favours the enforcement of forum selection clauses in commercial contracts. Where the parties have agreed to a forum selection clause, the starting point of the *forum non conveniens* analysis is that the parties should be held to their bargain;
>
> (ii)A stay of an action should be granted unless the plaintiff shows "strong cause" that the case is exceptional and the forum selection clause should not be enforced;
>
> (iii)The requirement that the plaintiff show "strong cause" presumes that there is an agreement containing a clear forum selection clause and that clause, by its terms, applies to the claims the plaintiff seeks to bring in Ontario; and
>
> (iv)The forum selection clause pervades the *forum non conveniens* analysis and must be given full weight in the consideration of other factors.

[27] This summary should be amplified by making reference to the Supreme Court's characterization of the "strong cause" test (at para. 20) as rightly imposing the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause and that it is essential that courts give full weight to the desirability of holding contracting parties to their agreements. The court further observed that the "strong cause" test provides sufficient leeway for

judges to take improper motives into consideration in relevant cases and to prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.

[28] The Supreme Court then went on (at para. 21) to observe that there is a similarity between the factors which are to be taken into account when considering an application for a stay based on a forum selection clause and those factors which are weighed by a court considering whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine.

[29] I note in passing that the "strong cause" doctrine was recently addressed by the Nova Scotia Court of Appeal in **Armoyan v. Armoyan**, 2013 NSCA 99 in the context of matrimonial litigation. Although the Court of Appeal found it unnecessary to consider the merits of the doctrine, given the invalidity of the forum selection clause under the principles of *res judicata*, it nonetheless went on to say that the doctrine encumbered the appellant with a significant onus to justify any departure from the contractually selected forum. The "strong cause" doctrine has also been applied in a number of decisions of this court in various contractual settings.

[30] Ultimately, the issue to be distilled from this jurisprudence is whether the plaintiff has shown that there is strong cause that the case is exceptional such that the forum selection clause ought not to be enforced. The onus is therefore on the party commencing the legal proceeding in the face of a valid forum selection clause to show that it would not be reasonable or just to give effect to the clause, taking into account all of the circumstances. As previously noted, in practice this

test has similarity to the *forum non conveniens* analysis, although the burden is reversed.

[31] There is a helpful summary of factors that may justify departure from the presumption of enforcement of a forum selection clause set out in the decision of the Ontario Court of Appeal in **Expedition Helicopters Inc. v. Honeywell Inc.**, [2010] O.J. No. 1998 (leave to appeal to SCC refused [2010] S.C.C.A. No. 258). Paragraph 24 of that decision reads as follows:

> **24** A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[32] None of these factors arise in the present case, nor is there any suggestion that the defendant is relying on the forum selection clause to gain an unfair procedural advantage. I recognize that the plaintiffs will experience some inconvenience and expense in the conventional sense in having to assert its claim in Alberta but as was the conclusion by the court in **Expedition Helicopters Inc.**, that inconvenience does not justify permitting it to resile from its agreement in this commercial contract to tolerate that inconvenience.

[33] It should also be noted that the forum selection clause here stipulates that any legal proceeding involving or arising out of the licensing agreements shall lie solely and exclusively in the appropriate courts located in Edmonton, Alberta. It

should further be noted that this legal proceeding will be governed by the federal *Copyright Act* such that the same law will apply in the disposition of the case regardless of whether it is tried in Nova Scotia or Alberta. Both of these factors further buttress the enforceability of this forum selection clause.

[34] In the final analysis, I find that there is no juristic reason to depart from the presumption that in this a commercial contract, the forum selection clause should be given effect. A departure can only be justified in "exceptional circumstances" and there is nothing exceptional about this case of any import. I therefore find that the forum selection clause in the licensing agreements should be upheld.

[35] It should be added, although implicit in the foregoing analysis, that I am satisfied that this court otherwise does have territorial competence over the claim made by Bull Run, contrary to the assertions made by Wild TV. Bull Run has its only office and place of business in Nova Scotia, its sole principal resides here, the episodes (movable property) were inferentially produced here, and the impugned broadcasts were aired here, among other places. These connections are sufficient to meet the "real and substantial connection" test vis-à-vis this province, as embodied in CJPTA and the common law.

[36] Accordingly, this decision is not the result of a lack of jurisdiction of this court, but rather is a discretionary decision not to exercise that jurisdiction because the plaintiff is unable to show "strong cause" that the forum selection clause should be departed from.

[37] It is clear from **Pompey** and other cases that where a court upholds a forum selection clause and declines to exercise its own jurisdiction, the appropriate remedy is a judicial stay of proceedings. The defendant Wild TV is accordingly entitled to an order for judgment to that effect in the disposition of this proceeding.

[38] If the defendant seeks costs, and the parties are unable to agree on them, written submissions can be filed with the court within 30 days of this decision.

J.