Cite as: 693663 Ontario Inc. v. Deloitte & Touche Inc., 1990 NSSC 144

1990 S.H. 74399

IN THE SUPREME COURT OF NOVA SCOTIA
TRIAL DIVISION

BETWEEN:

693663 ONTARIO INC.,
a body corporate

Plaintiff

- and -

DELOITTE & TOUCHE INC.,
a body corporate and
THE ROYAL BANK OF CANADA,
a body corporate

Defendants

HEARD: at Halifax, Nova Scotia, before the Honourable Mr. Justice G. A. Tidman, Trial Division, on November 21, 1990.

DECISION: December 5, 1990 (Oral)

COUNSEL: Mr. Timothy Matthews, for the Plaintiff
Mr. Robert Murrant, Q.C. and Mr. Kevin Downie, for the Defendants

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TIDMAN, J. (Orally)

This is an interlocutory application inter parties for an order dismissing the main action on the grounds that this court is a forum non-conveniens and that the courts of Prince Edward Island properly have jurisdiction over the issues raised in the statement of claim.

The defense filed, in addition to a denial of the allegations in the statement of claim, states that as a preliminary matter of jurisdiction the Province of Nova Scotia is a forum non-conveniens for the trial of the issues because the subject matter of the claim is explicitly within the jurisdiction of the Supreme Court of Prince Edward Island.

This matter comes before me as a contested chambers application for a determination of that jurisdictional issue.

I accept Mr. Murrant's submission that if I find in favour of the applicant the relief granted should be a stay of these proceedings rather than a dismissal of the action, which the applicant seeks.

Background

Marine Harvesting Ltd., (Marine), a Prince Edward Island company carrying on business in Prince Edward Island, issued a debenture to the Royal Bank of Canada secured by all of Marine's assets, including leasehold interests in land, all of which were situated in Prince Edward Island. The bank took action to realize on its security, and by order of the Prince Edward Island Supreme Court, Touche Ross Ltd. (now Deloitte & Touche Inc.), (Touche), one of the defendants herein, was appointed receiver/manager of the assets and undertakings of Marine. The same court granted a further order authorizing Touche to sell all of the assets of Marine to the plaintiff. A contract for the sale of the assets was entered into between the plaintiff and Touche and a down payment on the purchase price was made by the plaintiff. A contractual dispute arose between the parties as a result of which the plaintiff refused to complete the purchase.

The down payment was returned to the plaintiff except for $70,000. which was retained and considered as defaulted.

Subsequently the Prince Edward Island court authorized Touche to sell Marine's assets to other parties.

The order appointing Touche receiver/manager provides that no party, other than secured creditors of Marine, may bring action against Touche arising out of their duties set out in the court order without leave of the Prince Edward Island Supreme Court.

The plaintiff, in the Prince Edward Island court, sought leave to bring action against Touche for the balance of its deposit. Leave was granted "on the condition that the applicant post $10,000. with this court as security for costs". No action has been commenced by the plaintiff against Touche in Prince Edward Island and there is no evidence that such security for costs has been posted by the plaintiff with the Prince Edward Island court as ordered. The plaintiff now brings action in this court for the return of the its deposit retained by Touche.

The plaintiff is an Ontario company and is registered to do business in Nova Scotia. Touche is federally incorporated, and is registered to do business in both Nova

Scotia and Prince Edward Island, and has offices in both of those provinces. The Royal Bank is federally chartered, and has branches in both Nova Scotia and Prince Edward Island.

Issue

Should this action be stayed because this court is a forum non-conveniens?

The Law

I accept Mr. Murrant's statement of the law applying to these circumstances. In his brief he quotes from the decision in **MacShannon v. Rockware Glass Ltd. (1978), A.C.** 795, wherein Lord Diplock states at page 812:

> "In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court."

Mr. Murrant also refers to J.G. Castel's text, **Canadian Conflict of Laws**, (2nd Ed. 1986 Butterworths) as setting out the relevant matters the court will consider in exercising its discretion to grant or refuse a stay of proceedings.

Those matters set out at pages 233 and 234 of Castel's text are:

> "1. In what province the evidence on the issues of fact is situated or more readily available and its effect on the relative convenience and expense of trial as between the local and other courts;
>
> 2. Whether the law of the foreign jurisdiction applies and, if so, whether it differs from the local law in any material respects;
>
> 3. With what province or state either party is connected and how closely;
>
> 4. Whether the Defendant genuinely desires trial in the other province or is only seeking procedural advantages;
>
> 5. Whether the Plaintiff would be prejudiced by having to sue in the foreign court because he would i) be deprived of security for his claim, ii) be unable to enforce any judgment obtained, iii) be faced with a time problem, iv) for political, racial, religious or other reasons be unlikely to get a fair trial;
>
> 6. Whether the foreign court is able to deal with the issues.

I also accept as a true statement of the law the following quotation from Castel at page 133:

> "The question whether the forum is appropriate is one of degree and the answer will vary from case to case, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

Findings

In the statement of claim the plaintiffs allege that the defendants breached the agreement of sale. The breaches alleged include an allegation that the defendants improperly omitted certain assets from the sale and that the defendants misrepresented the health of fish stocks included in the sale.

In dealing with the considerations set out by Castel I find that the evidence on the issues of fact is situated or more readily available in Prince Edward Island than in Nova Scotia. The defendant has submitted a list of seventeen potential trial witnesses (Ex. 2) all of whom reside in Prince Edward Island. The plaintiff claims that the residence of one of the listed potential expert witnesses is New Brunswick, but Karen Cramm, a Vice-President of Touche who gave evidence for the defendants, says that the potential witness is in the process of moving back to Prince Edward Island.

The plaintiff submitted an affidavit of Mr. Hersh Spiegelman, an officer of the plaintiff. Mr. Spiegelman dealt with the defendants in connection with the proposed purchase of Marine's assets. Mr. Spiegelman in his affidavit also sets out a list of potential trial witnesses. Out of the eleven persons on the list, six are resident in Ontario, one in New Brunswick, whom Ms. Cramm says is returning to Prince Edward Island, one in Boston, Massachusetts, and the remaining three in Nova Scotia. The latter three residing in Nova Scotia are all officers of the defendant Touche.

The persons on the defendants' list of potential witnesses, who as stated all reside in Prince Edward Island, consist of former employees of Marine, biologists, fish

growers, a former accountant of Marine, an employee of Touche, an employee or former employee of the Charlottetown branch of the Royal Bank who negotiated and administered the Marine loan, employees of government agencies, employees of banks approached for financing by the plaintiff in relation to the proposed purchase, a former employee of the plaintiff and an appraiser retained by the plaintiff in connection with the proposed purchase of Marine's assets.

As between Nova Scotia and Prince Edward Island, since the majority of witnesses reside in Prince Edward Island and those who reside in Nova Scotia are all employed by the defendant, there is no question that it would be more convenient and less expensive to try the action in Prince Edward Island than to try it in Nova Scotia.

The law of Prince Edward Island would apply in relation to, at least, the land assets, although there is no evidence that it differs in any material respect with Nova Scotia law. However, the plaintiff Touche's powers in relation to the sale emanate solely from an order of the Prince Edward Island Supreme Court which, in effect, plays a supervisory role in the conduct of Touche in carrying out its responsibilities as receiver/manager of the Marine assets. It would thus, in my view, be more convenient to have the action tried in the court through which the defendant Touche

obtains its powers to act.

The plaintiff is connected most closely with the Province of Ontario, although registered to do business in Nova Scotia, it was incorporated under the laws of and has its head office in Ontario.

Both defendants have offices or branches in both Nova Scotia and Prince Edward Island, but the loan to Marine, which connects the Royal Bank as a defendant in this action, was negotiated and administered by employees of the Royal Bank's Charlottetown branch. Ms. Cramm says that insolvency work is done out of both the Halifax and Charlottetown offices of Touche, and although some of the Touche potential witnesses reside in Nova Scotia, others reside in Prince Edward Island and Ms. Cramm says it would be more convenient for Touche to have the trial in Prince Edward Island.

There is no suggestion that the plaintiff would be deprived of security for its claim by suing in Prince Edward Island. Neither is there a suggestion that the defendants would be unable to respond to a decision rendered against them by the Prince Edward Island court. In fact, the assets which would probably respond to a decision against the defendants are located in Prince Edward Island. I am therefore satisfied that the plaintiff would be able to

enforce a judgment obtained in Prince Edward Island. The plaintiff has offered no suggestion that it has a time problem nor that it is unlikely to get a fair trial in Prince Edward Island for racial, religious, or other reasons.

Finally, there is no question that the Prince Edward Island court is able to deal with the issues. The plaintiff as it must in accordance with an order of the Prince Edward Island court, has sought leave from that court to commence this action. In response to the defendants' argument that the plaintiff seeks a trial in Nova Scotia only to avoid paying security for costs, the plaintiff contends that the defendants can seek such an order in this court. That, however, would entail only more costs and expense while the Prince Edward Island court has already made that decision. In fact, the plaintiff is in violation of the Prince Edward Island order granting leave to sue since it has not fulfilled the condition upon which it was granted such leave, namely the posting of $10,000. with that court as security for costs. There is no evidence that a trial in Prince Edward Island would deprive the plaintiff of a legitimate personal or juridicial advantage available to it in this court.

After considering all of the evidence I am satisfied that the balance is strongly in favor of the action being tried in Prince Edward Island.

Conclusion

I find that this court is a forum non-conveniens and will, therefore, order the action stayed until further order of this court.

J.

Halifax, Nova Scotia
December 5, 1990