SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Bellissimo Living Ltd. v. Enqore Developments Ltd.,* 2024 NSSM 18

Date: 20240424
Docket: 525132
Registry: Halifax

Between:

Bellisimo Living Ltd.

Claimant

v.

Enqore Developments Ltd.

Defendant

DECISION
Written Motions for Production

Adjudicator:	Blair Mitchell
Heard:	Written Submissions concluding March 20, 2024
Decision:	April 24, 2024
Counsel:	John O'Neill, counsel for the Claimant John T. Boyle, counsel for the Defendant

By the Court:

Introduction

[1] Although there have been significant voluntary disclosure between the parties in this matter these are motions brought by each party seeking additional pre-hearing disclosure of documents from the other.

[2] The issue arises in a claim for the purchase price of a more than $ 29,000 chesterfield from the Defendant – a claim with damages capped at the Small Claims jurisdictional damages limit of $25,000. The motions are brought in writing by agreement between the parties and each also have provided reply briefs.

[3] In making these requests, each party indicates that it is seeking relevant documents or documents likely to lead to the discovery of relevant evidence. (Enqore initial brief dated March 12, 2024, page 4; Bellissimo initial brief dated March 12, 2024, page 1; reply brief dated March 20, 2024, page 3).

[4] As appears below, Bellissimo's representations contemplate three alternative outcomes to the motion, with a middle one suggesting that I consider assisting the

parties in fashioning an agreement on production. I have not immediately addressed that alternative but comment on it below.

[5] Enqore seeks documents described as follows:

> 1. Receipts, invoices or other records pertaining to Bellissimo's costs to obtain the furniture;
>
> 2. Any agreements or recommendations from Lee Industries concerning price;
>
> 3. Any internal documents, including any agreements between the owners of Bellissimo.

[6] For its part, Bellissimo seeks documents described as follows:

> 1. Pre-December 28, 2022 written, email, text, etc. comparison vendor inquiries and follow up communications relating to Enqore's determination that Bellissimo's quotation for the furniture ordered was priced disproportionately more than market, and
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> 2. Post-December 28, 2022 written, email, text, etc. comparison vendor inquiries and follow up communications relating to Enqore's determination that Bellissimo's quotation for the furniture ordered was priced disproportionately more than market.

Context

[7] The evidence on the hearing of the claim is expected to be that the Defendant, Enqore Developments, purchased the item – among several other items which are not at issue in this matter – and paid a deposit through the use, in total, of two credit cards. Subsequently, before delivery, when a dispute arose, the

Defendant reversed the charges, the Claimant was not paid and, ultimately this claim followed.

[8] The Defendant refuses to pay based on what it characterizes as false representations by the Claimant, Bellissimo Living, which it says induced the sale. The overall representation, Enqore claims, was that "Enqore was receiving the best possible pricing" for the item. Enqore goes on to cite three specific representations:

1. "Bellissimo could not go any lower given the cost for Bellissimo to obtain the furniture;"
2. Bellissimo's individual representation "...could not even get herself such a low price given the agreement she had with her business partner."
3. "Bellissimo was giving the best price a distributor..." of this product "could give."

[9] Bellissimo does not accede to Enqore's position.

[10] While Bellissimo argues the specific relevancy of some documents or information sought in this case, in the alternative, it raises concerns respecting a smaller subset of those documents which, it forecasts, involve sensitive confidential business or similar information and queries whether or not protection from more general disclosure is available when produced in this court.

Issues

[11] While each party seeks disclosure, the vantage point taken by each differs, and supporting issues fall out of those or are raised by Bellissimo individually. They are:

1. Does Small Claims Court have jurisdiction to *order* pre-trial disclosure, as such, at all or what vehicle, if any, is appropriate and available to provide for disclosure of documents or electronic information in the small claims process?

2. What is the standard of relevancy for production?

3. Does a pre-trial obligation of confidentiality attach to any such production, however ordered to be made, and, if so, how is it enforced?

4. If disclosure is directed, what are next steps?

1. Overall Small Claims Jurisdictional

[12] As well known, no process is specified by the Act or regulations which address specifically, pre-hearing disclosure in the Small Claims Court. Further, also as is well known, but bears explicit note, Small Claims Court process is to be "adjudicated informally and inexpensively but in accordance with established principles of law and natural justice."(s.2) (emphasis supplied). The scope for appeal from decisions of the court is restricted (s. 32.).

[13] The parties each wish pre-hearing production. In addition, noting any natural justice implications, as a reference point, Enqore makes reference to authorities

noting the Nova Scotia Civil Procedure Rules as a source of guidance for procedural decisions in some cases in the Small Claims Court.

[14] Enqore further cites *Royal LePage Atlantic* v. *Ross* 2021 NSSM 64 as an affirmation that the Small Claims Court has jurisdiction to order pre-trial disclosure as part of its capacity to manage procedural issues arising out of a claim before it. It goes from that point to cite *Johnston* v. *Wawanesa Mutual Insurance Co* 2013 NSSM 47 as a setting out a procedural vehicle to do so.

[15] In and since *Johnston*, adjudicators looking to facilitate pre-trial production (and to avoid delay at substantive hearing as requests for adjournment are made in the absence of such production before hearing) have employed the technique of setting of what is sometimes called a "notional hearing date," authorizing subpoenas to be issued including for documents and calling for production of such documents on that date in anticipation of a later substantive hearing date; hearing any arguments respecting the relevancy or producibility or compellability or admissibility of such documents at that time; allowing for the same to be decided; and setting a subsequent, substantive hearing date for the full hearing of the substantive claim.

[16] This approach is efficient, employs the prescribed form of subpoena which has an explicit statutory mandate, respects principles of natural justice and contributes to the efficient management of the proceeding. It has been effectively used in other administrative tribunal settings. Its use in Small Claims Court has not been challenged on any appeal that I have found.

[17] I conclude that this, *prima facie*, is an appropriate mechanism for pre-hearing production in this matter. Having determined that *Johnston* provides an acceptable and effective vehicle I note that it is not necessary for me to consider whether there is a basis for any broader jurisdiction for document production in the kinds of extent of authority considered in *Royal LePage* and have expressly not done so.

[18] However, this is not the end of the matter.

2. What is the standard of relevancy for production?

[19] As noted above, the parties are *ad idem* in this matter that the standard for production is for production of documents which are relevant or which are likely to lead to evidence relevant at trial. I am not going to disturb this consensus.

[20] Enqore states that it does not dispute that additional disclosure sought by Bellissimo is relevant (Enqore Reply brief dated March 19, 2024 page 1).

[21] Enqore further states that so far as there may be non-relevant, confidential information which it seeking from Bellissimo, it has no objection to the same being redacted. This conclusion is practical and efficient and I will adopt it as a standard.

[22] Enqore further submits that its request for records to be produced cannot be expected to overburden Bellissimo. This is supported by the face of the parties' respective submissions and I make this finding in respect of the request of each party.

[23] Bellissimo expresses its request as one for the production of documents and electronic information.

[24] Finally, Enqore states that it has produced all relevant records "...related to Cadieux Interiors or Cocoon furnishings" in its possession in its Reply, but is prepared to undertake to complete another review, to that end.

[25] For its part, Enqore frames its request most often as one sometimes phased as seeking documents; sometimes for "records" but there is no doubt that it sees

the overall issue as being one for broad disclosure and “records” include electronic information. I see the request and submissions as including electronic information.

[26] I expect each party is requesting electronic information to be disclosed by the other. I do interpret the requests for disclosure of the same by either party to include a request for metadata. In the unlikely event there is a request for information of that sort, this conclusion is without prejudice to any request for the same.

3. Does a pre-trial obligation of confidentiality attach to any such production, however ordered to be made, and, if so, how it is enforced?

[27] The question involves two steps. The first is whether such a duty of confidentiality does attach in some way in Small Claims. The second is, again in a Small Claims Court context, whether and how a breach of such a duty is to be enforced.

a. Does an obligation of Confidentiality attach in this case?

[28] In this case, for its part, Bellissimo is being asked by Enqore to produce documents which Bellissimo says reflect on its pricing relationship with its supplier; conceivably on other marketing information; and on its own, internal price-setting process. This, Bellissimo says, is highly confidential commercial

information and it asks what protection it is given from other uses of this information outside of for preparation for or as evidence in the hearing of the Claim. Bellissimo points to the present Nova Scotia Civil Procedures Rules' explicit imposition of a statutory duty of confidentiality on the parties who have received disclosure, and the absence of such provision in our, Small Claims context.

[29] As Bellissimo submits and Enqore does not disagree, generally, protection is afforded the use of such documents, restricting them to the purposes of trial preparation, in the form of an obligation of confidentiality as a matter of common law. The law imposes an implied undertaking to this effect on the parties who have received such information and documents to use them for no other purpose excepting preparation for trial. See: *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.); *Sezerman v. Youle* (1996), 150 N.S.R. (2d) 161 (C.A.)

[30] Moreover, albeit decided in the case of apparent voluntary production, it has been quite categorically found that the implied undertaking is applicable to pre-trial information produced in the Small Claims Court. *Gold Star Realty* v. *Grant,* 2008 NSSC 180.

[31] The undertaking lasts until at least such documents are entered into evidence in a substantive hearing under "the open court principle" or until it is lifted by a court of appropriate jurisdiction. The undertaking is implied and arises because the production of the documents is *prima facie* a compulsory intrusion into matters which are otherwise private and because some assurance of privacy is also generally necessary to encourage compliance in production by others.

b. How is a breach of the obligation arising in a Small Claims Court context to be enforced?

[32] In this case, Bellissimo has raised the additional question of the enforcement of that undertaking where the compulsory production originates in the Small Claims Court -- effectively a statutory decision-maker which has no express jurisdiction to enforce such an obligation of confidentiality; which is almost universally and fully understood to have no inherent jurisdiction, including to remedy contempt, except contempt committed in its face; and which has no authority to issue to other extraordinary relief, injunctive relief, as such.

[33] In Courts clearly of appropriate jurisdiction, means for the enforcement of the obligation have been described as follows:

> [29] Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the

> absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court. See Lac d'Amiante, at para. 64, and Goodman v. Rossi (1995), 1995 CanLII 1888 (ON CA), 125 D.L.R. (4th) 613 (Ont. C.A.), at p. 624.
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> *Juman* v. *Doucette,* 2008 SCC 8

[34] Moreover, setting aside whether or not there is any aspect of the statutory authority of the Small Claims Court or implied jurisdiction attaching to it, including as seen in light of the conclusion in *Royal LePage Atlantic* v. *Ross,* above, could give Small Claims Court authority to address or respond to breach of the obligation, there remains the possibility of the intervention of a superior court to support the enforcement of the undertaking and respond to its violation.

[35] Although such an exercise of jurisdiction is cautioned to be used "sparingly" and the higher court should not "meddle" in the affairs of statutory courts and administrative tribunals, superior courts, including the Nova Scotia Supreme Court, have the jurisdiction to assist them.

[36] In R. v. Caron, 2011 SCC 5, citing authority Binnie J wrote:[1]

> [26] ...superior courts do possess inherent jurisdiction "to render assistance to inferior courts to enable them to administer justice fully and effectively" (p. 48). For example, superior courts have long intervened in respect of contempt not committed "in the face

[1] In *Caron*, the Alberta Court of Queen's Bench had issued an order for the Crown to pay interim costs of a defendant's, constitutional language rights defence in a prosecution in the statutory to support the litigation of the argument on an Alberta Provincial Court prosecution, where the Provincial Court had been found not to have jurisdiction to do so.

> of" the inferior court because "the inferior courts have not the power to protect themselves" [citations omitted] In the same vein, Mr. Keith Mason, Q.C., a former President of the New South Wales Court of Appeal, has written [citation omitted]... that
>
> ... [i]t is not surprising that a general concern with the "due administration of justice" has been invoked to justify the Supreme Court creating or enforcing procedural rights applicable to other courts and tribunals. Such helpful intervention has been offered where the other body has been considered powerless to act or where undue expense or delay might be caused if parties were forced to resort to it.
> . . .
>
> Many of the more recent developments of administrative law can be related to the assumption by superior courts of a general inherent jurisdiction to use their process in aid of the proper administration of justice. [Emphasis added; p. 456.]....

The Court went on to say:

> [27] Canadian courts have, from time to time, exercised their inherent jurisdiction to render assistance to inferior courts as circumstances required. Novelty has not been treated as a barrier to necessary action. In the Peel Regional Police case, the superior court cited the Regional Police Service and the Police Services Board for contempt based on repeated delays in transferring prisoners to court rooms for hearings. This caused days of court time to be lost and inconvenienced lawyers, witnesses, and members of the public (paras. 20-28). The delays were said to undermine the rule of law. ....
>
> [28] In United Nurses of Alberta, this Court upheld a criminal contempt order made by the superior court against a union that defied a ruling issued by the province's Labour Relations Board. The superior court relied on its inherent jurisdiction to come to the aid of the tribunal. [Underlining added]

[37] In this circumstance, without limiting the capacity of the parties to seek a remedy for any breach of the obligation in the Small Claims Court, if it is available, it therefore appears that there is substantial authority for the Nova Scotia Supreme Court to address or remedy a meritorious claim of a breach of a party subject to it.

3. Next steps

[38] Bellissimo made a set of alternative requests on the motion:

> 1. For production in accordance with standards imposed by the CPR should I determine that they apply;
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> 2. For assistance to the parties in coming to an agreement as to the content of an order directing disclosure;
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> 3. For an order determining relevancy now and "...pre-approve the pre-hearing delivery of information and issuing a subpoena requiring Encore to disclose information that is relevant prior to the hearing of the claim." (Bellissimo initial brief page 15).

[39] As I have found above, I am prepared to direct, and do direct the issuance of reciprocal subpoenas to be issued to an appropriate representative of the opposite party for the production of expressing the material to be brought as:

> "documents and electronic information (without metadata) which are in the possession of [the named party] and which are relevant to the matters in issue in this proceeding or which contain information which will lead to the discovery of information relevant to this proceeding"

[40] I would suggest the foregoing be expressed as "including" a the foregoing examples each party has given and set out above. In the case of Enqore to the subpoenaed witness for Bellissimo including:

> 1. Receipts, invoices or other records pertaining to Bellissimo's costs to obtain the furniture;
>
> 2. Any agreements or recommendations from Lee Industries concerning price;
>
> 3. Any internal documents, including any agreements between the owners of Bellissimo.

[41] And in the case of Bellissimo to the subpoenaed witness for Enqore including:

1. Pre-December 28, 2022 written, email, text, etc. comparison vendor inquiries and follow up communications relating to Enqore's determination that Bellissimo's quotation for the furniture ordered was priced disproportionately more than market, and

2. Post-December 28, 2022 written, email, text, etc. comparison vendor inquiries and follow up communications relating to Enqore's determination that Bellissimo's quotation for the furniture ordered was priced disproportionately more than market.

[42] The subpoena should be issued in Form 3 under the regulations with the exception that I direct under regulation 9(1) that there is no requirement for personal service of the document on the witness but that electronic service on counsel for the respective party the witness is representative of, is to be effective the same.

[43] However, if there are additional categories of documents or information sought which may help illustrate the scope of discovery sought and which are relevant or calculated to lead to the discovery of relevant evidence, I would see these as permissible to be raised on the notional hearing date. I also note that Enqore has taken the position that it has produced all relevant materials, but to have taken the position that it will make another review of its material.

[44] The subpoenas will be set down for return on a date for telephone hearing which I will canvass with each party, without the necessity of the attendance of the witness.

[45] I leave it to the parties whether they wish to provide undisputed documents to their opposite before that date.

[46] If the parties are satisfied with the exchanges that have occurred, I would ask them to notify me that the return date will not be required.

[47] A substantive hearing date will be fixed on the return date or, if no return appearance is required as of that time.

[48] I note that I did not comment on Bellissimo's submission that I consider attempting to help broker a more specific agreement. I felt it more efficient to determine the issues first. As I say elsewhere, from the briefs and replies I believe there to be a consensus on the relevancy of the materials respectively requested. However, further to Bellissimo's suggestion if there are disagreements between the parties still on the return date I will resolve them on that date, either by informal discussion if both parties consent to that form of resolution, or by making a direction, if necessary, with the request that the parties identify any such issues by

email prior to that date. On the other hand, should there be any need for clarification of the foregoing itself, I look forward to hearing from the parties by email as any such issue arises.

[49] Finally, if either party requires an Order for these "next steps," I will issue the same.

Blair Mitchell, Small Claims Court Adjudicator