IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120201
Docket: S074293
Registry: Vancouver

Between:

EOS Transport Inc.

Plaintiff

And

Alta Pacific Transport Ltd.

Defendant

Before: The Honourable Madam Justice Kloegman

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	G.P. Forrester
Counsel for the Defendant:	E.P. Caissie
Place and Date of Hearing:	New Westminster, B.C. February 1, 2012
Place and Date of Judgment:	New Westminster, B.C. February 1, 2012

[1] **THE COURT:** Judgment. The defendant applies for a summary dismissal of the plaintiff's claim, together with judgment on its counterclaim, all under Rule 9-7.

[2] The plaintiff, in response, seeks to continue the action to a *viva voce* trial on the merits, and in that regard applies to further amend its statement of claim and response to counterclaim.

[3] This commercial dispute has arisen between the plaintiff, who is a broker of trucking and haulage services, and the defendant, with whom the plaintiff subcontracted some of those services.

[4] In summary, the plaintiff alleges that the defendant breached an agreement made May 1, 2007, by delivering tanks to the plaintiff's customer, Agri-Source Fuels LLC without the final approval of the plaintiff.

[5] The plaintiff also alleges a breach of a general brokerage agreement between it and the defendant dated July 12, 2006. This latter agreement contains a restraint of trade clause which the plaintiff alleges was breached by the defendant when the defendant made a further delivery of to Agri-Source on June 11, 2007, pursuant to an agreement directly between the defendant and Agri-Source.

[6] Thus the plaintiff claims damages for breach of contract, interference with economic relations, inducing breach of contract, aggravated damages and punitive damages.

[7] The defendant's counterclaim is for the fee to deliver the tanks pursuant to the loading confirmations dated April 13, and April 20, 2007.

[8] The parties spent the day before me arguing the merits of the case, and whose affidavit evidence I should accept when the evidence conflicted. Given some of my comments during the application, it will probably come as no surprise that I find this case is not suitable for a summary determination.

[9] Firstly, I counted at least nine legal and factual issues arising on the evidence, and some of these involved sub-issues. These issues are:

1) Is the contract of July 12, 2006, enforceable between the parties?

2) If it is enforceable, what is the correct interpretation of clause 5? That is, does it apply to business solicited by the defendant, or any business accepted by the defendant directly from a customer of the plaintiff?

3) Is the amended loading confirmation dated May 2, 2007, enforceable between the parties? That is, was there consideration for the alleged amendment?

4) If the May 2, 2007 amended term is enforceable, was it breached by the defendant or frustrated by the earlier delivery of the tank?

5) If both the July 2006 and May 2, 2007 agreements are enforceable, which restraint of trade clause applies?

6) If the May 2, 2007 agreement is paramount, is the restraint of trade clause in clause 3 void as imposing a penalty, not liquidated damages?

7) Did the plaintiff have a contract with Agri-Source for additional tanks beyond those delivered under its original agreement with Agri-Source?

8) If so, did the defendant have knowledge of this ongoing business?

9) If so, was the defendant acting in bad faith by dealing with Agri-Source directly?

[10] That is a rough list of the issues that appear to me when I review the material that is being put before me.

[11] Next I note that the evidence regarding many of these issues is in direct conflict. Some of these conflicts are listed in the chart prepared by the plaintiff and attached to the plaintiff's written submission. As an example, Mr. Higdon of Agri-Source deposes that he contacted the defendant only after the dispute arose with the plaintiff, whereas Mr. Rupp of the defendant deposed that Mr. Higdon called him

May 15, 2007. Mr. Kalkat says this was prior to any dispute between the plaintiff and Agri-Source, because as late as May 22, the plaintiff was still arranging for delivery of additional tanks to Agri-Source.

[12] Another example is that Mr. Kalkat deposes that he instructed Mr. Rupp not to deliver the May load to Agri-Source without his approval several days before issuing the amended loading confirmation, whereas Mr. Rupp denies any such conversation and says only that he knew there were some financial issues between the plaintiff and Agri-Source at the time.

[13] With regard to the amount in issue, the plaintiff's claim on its invoices is about $42,000 plus interest, and the damages for loss of business opportunities may be as much as that again. The costs of a four-day trial are unlikely to exceed that, although they could consume a significant amount of what the plaintiff hopes to gain. However, on reflection, I do not think that there would be a substantial saving by having further cross-examinations on affidavits or issuing letters rogatory to try and resolve these credibility issues. In the long run, a full trial is probably the most economical method of resolution.

[14] Therefore I dismiss the defendant's application for a summary trial. As suggested by plaintiff's counsel, the application of the plaintiff to further amend its statement of claim and response to counterclaim should be adjourned to allow the parties to digest the issues this I hope I have helped to crystallize. All right.

[15] MR. CAISSIE: Now, just my observation, the dismissal of the application typically seems to result in an order that costs be in the cause, and I would ask that that be the result. Because this may well turn out to be an appropriate attempt at least on the defendant's part, if he is a successful party. And if not, the plaintiff's going to get their costs.

[16] MR. FORRESTER: In my submission, My Lady, would be that costs should be to the plaintiff in any event of the cause, because with the exception of the agreement that should have been disclosed by both parties, this evidence was all

known to the defendant prior to bringing this application. There has been a tremendous expense involved. I am not saying that there has not been some constructive aspect, including getting these issues further delineated, but my submission is costs should follow the event but payable in any event of the cause.

[17] THE COURT: Yes. I tend to agree with Mr. Caissie, that if at the end of the day he is successful, then that is -- because all this other evidence that you have taken such pains to point out is not accepted by the court. And so I think it is appropriate in this instance that the matter proceed to trial and that costs be in the cause.

[18] MR. CAISSIE: Thank you, My Lady.

[19] MR. FORRESTER: Thank you, My Lady.

[20] MR. CAISSIE: And, My Lady, my friend and I discussed one other -- and I am not sure you want to hear any more about this case.

[21] THE COURT: Yes.

[22] MR. CAISSIE: But what we both realize, we were -- we were expected this result by the end of the day, My Lady, and I think we both quite fairly realize that our clients are -- this is uneconomic for both of us to go to a full trial.

[23] Now, what I suggested to my friend is that, you know, subject to what Your Ladyship thought, if we could find an hour of time, you know, on your schedule within the next several months to have a chat, it would preclude you being the trial judge. Although that is pretty unlikely in any event, about your thoughts on some of the issues just generally that might assist us in just settle this case. Because it really should be settled.

[24] THE COURT: Yes. Well, I do agree with you that it should be settled. Because like I said in my reasons, that a good chunk of it would be taken out on the trial expenses.

[25] I am in New West this week and next. I do not know if there is time you can find then to have a settlement conference. I do not know how busy things are or how busy you are. If we can do that, I am happy to assist. If not, like I say, I am not going to be available for another couple of months down the road, and by then probably anything I remember from here, you know, is going to be negligible and you might as well go in front of any judge for a settlement conference at that point.

[26] So if you can do something, well, Thursday. I know tomorrow they have got my completely booked, but if there is any time on Friday or next week, we could do that.

[27] MR. CAISSIE: Yeah, I should jump right in and just say that is not going to work --

[28] THE COURT: Is not going to work for you?

[29] MR. CAISSIE: I am off to Palm Springs tomorrow for the balance of the week and all of next week. So --

[30] THE COURT: Okay.

[31] MR. CAISSIE: So, yeah, that is --

[32] THE COURT: So I think that is unlikely, and I just, you know, if you want to wait for me, that is fine, but I am just saying that is probably not worthwhile because I will -- the learning curve --

[33] MR. CAISSIE: No, I complete I understand that. You are absolutely right. That is the problem with doing that. Okay. Well, that is fine. We will hopefully sort it out. Thank you, My Lady.

[34] MR. FORRESTER: Thank you, My Lady.

D. Kloegman, J.

Madam Justice D.A. Kloegman