

SUPREME COURT OF NOVA SCOTIA

Citation: *Maritime Varsity Academy v. 3300819 NS Ltd.*, 2024 NSSC 64

Date: 20240131
Docket: 489568
Registry: Halifax

Between:

Maritime Varsity Academy

Plaintiff

v.

3300819 Nova Scotia Limited, a body corporate, and Christopher Prentice, and
Brandon Moore

Defendant

DECISION

Judge: The Honourable Justice Mona Lynch

Heard: January 31, 2024, in Halifax, Nova Scotia

Oral Decision: January 31, 2024

Final Written Decision: February 29, 2024

Counsel: Daniel MacKenzie, for the Plaintiff
Allison Godwin, for the Defendant

By the Court:

Introduction

[1] The Plaintiff sought to strike the rebuttal expert report which was filed by the Defendants for failure to comply with Rule 55.05.

[2] For the reasons set out below some portions of the rebuttal report are struck but the majority of the report is compliant with Rule 55.05 and will not be struck.

Background:

[3] The Statement of Claim, filed on June 28, 2019 claims against the Defendants for unjust enrichment, passing off, breach of contract, breach of employment duties, conversion, fraud, and breach of the duty of good faith. The Notice of Defence was filed on September 11, 2019. The matter was scheduled for trial for 6 days starting on February 7, 2024.

[4] The Plaintiff filed an expert report on the economic loss suffered by the Plaintiff and the Defendants filed a rebuttal expert report.

[5] The Plaintiff filed a Notice of Motion seeking to strike the rebuttal expert report. The motion was heard on January 31, 2024, and an oral decision was provided on that date, with written reasons to follow. Due to some unforeseen circumstances the motion was heard a week before the trial dates.

Issue:

[6] Should the rebuttal report be struck for noncompliance with Rule 55.05?

Law:

[7] *Civil Procedure Rule 55.05* reads:

55.05 Content of rebuttal expert's report

A rebuttal expert's report must be signed by the expert and provide all of the following:

- (a) representations and information required in an expert's report;
- (b) the name of the expert with whom the rebuttal expert disagrees and the date of that expert's report;
- (c) a quotation of the statement of opinion with which the rebuttal expert disagrees;
- (d) a statement that the rebuttal opinion is strictly confined to the same subject as the quoted opinion;
- (e) the rebuttal opinion and no further opinion.

Position of the Parties:

[8] The Plaintiff says that the rebuttal report is not compliant with Rule 55.05 because it failed to quote the statement of opinion with which the rebuttal experts disagree; it is not strictly confined to the same subject as the quoted opinion; and there is further opinion in the rebuttal report. The Plaintiff relies on Justice Keith's decision in *Graca v. Carter*, 2022 NSSC 107 to support the motion.

[9] The Defendants state and that rebuttal report complies with the intent and purpose of Rule 55.05. The Defendants acknowledge that, at times, the opinion with which the authors of the rebuttal report disagree is referenced by footnotes and not direct quotes. They submit that a quote is not always possible, such as where the rebuttal report points to assumptions not used by the original expert.

Analysis:

[10] It is the obligation of the party submitting the rebuttal report to ensure that it is compliant with Rule 55.05.

[11] The Plaintiff submits that rebuttal reports are strictly limited. The Defendants and the Court agree, however, they are not as strictly limited as the Plaintiff submits.

[12] The Plaintiff quotes *Graca* and says that the rebuttal report here does not conform to Justice Keith's standard. There are two ways to interpret *Graca*. The Plaintiff reads *Garca* in a very rigid and strict manner – follow the format exactly or the report is excluded. I do not read *Garca* as requiring the same format in every case and every rebuttal report.

[13] The overall concerns relating to rebuttal reports are with regard to notice, trial fairness and not allowing a late expert report to which the other party cannot respond. An expert report in the guise of a rebuttal report should clearly be rejected.

[14] In *Graca* Justice Keith clearly stated:

1. There is no single form, boiler-plate form or formula which can be adopted in every report to automatically transform any opinion into proper rebuttal. Rebuttal opinion is obviously contextual and must adapt to the quoted opinion and the circumstances of the case;
2. The predominant purpose of expert rebuttal opinion is to respond to the original opinion. As such, it must remain centred around a disagreement with the quoted opinions. The focus of any alternate explanations, reasoning, inferences, or conclusions offered in rebuttal must similarly be connected to the quoted opinion. It is not, in other words, an opportunity to embark upon a fresh, wide-ranging examination into all of the issues in dispute and develop comprehensive reports with new opinions, disconnected from the original report;

(para. 57)

Justice Keith goes on to indicate what a rebuttal report must contain, and he includes:

3. The rebuttal expert report must:
 - a. Quote the opinion in question;
 - b. Confirm a disagreement with the quoted opinion;
 - c. Identify and explain the specific nature or basis of the rebuttal expert's disagreement with the quoted opinion. Examples include (but are not limited to) disagreements around:
 - i. the appropriate assumptions made in respect of the quoted opinion;
 - ii. the reliability of any test or experiment which underpin the quoted opinion, including the data or output generated from any such test or experiment;
 - iii. the reliability or currency of any research used to develop the quoted opinion; and/or
 - iv. the appropriate methodology or the appropriate discipline (or area of expertise) needed to properly analyse the evidence.

- d. Articulate and explain why the nature of the disagreement exposes problems with the quoted opinion and leads to a different opinion which is preferable to the quoted opinion.
4. The party offering a rebuttal expert report is responsible for ensuring clarity in terms of explaining the path of reasoning which gives rise to the disagreement and, more generally, complying with the rules.

(para. 57)

And that would be the preferred format of a rebuttal report, in most cases.

[15] However, in some cases, such as this one, the rebuttal report expert is disagreeing with opinions in the original report because they disagree with the assumptions used by the original expert, or they assert that assumptions were missing which should have been used. No one reading the report could have any doubt as to what the rebuttal experts are disagreeing with in the original report, but it is impossible to quote something that is missing. The rebuttal experts are confining themselves to the opinion of the original expert, but they are saying that he should have also made other assumptions in his analysis. That is the basis of their disagreement. They say what they disagree with and why they disagree.

[16] The rebuttal experts sometimes place the “quotation” they are disagreeing with in a footnote to reference the paragraph of the original report that they disagree with. They cite what they disagree with. “Citation” is included in the dictionary definition of “quotation” (Oxford Languages online dictionary). While it is not a verbatim quotation, it clearly indicates to any reader what the rebuttal report experts are disagreeing with. The preferable practice would be to provide the quotation in the rebuttal report, but does failure to format the report in that exact fashion mean that the rebuttal report is struck? Is a citation of the portion of the original report disagreed with not enough?

[17] The *Rules* are to be interpreted in accordance with the principles for statutory interpretation (Rule 94.01). The object of the *Rules* is for the “just, speedy, and inexpensive determination of every proceeding” (Rule 1.01). The Court of Appeal has described the object of the *Rules* as the “preeminent goal” of the *Rules*, informing their interpretation and application (*Homburg v. Stichting Autoriteit Financiële Markten*, 2017 NSCA 38, para. 41, and *Delano v. Gendron*, 2019 NSCA 32, para. 15). A broader and purposive contextual analysis is the interpretative approach to be used for the *Rules* (*Delano*, para.12). The *Rules* for disclosure and discovery must

be interpreted broadly and liberally and in a manner consistent with the purpose of the *Rules* (*Delano*, para. 14).

[18] Interpreting Rule 55.05 in the manner proposed by the Plaintiff would not be a broad and purposive contextual analysis but instead a rigid and strict interpretation. The words “quotation” and “quoted opinion” in Rule 55.05 should not be interpreted so strictly as to exclude every rebuttal report without a word-for-word quotation from the original report.

[19] It is clear what the rebuttal experts are disagreeing with in the original report and why they disagree. That conforms to the predominant purpose of an expert rebuttal report -- to respond to the original report (*Graca*, para. 57).

[20] *Graca* permits a less strict interpretation than the Plaintiff asserts:

[53] The proper interpretation and application of CPR 55.05(c) – (e) again engages some of the policy concerns summarized in paragraphs 28 – 41 above.

[54] On the one hand, as indicated, expert opinion evidence is admitted because the Court needs help understanding and weighing complex subject matter. As such, the “subject” of a rebuttal expert’s quoted opinion cannot be so rigidly interpreted that the rebuttal expert:

1. Becomes automatically trapped within the original expert’s theoretical framework;
2. Is compelled to adopt whatever assumptions or methodology their original expert chose to apply, regardless of how inappropriate or far-fetched it might be; and/or
3. Is precluded from applying a different theory or offer an alternative opinion.

[55] Any such conclusion would unfairly impede the rebuttal expert’s ability to address the original quoted opinion and unduly constrain the Court’s ability to properly evaluate the relative strengths and weaknesses of opposing expert opinions. Murray, J generally captured this concern in *McKinnon v Cadegan* when he wrote:

...a rebuttal expert must be able to say words to the effect “I disagree and this is why”. If the reason for disagreement pertains to another theory, then the rebuttal expert is able to state that theory. In fact, he is required to state it. Explaining his or her theoretical basis is permissible under Rule 55.04.

[paragraph 40]

[21] The Court can consider whether trial fairness would be affected by allowing the rebuttal report to be admitted. The Court can consider whether the rebuttal opinion responds to the original report and does nothing more. In this case, as Justice Murray said in *McKinnon*, most of the rebuttal report simply says – here is what I disagree with, and this is why.

[22] *Graca* was dealing with a rebuttal medical report and the facts of that case. Here to strike the whole report would be putting form over function. The rebuttal report is clear as to what the disagreement is with the original report. The assumption disagreed with or missing is stated and the basis of the disagreement is stated. In some cases, the rebuttal expert uses footnotes to direct the reader to the portion of the original expert report that they are referring to. Here, the rebuttal expert, does not, for the most part, stray into a Rule 55.04 report. The majority of the report is proper rebuttal.

[23] One of the Plaintiff's other complaints about the rebuttal report is that the declaration required in an expert report was not done in the normal fashion. However, all the representations and information required are included in the rebuttal report. It would be preferable that the representations and information required by Rules 55.04 and 55.05 be in one place. That would be the best practice.

[24] The majority of the expert report should not be struck but there are two portions of the rebuttal report which should be struck. The portion of the report entitled "Background", from paragraph 28 to and including paragraph 61, is struck for not responding to anything in the original report. In paragraphs 86-96 the rebuttal experts used alternative methods of quantifying the Plaintiff's loss. In these paragraphs, the rebuttal experts do not explain why those methods are superior to the method used in the original report and in doing so they stray from the requirement that they respond to the original opinion and instead they offer further opinion. Those paragraphs will be struck.

Conclusion

[25] Paragraphs 28 to and including 61 are struck as are paragraphs 86 to and including 96. The rest of the rebuttal report is not struck.

Lynch, J.