IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *North Atlantic Refining Limited v. Royal Garage Limited.*, 2023 NLSC 61
Date: April 19, 2023
Docket: 201501G4753

BETWEEN:

NORTH ATLANTIC REFINING LIMITED	PLAINTIFF

AND:

THE ROYAL GARAGE LIMITED	FIRST DEFENDANT (DISCONTINUED)

AND:

TTI SALES & SERVICES INC.	SECOND DEFENDANT

AND:

JIM PATTISON INDUSTRIES LTD.	THIRD DEFENDANT (DISCONTINUED)

AND:

ONTARIO HOSE SPECIALTIES INC. Operating as MARITIME HOSE SPECIALTIES	FIRST THIRD PARTY

AND:

THE ROYAL GARAGE LIMITED	SECOND THIRD PARTY (DISCONTINUED)

AND:

TTI SALES & SERVICES INC.	THIRD THIRD PARTY (DISCONTINUED)

Before: Justice Alexander MacDonald

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: February 20, 2023

Appearances:

Giles W. Ayers	Appearing on behalf of the Plaintiff
James D. Hughes, K.C.	Appearing on behalf of the Second Defendant
Edward J. Vanderkloet	Appearing on behalf of the First Third Party

Authorities Cited:

CASES CONSIDERED: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35; *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. C.A.); *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543; *Ind-Rec Highway Services Ltd. v. Miawpukek Band* (1999), 172 Nfld. & P.E.I.R. 245, 528 A.P.R. 245 (Nfld. C.A.); *Anderson v. Canada (Attorney General),* 2014 NLTD(G) 16; *Martel Building Limited* v. *Canada*, 2000 SCC 60; *D'Amato v. Badger*, [1996] 2 S.C.R. 1071; *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Ryan v. Dew Enterprises Ltd.*, 2014 NLCA 11

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

MACDONALD, J.:

INTRODUCTION

[1] This is a dispute about whether TTI Sales & Service Inc. (TTI) can be liable to North Atlantic Refining Limited (North Atlantic) for economic losses arising from the negligent supply of shoddy goods. TTI third partied Ontario Hose Specialties Inc., operating as Maritime Hose Specialties (Maritime Hose) seeking indemnity if it is liable for the loss.

[2] A North Atlantic fuel distributor (Distributor) obtained a truck from Royal Garage Limited (Royal Garage). TTI converted it into a fuel delivery truck. It installed an oil tank, pump, and fuel hose. TTI acquired the fuel hose, including a nozzle, from Maritime Hose. Maritime Hose attached the nozzle to the hose with couplings.

[3] Jim Pattison Industries Ltd (Pattison) then acquired the fuel delivery truck and leased it to North Atlantic. North Atlantic had no contract with Royal Garage, TTI, or Maritime Hose.

[4] In September 2013, the Distributor, while operating the truck leased to North Atlantic, spilled North Atlantic fuel on North Atlantic customers' property when the nozzle separated from the hose. North Atlantic theorizes that the hose–nozzle couplings were either improperly installed or were the wrong size for the particular hose. It says that either could have caused the separation.

[5] North Atlantic spent about $54,000 remediating the customers' property. North Atlantic obtained a release from its customers. It has no assignment of the customers' claims. North Atlantic makes no claim for damages to its own fuel truck, personnel, or other property. It seeks only recovery of the remediation costs.

[6] Maritime Hose asked me to dismiss North Atlantic's claim for want of prosecution under Rule 40.11 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D.

[7] Maritime Hose also asked me to dismiss North Atlantic's claim under Rule 38, because it represents a pure economic loss not recoverable under one of the exceptions established by the Supreme Court of Canada in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35.

[8] TTI supports Maritime Hose's applications. Its counsel attended the hearing but made no arguments.

ISSUES

[9] At the hearing the parties agreed on the questions I was to answer in these applications. I am to decide:

Issue 1: Should I dismiss North Atlantic's claim for want of prosecution?

Issue 2: Should I provide discretionary relief under Rule 38? If so:

(a) Is North Atlantic's loss a pure economic loss?

(b) Can North Atlantic recover its losses by subrogating to its Customers' claim?

(c) Does North Atlantic's pure economic loss fall within one of the exceptions to a prohibition against recovery of such loss?

DISCUSSION

Issue 1: Should I dismiss North Atlantic's claim for want of prosecution

[10] I will not dismiss North Atlantic's claim. I will now explain why.

[11] I will consider the factors set out by the Court of Appeal in *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. C.A.), at para. 2. Maritime Hose must show that:

(a) there was an "inordinate delay." There is no rule defining what is too long. I am to decide if there is an inordinate delay on the facts of each particular case;

(b) this inordinate delay is inexcusable. I will make an inference that until credible excuses are made out, the delay is inexcusable; and

(c) this inordinate delay seriously prejudices Maritime Hose. The longer the delay, the greater the probability Maritime Hose is prejudiced.

[12] I will first consider whether there was an inordinate delay.

Inordinate Delay

[13] I find that there is no inordinate delay. I will now explain why.

[14] The Court of Appeal in *Penney* at paragraph 10 quoted with approval an English court's statement in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 1 All E.R. 543, that a dismissal is "a draconian order that will not be lightly made."

[15] I should not exercise a dismissal "without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay ... has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible." (*Allen* at para. 10) Maritime Hose must satisfy the Court that one or more of these conditions exist.

[16] The relevant timeline follows:

(a) The Distributor spilled North Atlantic's oil on the customers' property in 2013. North Atlantic issued its Statement of Claim against Royal Garage, TTI, and Pattison in September 2015;

(b) TTI filed its defence and third partied Maritime Hose in November 2015;

(c) Pattison filed a defence and third partied TTI and the Royal Garage in August 2017. Royal Garage filed a defence to the third party claim in September 2017.

(d) TTI and Maritime Hose filed a list of documents in October 2017 and April 2018, respectively;

(e) North Atlantic filed discontinuances against Royal Garage in September 2018, and Jim Pattison Industries in October 2018; and

(f) Discoveries concluded by November 2018.

[17] In 2019, the parties learned that the Distributor discarded the couplings and a small piece of attached hose almost immediately after the spill. It replaced, and then disposed of, the remaining original hose in 2013.

[18] North Atlantic then asked Gates Canada Inc. the hose manufacturer and an Alberta resident company, for production of technical and quality control specifications for the hose it originally supplied.

[19] Gates Canada Inc. failed to provide the specifications. In July 2022, North Atlantic obtained "Letters Rogatory" from this Court asking the Alberta Court of Queen's Bench for its assistance to compel Gates Canada Inc. to provide the specifications.

[20] Although the parties did not move through this litigation quickly, I find the parties methodically moved it to trial. North Atlantic did not act contumeliously or, as defined by the *Oxford English Dictionary* 2nd ed., it did not act reprehensibly and outrageously, because it was rude, contemptuous, insolent or arrogant. There is no evidence that North Atlantic either intentionally lost the equipment, or concealed the loss. Thus, I find there is no inordinate delay.

[21] I now turn to whether Maritime Hose is prejudiced.

Prejudice

[22] Maritime Hose suggests that the loss or disposal of the hose and the couplings causes it prejudice. I find that it does not.

[23] The hose and couplings were disposed of or lost before the end of 2014, before North Atlantic issued its Statement of Claim.

[24] Although loss of the equipment may adversely affect North Atlantic's ability to prove its claim, it is not related to North Atlantic's litigation conduct. I have no evidence to suggest that any of the parties asked for access to the lost equipment earlier in the litigation process or that North Atlantic concealed the loss.

[25] Therefore, I will not dismiss the Plaintiff's claim. I now turn to whether I should provide discretionary relief under Rule 38.

Issue 2: Should I provide discretionary relief under Rule 38?

[26] The Newfoundland and Labrador Court of Appeal sets out the principles for my exercise of discretionary relief under Rule 38 in *Ind-Rec Highway Services Ltd. v. Miawpukek Band* (1999), 172 Nfld. & P.E.I.R. 245, 528 A.P.R. 245 (Nfld. C.A.), at paras. 14–20. This Court summarized these principles in *Anderson v. Canada (Attorney General),* 2014 NLTD(G) 16, at para. 6.

[27] This application is unusual in the sense the parties agree that I if decide these issues in Maritime Hose's favour, I cannot dismiss the claim. North Atlantic may seek to establish a 'novel' duty of care at trial after undertaking a full proximity analysis referred to in *Maple Leaf Foods* as I describe later in this judgment.

[28] Despite this, the parties say and I agree that while my answers may not eliminate a trial, they allow the parties to narrow the issues before the trial judge. Furthermore, I can answer the questions based on the Agreed Statement of Facts.

[29] Finally, as I describe later, I ask the parties to request a meeting to discuss next steps to bring this matter to resolution through trial or otherwise.

[30] I now turn to whether North Atlantic's claim is one for a pure economic loss.

Issue 2(a): Is North Atlantic's claim a pure economic loss?

[31] I find that North Atlantic's loss is a pure economic one.

[32] The court in both *Maple Leaf Foods* (at para. 17) and in *Martel Building Limited* v. *Canada*, 2000 SCC 60, at para. 34, define pure economic loss as "economic loss that is unconnected to a physical or mental injury to the plaintiff's person or physical damage to property."

[33] In *D'Amato v. Badger*, [1996] 2 S.C.R. 1071, at para. 13, the court said *whose* property must be damaged, when it said, "[p]ure economic loss is suffered by an individual that is not accompanied by physical injury or property damage. In the present case, the *corporate appellant, Arbor* suffered neither property damage nor physical injury" [emphasis added].

[34] North Atlantic makes no claims for any damage to its own property or personnel. It makes no claim for damage to its hose or couplings. It makes no claim for its lost oil. Therefore, it did not suffer property damage nor physical or mental injury.

[35] In *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at para. 171, the Supreme Court of Canada defined consequential economic loss as "economic loss in addition to his claims for property damage or personal injury."

[36] Thus, it is not enough that North Atlantic might say it suffered loss of its oil and its couplings. North Atlantic must make a "claim" for such losses. Thus, North Atlantic's loss is not a consequential economic loss but a pure economic one.

[37] I now turn to whether North Atlantic can recover its losses by subrogating its Customers' claim.

Issue 2(b): Can North Atlantic recover its losses by subrogating its Customers' claim?

[38] I find that North Atlantic cannot subrogate to its customers' loss. The customers did suffer damages. North Atlantic did incur costs when it remediated the property damages. It obtained a signed release from its customers. It did not obtain an assignment of the customers' claim for their damages.

[39] There is no common law right of subrogation for a tort claim (*Ryan v. Dew Enterprises Ltd.*, 2014 NLCA 11, at para. 47). North Atlantic could have, but did not, ask its customers to assign their tort claim.

[40] Now, I turn to whether any of North Atlantic's pure economic loss fall within one of the exceptions to a prohibition against recovery of such losses.

Issue 2(c): Does any of North Atlantic's pure economic loss fall within one of the exceptions to a prohibition against recovery of such losses?

[41] I find that it does not.

[42] The court in *Maple Leaf Foods* (at para. 21) said that the current permitted categories of proximate relationship that allow for recovery of pure economic losses are:

(a) negligent misrepresentation or performance of services;

(b) negligent supply of shoddy goods or structures; and

(c) relational economic loss.

[43] North Atlantic says that it can recover its loss under the second category, negligent supply of shoddy goods or structures.

[44] The court said in quoting *Martel* at paragraph 22 that the categories are simply "'analytical tools' that 'provide greater structure to a diverse range of factual situations … that raise similar ... concerns.'" It said, "what matters is whether the requirements for imposing a duty of care are satisfied – and, in particular, whether the parties were at the time of the loss in a sufficiently proximate relationship."

[45] It continued: "Where they are, it may be because the relationship falls within a *previously established category* of relationship in which the requisite qualities of closeness and directness were found, o*r is analogous thereto*" [emphasis added], and if the plaintiff cannot bring its case within a previously established category, it "may seek to establish a 'novel' duty of care after undertaking a full *Anns/Cooper* analysis."

[46] The court described the analysis at paragraph 31: "courts must undertake a full proximity analysis in order to determine whether the *close and direct* relationship – which this Court has repeatedly affirmed to be the hallmark of the common law duty of care – exists in the circumstances of the case" [emphasis original].

[47] North Atlantic says its claim falls within the established category of negligent supply of shoddy goods or structures. In this case, as in *Maple Leaf Foods*, there is no privity of contract between the parties and its claim is in tort.

[48] In *Maple Leaf Foods*, the court confirmed that this category requires that the defect must pose "a real and substantial danger" that there is risk of physical harm to the plaintiffs or their property and the danger would unquestionably cause serious injury or damage if realized (at para. 45).

[49] I find that failure of defective or improperly installed couplings could cause real and substantial danger to persons or their property if the failure causes a spill of fuel. However, the court directs, in paragraph 57, that I must focus on the danger to the "ultimate consumer." In the context of a spill, this must be the customers on whose property the spill occurred and who ultimately suffered loss.

[50] In *Maple Leaf Foods*, Maple Leaf provided franchisees of Mr. Sub with contaminated meat product. The court found that this contaminated meat could be a danger only to the ultimate consumer.

[51] Even if the dangerous product "posed a real and substantial danger to *consumers*, this offers no support for the franchisees' claim that the alleged [pure economic] loss ... was the result of interference with *their* rights. Effectively, the … franchisees are seeking to bootstrap their claim to the rights of *consumers*" (at para. 57 [emphasis original]).

[52] North Atlantic supplied oil to its customers. The fuel is dangerous only if improperly handled. If North Atlantic improperly delivers it, the fuel had "the capacity to cause serious damage to *other* persons and property in the community" (*Maple Leaf Foods* at para. 43 [emphasis added]).

[53] Failure of the couplings and the delivery system resulting in a spill makes an otherwise safe product dangerous. Presumably, meat products are dangerous only if improperly handled.

[54] However, North Atlantic suffered no loss to its personnel or property. Its customers incurred the loss. North Atlantic thus incurred a pure economic loss when it remediated the customers' property.

[55] North Atlantic attempts to bootstrap its claim onto its customers' loss. Therefore, it does not fit under the category for negligent supply of shoddy goods or structures, nor, as in *Maple Leaf Foods*, is it analogous to an established proximate relationship.

[56] Therefore, if North Atlantic seeks to recover its loss, it must establish a new category of recovery for pure economic loss. A trial judge must make a "full proximity analysis." The judge must ask, "in light of the nature of the relationship at issue … the parties are in such a 'close and direct' relationship that it would be 'just and fair having regard to that relationship to impose a duty of care in law'" (at para. 63).

[57] The Supreme Court of Canada in *Maple Leaf Foods* reminds us that a court "must examine all relevant factors present in the relationship between the plaintiff and the defendant – which, while 'diverse and depend[ent] on the circumstances of each case' include 'expectations, representations, reliance, and the property or other interests involved'" (at para. 66).

[58] Not surprisingly, the parties agreed that I cannot decide this in a Rule 38 application.

DISPOSITION

[59] I will not dismiss North Atlantic's claim for want of prosecution.

[60] I find that:

(a) North Atlantic's loss is a pure economic one;

(b) North Atlantic cannot subrogate to its customers' loss;

(c) North Atlantic cannot recover its pure economic loss under an established exception to the prohibition against recovery of such a loss; and

(d) I cannot, in the absence of a robust factual record, conduct the proximity analysis required under *Maple Leaf Foods* to establish a new category of recovery of pure economic loss. This is a matter for trial.

[61] The parties shall request a meeting within 21 days of this decision to discuss next steps to bring this matter to resolution.

COSTS

[62] I reject Maritime Hose's application to dismiss North Atlantic's claim for want of prosecution.

[63] I reject North Atlantic's submission that its loss was not a pure economic one. I reject its submission that it can recover its pure economic loss under an established category. I reject its claim that it can subrogate to its customers' loss.

[64] Therefore, in these circumstances the cost of this application will be in the cause.

ALEXANDER MacDONALD
Justice