Date: 1999 06 10
Docket: CV 06941

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

STEVEN ROBERTSON

Plaintiff

-and-

BHP DIAMONDS INC.

Defendant

-and-

FINNING INTERNATIONAL INC. and FINNING TRACTOR (1959) LTD. carrying on business under the name and firm of FINNING TRACTOR CO.

Third Party

REASONS FOR JUDGMENT

[1] This is an application by the Third Party, Finning International Inc. and Finning Tractor (1959) Ltd. carrying on business under the name and firm of Finning Tractor Co. ("Finning"), to strike out the third party notice filed against it in this action by the Defendant BHP Diamonds Inc. ("BHP"). It is really an application for summary judgment.

Summary of the facts

[2] The factual allegations are as follows. At the relevant time, the Plaintiff was employed by a contractor at BHP's Ekati Diamond Mine Site. His duties involved driving a water truck owned by BHP. He alleges that on January 24, 1996, while filling the water truck's tank on a frozen lake, he heard unusual noises and climbed on top of the truck to lift the tank's manhole cover. As he bent down, the cover flew off and hit him in the face, causing him to lose his balance and fall from the truck, sustaining injuries for which, in this subrogated Workers' Compensation Board action, damages are claimed from BHP.

[3] Prior to the accident, BHP had retained Finning to do maintenance and mechanical work at the mine site. Finning's employee on the site was Peter Raftery. He was consulted when a buildup of ice was noted on the water truck. In discussions with BHP personnel, it was decided that a latch would be welded to the manhole to secure the cover. It was felt that this would stop water from sloshing around and thus prevent ice buildup. Raftery was to do this work with the help of a welder. As it turned out, the welder was not available and so instead of a latch, Raftery used one or more two-by-fours to secure the manhole cover. This was done on January 18, 1996.

[4] Raftery did not tell the BHP employees how he had secured the manhole cover but did tell them that it was secure. The Plaintiff's accident occurred approximately six days after the work was done.

[5] In its Third Party Notice, BHP claims contribution and indemnity from Finning and alleges breach of contract and that Finning's employee Raftery was negligent in the performance of the work done to the manhole cover.

[6] In its Defence to Third Party Notice, Finning denies any breach of contract or negligence. It also relies on a limitation of liability clause found on the back of its Daily Field Service Activity Reports which were submitted to BHP's mine manager. At the bottom of the Activity Reports is a section that reads:

> Finning's liability under this agreement is limited. Please read and understand the general conditions appearing herein and in particular clause 6 of the terms and conditions and

clause 3 of the service warranty policy on the reverse hereof prior to signing this agreement.

[7] It is clause 6 that is important for purposes of this application. Found on the back of the Activity Reports, it says:

> Limitation of Finning's Liability
>
> Finning, its employees, agents and contractors shall not under any circumstances, be liable for personal injuries (including death) to any person (including the Customer) or for any loss or damage to property or business either direct, indirect, or consequential whether to parts, components or equipment or to any other property, caused or contributed to by the work performed hereunder or by the delivery, operation or possession of parts, components or the equipment by Finning or by any other person or by any default or negligence of Finning, its employees, agents and contractors or by any other cause or reason whatsoever. In addition, in no case shall Finning be liable for loss of profits, income or use of parts, components or the equipment whether or not caused or contributed to by the negligence or default of Finning. The limitation of Finning's liability contained in this paragraph 6 shall survive the expiration of this Agreement.

The test for summary judgment

[8] The *Rules of the Supreme Court of the Northwest Territories* provide as follows:

> 175. A defendant may, after delivering a statement of defence, apply with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.
>
> 176. (1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.
>
> (2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

> (3) Where the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

[9] Although these Rules apply to defendants, counsel submitted that by analogy they should apply when a third party seeks summary judgment as against a defendant who has brought it into the action. I agree.

[10] The test for summary judgment was discussed by Vertes J. in *923087 N.W.T. Ltd. v. Anderson Mills Ltd.,* [1997] N.W.T.R. 212 (S.C.), referred to by both counsel. As stated in that case, the entire focus of an application under the Rules is to determine if there is a genuine triable issue. Vertes J. referred to the description of the summary judgment test given by O'Leary J. (as he then was) in *Allied Signal Inc. v. Dome Petroleum Ltd.* (1991), 81 Alta. L.R. (2d) 307 (Q.B.), at p. 319:

> Summary judgment may be granted to a defendant under (the Alberta Rule) if the court is satisfied that there is no merit to the claim, that is, it does not raise a genuine issue for trial. The court must look at the merits of the claim and the defence and determine whether there is an issue requiring a trial. A defendant must show more than a strong likelihood that he will succeed. To justify deciding the matter without a trial the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success.

[11] While the applicant on a motion for summary judgment must establish that there is no genuine issue for trial, the respondent must also put forward evidence showing the existence of issues requiring a trial: Rule 176(1); *923087 N.W.T. Ltd.*.

[12] On this application the evidence consists of a summary of facts for the most part agreed to by counsel as well as affidavit material from both Finning and BHP and transcript excerpts from the cross-examinations or examinations for discovery of the deponents of those affidavits.

<u>The claim against Finning</u>

[13] As I have indicated above, most of the facts are not in dispute. On January 18, 1996, Finning's employee, Raftery, had discussions with BHP personnel about fastening down the manhole cover on the truck's tank to resolve the problem of ice build-up. Raftery was a heavy-duty mechanic. The BHP personnel were not mechanics. The plan was to effect the fastening by way of a latch to be welded onto the cover. When the welder was not available, Raftery used a two-by-four to fasten the cover. His evidence on examination for discovery was that he advised BHP personnel that the manhole cover was secure and that they had better start thawing the breather vent. He apparently suspected that in the past the truck operators had used the manhole as a breather, to allow air to escape when the truck was filled with water. In an affidavit filed on behalf of BHP on this application, the mine manager, Mr. Stibbard, stated that he had not been made aware of any problems concerning the breather vent or ventilation prior to the work done by Raftery.

[14] Finning's position is that Raftery did everything in accordance with BHP's wishes and instructions. It points to Raftery's evidence on examination for discovery that he had no training on tanks and that mechanical knowledge would not be required to fasten a manhole cover. BHP's evidence is that it relied on Raftery's knowledge and expertise as a heavy-duty mechanic and further relied on him to complete all repairs in a safe manner and to warn of any dangerous situations. Whether BHP did rely on Raftery and whether it was reasonable to do so in the circumstances are not issues that I can resolve on this application.

[15] Whether Raftery's method of fastening the manhole cover was negligent or whether there was a problem with the water truck itself, which led to the Plaintiff's accident, and which Raftery's actions caused or contributed to or whether Raftery failed to give sufficient warning to BHP personnel after he had done the work are not issues that can be resolved at this stage. Counsel for Finning very fairly conceded that it cannot be said that there is no possibility that Finning will be found liable, although others may be liable to a greater degree. Thus, there is a genuine issue for trial on the negligence aspect of the case.

[16] The limitation of liability clause on the back of the Activity Reports covers "personal injuries ... to any person ... caused or contributed to by the work performed hereunder ... or by any default or negligence of Finning, [or] its employees... ." The wording of the clause would appear to cover the Plaintiff's accident if Finning is found liable. I will therefore go on to deal with the application of the clause in the context of the application for summary judgment.

The application of the limitation of liability clause

[17] Finning relies on clause 6 of its Activity Reports as a full defence to the third party action.

[18] Counsel agreed that the original or main agreement, whereby Finning was retained to perform maintenance and mechanical work for BHP, was most likely in written form. However they have not been able to locate it. Counsel for BHP stated that at trial, the BHP employee who negotiated that agreement would be called as a witness. Since neither party has put forward any evidence on this application as to the terms and conditions of that agreement, I will proceed on the assumption that the agreement did not include a clause excluding or limiting Finning's liability in any way. I understand from the submissions made by Finning's counsel that Finning in fact does not allege that the retainer agreement limited or excluded liability for Finning's services.

[19] The factual information before me is that the Activity Report was the form used for all the service work done to the water truck. Raftery stated in his affidavit that he did not ever refer any BHP employee to the back of the Activity Report, where clause 6 is located, when handing in the Reports. In his affidavit, Stibbard agreed that the Activity Reports were submitted after any work was completed on the site and stated that neither Raftery nor any other Finning employee drew his attention to the terms and conditions on the back.

[20] There is no evidence before me as to how often Activity Reports had been submitted before Raftery did the work on the manhole cover on January 18, 1996. Finning's argument is that there were a series of written contracts which limited Finning's liability, those contracts being the Activity Reports. In Finning's brief, filed for this application, it is stated that: "Finning's liability to BHP is limited by virtue of a series of written contracts entered into starting on January 18, 1997 *(sic)*, each of which contain specific terms and conditions specifically limiting Finning's liability" (paragraph 3 on page 1 of the brief). I could find no other reference in the material before me to when the Activity Reports were submitted in relation to when Raftery did the work on the water truck.

[21] As for the purpose of the Activity Reports, Raftery has stated in his affidavit that, "This Activity Report was the form utilized for all of the service work done to the water truck in question." Stibbard's affidavit states, "After completing any work at the Ekati Diamond Mine Site, Mr. Raftery would provide to me a daily field service activity

report." In cross-examination on that affidavit, the following questions were asked of Stibbard and answers given by him:

Q Sure. M. Stibbard, in the course of working at BHP up at the Ekati Mine -

A Yeah.

Q -- you would have had occasion to see a number of Finning daily service activity reports?

A Yes.

Q They would have been provided to you in the ordinary course?

A Yes.

Q In fact, when Mr. Raftery and other trained mechanics have occasion to do work, when the work is done they hand in those service reports.

A That's correct.

Q It's their means of evidencing the work that's been done?

A To a limited, limited capacity, yes.

Q Sure. I mean, unlike a lawyer who's going to list everything he does because he wants to charge you a large amount of money --

A Yeah.

Q -- here's the general nature of the repairs that were undertaken?

A Yes.

Q And that information is communicated to BHP personnel?

A That's correct.

[22] Counsel filed a number of cases dealing with the applicability of limitation clauses. A summary of the legal issues engaged in considering the applicability of such clauses is found in *Trigg v. MI Movers International Transport Services Ltd.* (1991), 4 O.R. (3d) 562 (Ont. C.A.):

> The purpose of limitation or exemption clauses is to protect a contracting party who turns out to be negligent. Given that such clauses are frequently inserted where the other party has had little opportunity to negotiate, courts have assessed the validity and applicability of such clauses cautiously.
>
> Where a party to a contract raises a defence based on a limitation or exemption clause, the immediate issue is whether or not the clause is legitimately part of the contract between the parties. The determination of this issue depends on the adequacy of the notice given by the party for whose benefit the clause is inserted. G.H.L. Fridman, *Law of Contracts in Canada*, 2nd ed. (Toronto: Carswell, 1986), summarizes the law as follows, at p. 537:
>
> The applicability of an exclusion or limitation clause can be challenged on the ground that the party seeking its protection did not bring its existence and inclusion in the contract sufficiently to the notice of the other party *at the time of, or prior to the making of the contract*, with the result that the latter cannot be taken to have assented to the clause. If this is so, then the clause will not be effectuated. Unless a party has taken reasonable steps to draw the other party's attention to the contents, or some particular contents, of the proposed contract, *the consent of the offeree to the offer will not be taken to extend as far as the term or terms of which the offeree is ignorant.* (emphasis added)

[23] In *Trigg*, the Ontario Court of Appeal refers to the general rule "that a limitation or exemption clause is not imported into a contract unless it is brought home to the other party so prominently that he or she must be taken to have known it and agreed to it". The Court then went on to refer to the "ticket" cases as the origin of this line of reasoning. Those cases often involve situations where the plaintiff has been given a ticket as a receipt for goods left in the care of the defendant. When the goods are lost or damaged, the defendant relies on a limitation clause or clause containing other onerous conditions in its favour on the back of the ticket which has not been made known to the plaintiff. The lack of notice and lack of agreement on the part of the plaintiff in such circumstances was held to disentitle the defendant from relying on the clause in *Kalmer v. Greyhound Lines of Canada Ltd.* (1979), 105 D.L.R. (3d) 663 (Alta. Q.B.).

[24] Finning submits that the Activity Reports were not like tickets but rather contracts. It argues that the Activity Report was like an offer made by Finning which BHP accepted

without objection and the contents of which therefore bind BHP. The difficulty with this argument is that the evidence indicates that the Activity Reports were not tendered to BHP until after the work was done. Whether the limitation clause is effective surely must depend (at least in part) on whether BHP had notice of its existence prior to the work done by Raftery. In that sense this case bears more similarity to the ticket cases than it does, for example, to *Eagle Dancer Enterprises Ltd. v. Southam Printing Ltd.* (1992), 6 B.L.R. (2d) 45 (S.C.). In *Eagle Dancer*, the limitation clause was contained in the original purchase order or quotation which the plaintiff had accepted and the clause was therefore found to form part of the contract between the parties. In this case, it would appear that the work done by Raftery was done under the main retainer agreement and the Activity Report submitted only after its completion.

[25] A number of issues appear to me to arise from the material, as set out below.

[26] Were the parties *ad idem* as to the purpose of the Activity Reports? The material before me suggests that they may not have been. The excerpt from Stibbard's cross-examination suggests that he understood the Activity Reports to be Finning's method of documenting its work under the retainer agreement rather than individual contracts or amendments to the retainer agreement. Raftery's affidavit suggests that Finning understood the Activity Report to be the governing document.

[27] Was adequate notice given? Whether adequate notice was given is a question of fact: *Trigg v. MI Movers International Transport Services Ltd.*. There is no indication on the material before me that Finning ever brought clause 6 to the attention of anyone at BHP. Finning relies on the fact that the Activity Reports were used on a number of occasions and argues that BHP should be deemed to have had notice of the clause. But it is not clear whether or how often the Activity Reports were used prior to Raftery doing the work on the water truck and the reference to January 18, 1997 (which I assume was meant to be January 18, 1996) in Finning's brief suggests that they may not have been.

[28] As set out in the quotation from Fridman's *Law of Contracts in Canada*, found in the excerpt above from the *Trigg* case, notice of the existence and proposed inclusion of a limitation clause must be given at the time of or prior to the making of the contract. If the Activity Report for Raftery's work on the truck is said to be the contract, then it

is not clear that notice was given prior to that by way of the tendering of other such Activity Reports.

[29] Even if BHP did receive Activity Reports prior to the work complained of, the issue remains whether that is sufficient to find that Finning took reasonable steps to draw BHP's attention to the clause.

[30] Unlike the circumstances in *Eagle Dancer* and *DiPaolo Machine Works Ltd. v. Prestige Equipment Corp.*, [1996] O.J. No. 5069 (Ont. Gen. Div.), in this case there is no evidence that BHP knew that the limitation clause could be found on the back of the Activity Reports or was aware of the likelihood of such clause being there or that BHP had earlier been expressly referred to a like clause. And unlike the circumstances in *Fedak v. Yorkton Auto Haus Ltd. (No. 52)* (1983), 28 Sask R. 275 (Q.B.), in this case there was a main retainer agreement in which one would expect that a significant issue like limitation of liability would be addressed if the parties had contemplated it. There are accordingly in this case issues about what was sufficient for there to be an effective variation of that agreement.

[31] It may be that certain inferences can be drawn where, as here, the parties are sophisticated and are dealing with standard form documents. I do not think that the facts are so clear as to allow inferences to be drawn on this summary judgment application.

[32] With respect to whether the Activity Reports were effective to vary the retainer agreement, the issues will be whether the parties were *ad idem* and notice was given but there is also the issue whether any consideration passed for the variation: *Hyslip v. Macleod Savings & Credit Union Ltd.* (1988), 62 Alta. L.R. (2d) 152 (Q.B.). Finning's argument is that prior acceptance of the Activity Reports constitutes acceptance by BHP of the unilateral notification by Finning of the inclusion of the limitation clause. What the consideration was for that variation is not clear.

[33] All of the above are issues for the trial judge. It cannot be said that BHP has no reasonable prospect of success in its claim that Finning is liable and that the limitation of liability clause is not applicable. There is accordingly a genuine issue for trial.

[34] The application for summary judgment is dismissed. I leave the issue of costs to the trial judge.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
10th day of June, 1999.

Counsel for the Third Party Finning International Inc. and Finning Tractor (1959) Ltd. carrying on business under the name and firm of Finning Tractor Co.:	Donald J. Wilson
Counsel for the Defendant BHP Diamonds Inc.:	Sharon R. Stefanyk
Counsel for the Plaintiff:	Nathan Paul, Student at Law