

Date: 20080307

Docket: T-822-07

Citation: 2008 FC 319

Ottawa, Ontario, March 7, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

LOCHER EVERS INTERNATIONAL

Plaintiff

and

CANADA GARLIC DISTRIBUTION INC.

Defendant

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is a motion for summary judgment brought by the plaintiff, Locher Evers International (LEI) to recover amounts claimed from the defendant, Canada Garlic Distribution Inc. being the sum of \$3,154.09 plus an amount sufficient to purchase \$212,503.00 USD in respect of freight for the carriage of produce from China to Toronto. The defendant does not dispute the amount claimed but asserts first, that damage to cargos attributed to alleged breaches of contract by the plaintiffs gives it a right to set-off against the claim and, second, that the agreement reached between the parties contains a clause ousting the jurisdiction of the Federal Court to adjudicate this claim.

II. Facts

[2] Canada Garlic imports fresh vegetables to Canada from China via cargo ships. LEI is a company that arranges the import of goods via cargo ships. The parties entered into an agreement on January 8, 2002, which was based on a credit facility agreement. The credit agreement is a single page document. The relevant terms read as follows:

CREDIT TERMS

Agreement:

[...]

All invoices shall be payable to LEI within ___ days from the date of invoice. Interest, calculated daily, is charged and payable on all overdue invoices, reckoned from the due date of each invoice, at an annual rate equal to the commercial prime lending rate at the Canadian Imperial Bank of Commerce, plus 2 per cent per annum, for any given day.

[...]

“Customer” will be bound by the Standard Trading Conditions (“Conditions”) (as amended or revised from time to time) of the Canadian International Freight Forwarders’ Association Inc. and the Canadian Society of Customs Brokers which amendments or revisions LEI will, upon request, send to the “Customer”.

[...]

“Customer” acknowledges having received a copy of said “Conditions” and “Contract Terms” on or before the date of this application.

The Courts of the Province of Ontario shall have jurisdiction over any action brought to recover amounts owing to LEI under this Agreement or upon invoices rendered by LEI for services performed for its “Customer”.

[3] The defendant has imported 635 full containers of vegetable products with the importing assistance of the plaintiff since January 2002. Between May and July 2006 five containers of snow peas and sugar snaps arrived in Canada which were said to have been spoiled after being transported by Evergreen Marine Corporation. The total damages claimed by the defendant for the plaintiff's failure to deliver the vegetables in good condition amount to \$222,585.15 CAD. The defendant alleges that the vegetables were damaged due to a malfunctioning of the temperature controlled refrigeration container and began to decompose during transit.

[4] The defendant paid for the freight and associated charges on these five damaged containers and continued to do business with the plaintiff. Forty-nine invoices were issued to the defendant by the plaintiff between November 15, 2006 and March 19, 2007 for subsequent shipments, unrelated to the damaged cargo. The total amounts of these charges is \$212,503.00 USD and \$3,154.09 CAD respectively and the defendant has not paid these invoices, claiming that no satisfactory resolution had been reached for the five damaged containers and thus, it was entitled to set-off.

[5] The defendant claims that prior to this litigation, the specific CIFFA terms were never brought to its attention despite the fact that they were included in the credit agreement. At paragraph 17 of the CIFFA conditions we find the following:

“The Customer shall pay to the Company in cash, or as otherwise agreed, all sums immediately when due without reduction or deferment on account of any claim, counterclaim or set off.”

[6] Each of the plaintiff's bills of lading issued to the defendant contains the following text:

The goods covered by this Multimodal/Through Transport Bill of Lading have been received by the pre-carrier or by the ocean carrier named hereon as the case may be in apparent good order and condition except as noted and will be shipped, carried, forwarded, stored, handled, and delivered subject to the terms and conditions of the shipping lines, airlines, land carriers, organizations or firms who have a part in the receiving, shipping, carrying, forwarding, storing, handling and delivering of the under-mentioned goods. It is agreed that LOCHER EVERS INTERNATIONAL (LEI) and/or their appointed agents are only the agent of the shipper or consignee and are not carriers or principals to any contract of carriage. The current version of the terms and conditions of the Canadian International Freight Forwarders' Association (CIFFA) are incorporated by reference herein and shall apply and govern the responsibilities of LEI as agent in issuing or arranging for the issue of this Bill of Lading. To assist the holder of this bill of lading, the terms and conditions applicable to the actions of LEI as agent have been set out on the reverse side of this document. The CIFFA standard trading conditions can also be viewed at www.ciffa.com, including the French version. Despite the title of this document as "Multimodal Transport Document", these conditions also apply if only a single mode of transport is used.

III. Analysis

[7] This and higher Courts have repeatedly held that a claim for ocean freight such as the one here asserted falls squarely within the grant of jurisdiction found in section 22 of the *Federal Courts Act*, R.S.C., 1985, c. F-7. (See *e.g. ITO—Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437).

[8] Section 22 reads in relevant part:

Navigation and shipping

22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as Navigation and shipping

Navigation et marine marchande

22. (1) La Cour fédérale a compétence concurrente, en première instance, dans les cas — opposant notamment des administrés — où une demande de réparation ou un recours est présenté

22. (1) The Federal Court has concurrent original jurisdiction, between subject and subject as well as otherwise, in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.

en vertu du droit maritime canadien ou d'une loi fédérale concernant la navigation ou la marine marchande, sauf attribution expresse contraire de cette compétence.

Maritime jurisdiction

Compétence maritime

(2) Without limiting the generality of subsection (1), for greater certainty, the Federal Court has jurisdiction with respect to all of the following:

(2) Il demeure entendu que, sans préjudice de la portée générale du paragraphe (1), elle a compétence dans les cas suivants :

[...]

[...]

(e) any claim for damage sustained by, or for loss of, a ship including, without restricting the generality of the foregoing, damage to or loss of the cargo or equipment of, or any property in or on or being loaded on or off, a ship;

e) une demande d'indemnisation pour l'avarie ou la perte d'un navire, notamment de sa cargaison ou de son équipement ou de tout bien à son bord ou en cours de transbordement;

(f) any claim arising out of an agreement relating to the carriage of goods on a ship under a through bill of lading, or in respect of which a through bill of lading is intended to be issued, for loss or damage to goods occurring at any time or place during transit;

f) une demande d'indemnisation, fondée sur une convention relative au transport par navire de marchandises couvertes par un connaissement direct ou devant en faire l'objet, pour la perte ou l'avarie de marchandises en cours de route;

[...]

[...]

(i) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

i) une demande fondée sur une convention relative au transport de marchandises à bord d'un navire, à l'usage ou au louage d'un navire, notamment par charte-partie;

[9] In the case at bar, the jurisdiction clause relied on by defendant does not purport to oust the jurisdiction of the Federal Court. Whether or not the word shall is viewed as mandatory, the clause does not defeat the statutory grant of jurisdiction quoted above at paragraphs 22(2)(e) and (f).

[10] Furthermore, it is also my view that the defendant has failed to raise the question of jurisdiction timely. It should have done so by preliminary motion to strike the pleadings of the plaintiff. Instead, the defendant has simply pleaded over. I would refer to my decision in *Dene Tsaa First Nation v. Canada* [2001] F.C.J. No. 1177 at paragraphs 3 and 4 where I said:

3 In my view, the great weight of the case law in this Court is to the effect that a motion which is based on the subparagraphs of Rule 221 other than subparagraph a) must be brought before the defendant has pleaded over, or if brought after that time the plea itself must have contained a reservation with regard to the impugned paragraphs. I am satisfied to cite only one case in support of that proposition and that is the decision of the Court of Appeal in *Proctor & Gamble Co. v. Nabisco Brands Ltd.* [(1985) 62 N.R. 364 at 366]

4 There is a reason for the rule, namely that where a motion to strike is based on paragraph a), that is to say that the statement of claim or the impugned paragraphs do not disclose a reasonable cause of action, the motion goes to the very heart of the action itself and it is appropriate that the Court should be able to deal with matters of that sort at any stage with perhaps only cost consequences flowing if the person making the motion does so on a late basis. However, where the motion is based on paragraphs b) to f) of the Rule, it is essentially a technical pleading matter and the policy of the Court is, and has for many years, been that parties should be encouraged to put those matters behind them at an early stage. If a party wishes to take issue on a technical basis with another party's pleading, that must be done as soon as possible in the proceedings, otherwise the party must hold his or her peace.

[11] Further, I note that the defendant's reliance on the jurisdiction clause in the credit agreement is inconsistent with its attempt to avoid the application of the other clauses in the same agreement. Ms. Qiu who was in charge of logistics for the defendant, in her affidavit, deposes to the effect that the CIFFA terms and conditions were not brought to her attention. This is incompatible with the statement in the credit agreement, quoted above, that a copy of those terms and conditions was provided to Canada Garlic.

[12] There are constant and consistent references to the CIFFA terms and conditions in virtually all the documents emanating from the plaintiff to the defendant, notably in the Credit Agreement and on the bills of lading mentioned above. I am persuaded that the former took reasonable steps to draw those terms and conditions to the defendant's attention. I find that the CIFFA terms form part of the contractual arrangements between them.

[13] In particular I find that the CIFFA terms and conditions exclude any claim to set-off for alleged claims for damage to cargo and when read with the face page of the bills of lading issued in respect of the disputed shipments, make it plain that LEI was acting as agent for the defendant in concluding the contracts of carriage and as agent for the carrier in acknowledging receipt of the goods in apparent good order and condition. LEI was not the actual carrier, the latter being clearly identified in the bills of lading. The evidence is virtually all to be found in contemporary documents and there are no questions of credibility in this case. I find that there is no genuine issue for trial and the defense to the claim must fail.

[14] The motion for summary judgment will be granted and the plaintiff shall have judgment in the amounts claimed together with its costs to be assessed. If the parties cannot agree on the calculation of the amounts due a reference may be requested.

ORDER

THIS COURT ORDERS that

1. The plaintiff's motion for summary judgment be granted.
2. The plaintiff shall have judgment in the amounts claimed together with its costs to be assessed.

"James K. Hugessen"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-822-07

STYLE OF CAUSE: LOCHER EVERS INTERNATIONAL
v. CANADA GARLIC DISTRIBUTION INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 16, 2008

REASONS FOR ORDER: HUGESSEN J.

DATED: MARCH 7, 2008

APPEARANCES:

GAVIN MAGRATH FOR THE PLAINTIFF

ALLAN S. HALPERT FOR THE DEFENDANT

SOLICITORS OF RECORD:

MAGRATH O'CONNOR LLP FOR THE PLAINTIFF
TORONTO, ONTARIO

TORONTO, ONTARIO FOR THE DEFENDANT