Federal Court of Appeal | Cour d'appel fédérale

Date: 20200204

Docket: A-242-19

Citation: 2020 FCA 36

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

LABRADOR-ISLAND LINK GENERAL PARTNER CORPORATION ACTING AS THE GENERAL PARTNER FOR THE LABRADOR-ISLAND LINK LIMITED PARTNERSHIP
and
THE LABRADOR-ISLAND LINK LIMITED PARTNERSHIP

Appellants

and

PANALPINA INC.
and
DESGAGNÉS TRANSARCTIK INC.
and
LOGISTEC STEVEDORING INC.

Respondents

Heard at Montréal, Québec, on December 16, 2019.

Judgment delivered at Ottawa, Ontario, on February 4, 2020.

REASONS FOR JUDGMENT BY: RIVOALEN J.A.

CONCURRED IN BY: BOIVIN J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

RIVOALEN J.A.

I. Introduction

[1] This appeal is from the judgment of Justice Roger Lafrenière of the Federal Court (the Judge) rendered on May 24, 2019 (2019 FC 740), granting the respondents' motions for summary judgment and dismissing the appellants' action because it was time-barred. The appellants challenge the Judge's findings in respect of contractual terms and conditions that they say apply to the dealings between the parties. The appellants also submit that the Judge erred when finding that the respondents did not consent to an extension of time to file the action and were not estopped from invoking the shorter limitation period.

[2] Although this appeal touches on some aspects of maritime law, it rests entirely on principles of contract law. This case turns on the contractual interpretation applied to a distinct factual matrix. The facts are not in dispute and the Judge summarized them at paragraphs 3 to 10, and 17 to 47 of his reasons. The dispute, and the heart of this appeal, lies in the application of the contracts put forward by the parties, which ones apply to whom and to what extent. As this is a contextual exercise, I will briefly describe the parties and their dealings with each other.

II. Background

[3] On October 3, 2013, Nalcor Energy (Nalcor) entered into an agreement with Panalpina Inc. (Panalpina), one of the respondents in this appeal. The agreement is described as a services agreement for the provision of freight forwarding services (FFSA) with respect to the development of a hydroelectric project located in the lower Churchill River area in Labrador. Nalcor contracted with Panalpina for it to provide general freight forwarding services for the project including the domestic and international shipment of materials and equipment to the lower Churchill River project location.

[4] Under the FFSA, Panalpina was responsible for arranging and collecting, dispatching, port/dock handling, storing and transporting materials and equipment from the place of shipment to the destinations designated by Nalcor. Panalpina was encouraged to contact other project contractors and suppliers to support its transportation requirements. It was also required to hire staff and set up an office in St. John's, Newfoundland and Labrador, to manage and coordinate the freight forwarding services.

[5] The appellants are the affiliates of Nalcor. They are not a party to the FFSA. However, for ease of reference, I refer to Nalcor acting alone or in concert with the appellants, as "Nalcor" throughout the reasons, except where identification of the appellants standing apart from Nalcor assists with the analysis.

[6] As contemplated by the FFSA, Panalpina issued quotes to Nalcor suggesting various carriers and stevedoring services for each shipment of the project materials. Nalcor approved quotes involving Logistec Stevedoring Inc. (Logistec) for its stevedoring services and Desgagnés Transarctik Inc. (Desgagnés) for its carrier services, the two other respondents in this appeal. Desgagnés performed carrier services pursuant to contracts with Panalpina, while Logistec performed stevedoring services pursuant to contracts with both Panalpina and Desgagnés.

[7] At the conclusion of each shipment, Panalpina provided invoices to Nalcor for the payment of its services, in accordance with paragraph 11.4 of the FFSA.

[8] At no time did Nalcor enter into any contractual arrangements with Logistec and Desgagnés.

[9] Nalcor purchased project materials and equipment under different procurement scenarios described in the scope of work specification document attached to the FFSA. In particular, Nalcor required the transport of multiple reels of aluminum conductor steel-reinforced cable weighing thousands of metric tonnes that it purchased for the hydroelectric project. Panalpina was responsible for hundreds of shipments of these materials to the project location and Nalcor discovered upon arrival of two such shipments on June 2, 2015, and November 2, 2015, that the materials were damaged. On September 9, 2015, and on November 2, 2015, Nalcor advised Panalpina of its intent to file a claim for damages in relation of those two shipments.

[10] The two subject shipments were, respectively, the 299th and 459th shipments arranged at the request of Nalcor, all of which followed the same sequence of events of quotes offered by Panalpina, acceptance by Nalcor, and invoices from Panalpina to Nalcor for payment of its services.

[11] On May 29, 2017, the appellants filed a statement of claim for damages against the respondents in an amount over $3,700,000. The respondents each filed a motion for summary judgment requesting that the Federal Court dismiss the action as it was time-barred.

[12] Three potential limitation periods arise in this factual matrix. The first period is of nine months in total, in accordance with the Standard Trading Conditions of the Canadian

International Freight Forwarders Association, Inc. (CIFFA). The CIFFA terms were referenced on each quote and each invoice prepared by Panalpina (AB, Volume IV, Tab 68 and Volume V, Tab 76).

[13] The second period is of one year in accordance with the *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, also known as *The Hague Rules,* as incorporated by reference in Sea Waybills issued by Desgagnés (AB, Volume VI, Tab 85).

[14] The third period is of two years. The appellants rely on this limitation period and submit that the FFSA operates in this fact scenario. Although the FFSA does not expressly refer to this limitation period, the appellants rely on paragraph 1.9 of the FFSA that states it is to be construed in accordance with the laws of Newfoundland and Labrador, which, at the relevant time, provided for a two year limitation period for contractual claims (AB, Volume I, Tab 16 p. 114, 118).

[15] The Judge found that the nine months limitation period set out in the CIFFA applied to the facts of this case and that the action was therefore time-barred. The Judge granted the motions for summary judgment with costs and for one of the respondents, double costs, against the appellants.

[16] For the reasons set out below, I would dismiss this appeal with costs.

III. Standard of Review

[17] The standard of review applicable to the Judge's findings was in dispute. The appellants argue that correctness is the standard of review this Court must apply because the CIFFA terms and conditions in this case are a standard form contract and therefore their interpretation is a question of law (*Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 at paragraph 46 (*Ledcor*)). Furthermore, they say the Judge erred in law when he failed to apply the "legal test" established in *Locher Evers International v. Canada Garlic Distribution Inc*., 2008 FC 319, 165 A.C.W.S. (3d) 7 (*Locher Evers*) and did not apply the rule of *contra proferentem* to construe the terms of the FFSA against the respondents (*Ledcor* at paragraph 51).

[18] Relying on their arguments that the standard is a correctness review, the appellants did not point to any palpable and overriding errors made by the Judge in his fact-finding exercise or in his application of the law to those facts.

[19] The applicable standard of review was articulated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Housen*). The standard of correctness applies to questions of law (*Housen* at paragraph 8), but findings of fact or questions of mixed fact and law are reviewable only where the court of first instance has made a palpable and overriding error (*Housen* at paragraphs 10 and 36).

[20] Generally, the interpretation and characterization of contracts have been found to be questions of mixed fact and law (*Churchill Falls (Labrador) Corp. v. Hydro-Quebec,* 2018 SCC 46, [2018] 3 S.C.R. 101 at paragraph 49; *Uniprix inc. v. Gestion Gosselin et Bérubé inc.,* 2017 SCC 43, [2017] 2 S.C.R. 59 at paragraphs 41-42; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at paragraph 50 (*Sattva*)).

[21] I accept that *Sattva* should not be read as holding that contractual interpretation is always a question of mixed fact and law requiring deference on appeal. As the Supreme Court of Canada reminds us at paragraph 46 of *Ledcor*, if the appeal involves a standard form contract, the interpretation issue is of precedential value and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, the interpretation is better characterized as a question of law subject to correctness review.

[22] The contract under scrutiny in the *Ledcor* decision was a standard form builders' risk insurance policy. However, unlike in *Ledcor,* I find that the contracts in this appeal cannot be described as standard form contracts, the interpretation of which having precedential value. In the case before us, all of the parties and Nalcor, who is a non-party but the owner of the materials, are sophisticated corporate entities involved in the construction of a multi-billion dollar hydroelectric project. The FFSA was negotiated and prepared with the assistance of lawyers. The other contracts, terms and conditions set out in paragraph [6] above cannot be described as being standard form contracts for which interpretation in the present circumstances would have precedential value. Importantly, the factual matrix in this case assists in the interpretation process. I am of the view that the questions in this case are of mixed fact and law,

and therefore the appropriate standard of review this Court must apply is whether the Judge committed any palpable and overriding error unless there is a readily extricable error of law, in which case we must apply the standard of correctness (*Housen*).

IV. The Issues and Analysis

[23] The appellants submit that the Judge erred in four ways, namely:

i. The Judge erred in holding that the CIFFA terms were applicable to the parties;

ii. The Judge erred in holding that the respondents did not consent to an extension of time or were not estopped from invoking the CIFFA terms or Sea Waybill terms;

iii. The Judge erred in holding that the Sea Waybill terms applied and that all three respondents could benefit from them; and

iv. The Judge erred in holding that Desgagnés could benefit from a double costs rule.

A. *Did the Judge err in holding that the CIFFA terms were applicable to the parties?*

[24] On the first ground of appeal, the appellants advance three main arguments. First, they argue that at no time did Nalcor consent to the CIFFA terms. They say it is unclear how the CIFFA terms could apply and those terms should be restricted to "rates" only (Appellants' memorandum of fact and law at paragraphs 29-35).

[25] Second, they say the terms of the FFSA applied to the individual shipments of the materials (Appellants' memorandum of fact and law at paragraphs 7-21). Accordingly, the two-year time limitation period should apply.

[26] Third, the appellants submit that the Judge committed errors in law on principles of contractual interpretation; the first on the *contra proferentem* rule, the second on the application of the *Locher Evers* decision (*Locher Evers* at paragraph 12).

[27] To succeed on the first and second arguments I have just outlined, the appellants must establish that the Judge made palpable and overriding errors. They have not established any such errors, as I will explain below.

[28] Dealing with the first argument, the appellants maintain that there were only a few obscure references to the CIFFA terms contained in the parties' documents and that the appropriate personnel at Nalcor never saw or consented to them.

[29] On the question of the incorporation of the CIFFA terms, the Judge determined that the appellants had notice of the terms as each quote and each invoice Panalpina provided to the appellants referenced the CIFFA terms and conditions. He also found that the evidence established that Panalpina brought the terms and conditions to the attention of the appellants, for example by way of Panalpina's quotes (Reasons at paragraph 60). He observed that the appellants were sophisticated shippers, and were familiar with other international freight forwarders and knew the nature of their role (Reasons at paragraph 58). The Judge also drew an

adverse inference against the appellants when they chose not to call on the testimony of Mr. Caporiccio, the Nalcor employee who was most involved with the Panalpina arrangements. The appellants instead relied on "second hand" knowledge of a different witness, Mr. Hussey, who admitted that he did not focus on terms printed on relevant documents that he was asked to sign (Reasons at paragraphs 63-65).

[30] The Judge concluded that the appellants had actual notice or were negligent in not taking proper notice of the contracts put before them (Reasons at paragraph 66).

[31] Therefore, the Judge concluded that the CIFFA terms applied to the two shipments in question, and the claims were time-barred.

[32] It was open to the Judge to find on the evidentiary record before him that the CIFFA terms applied and he committed no reviewable errors in so finding. The appellants had notice of the CIFFA terms hundreds of times, through the quotes and invoices provided for each shipment. Indeed, as stated in paragraph [10] above, the two subject shipments were, respectively, the 299th and 459th shipments arranged at the request of Nalcor, all of which followed the same sequence of events of quotes offered by Panalpina, acceptance by Nalcor, and invoices issued from Panalpina to Nalcor for payment of its services.

[33] Turning to the second argument, the appellants point to several ways in which they say the FFSA encompassed the shipments and was operative over the CIFFA terms. In particular, they direct the Court to specific clauses of the FFSA to support their arguments. Article 1.9 of

the FFSA confirms that it is to be construed in accordance with the laws of the Province of Newfoundland and Labrador; hence, the two-year limitation period applies (Appellants' memorandum of fact and law at paragraph 24). Article 28 of the FFSA, entitled "Entire Agreement", mandates that amendments to the FFSA are allowed only in accordance with this provision.

[34] On the question of the terms of the FFSA, the Judge concluded that Panalpina was acting as Nalcor's principal with respect to the May and October 2015 shipments, pointing to several facts in support of this finding (Reasons at paragraph 53). He determined that the FFSA did not cover each individual shipment: "[t]he FFSA makes no mention of the transportation of the Conductor Reels. It also does not contain any of the material terms relating to their carriage. In fact, it was clearly contemplated by the parties to the FFSA that the terms and conditions of each specific shipment would be determined in the future by way of distinct contractual documents." (Reasons at paragraph 67). The Judge found that Mr. Hussey, witness for the appellants, admitted that the specific terms and conditions for each shipment would be specified in the contracts relating to that shipment (Reasons at paragraphs 68-70). Moreover, the Judge found that the FFSA did not explicitly address a limitation period, and there was no evidence that the parties had turned their mind to it during negotiations; he held that the choice of law clause in the FSSA was limited to matters of construction and disputes arising from the FFSA itself. Therefore, the parties were free to put forward terms that dealt directly with limitation (Reasons at paragraphs 71-72).

[35] While I do not condone the assumption the Judge appears to have made to the effect that the appellants were a party to the FFSA, I agree with his ultimate conclusion that the FFSA does not assist them. The respondents say that the appellants cannot rely upon the FFSA as they are not a party to it and have not established any basis upon which they may avail itself of its provisions. The evidentiary record supports this argument. I agree that while Nalcor and Panalpina are parties to the FFSA, the appellants are not. The appellants cannot rely on its terms. Accordingly, the limitation period of two years is not available to them

[36] The appellants have not convinced me that the Judge made any palpable and overriding errors in his analysis of the facts and their application to the FFSA in this appeal. They have not pointed this Court to any palpable and overriding errors made by the Judge, and I find that he in fact made no such reviewable errors because there was ample evidence to support his conclusions.

[37] Finally, I will now turn to the legal arguments advanced by the appellants framed in contract law. As indicated earlier, they submit that the Judge committed errors on contractual interpretation; the first on the *contra proferentem* rule, the second on the application of the *Locher Evers* decision (*Locher Evers* at paragraph 12).

[38] On the *contra proferentem* rule, the appellants submit that there is an ambiguity between the terms of the FFSA and the CIFFA, and because Panalpina is attempting to exculpate its liability by invoking terms to its benefit, the Judge should apply the *contra proferentem* rule in favour of the appellants.

[39] I cannot agree.

[40] The *contra proferentem* rule is to be applied only if a contract is ambiguous. The Supreme Court of Canada has held that it is to be used as a rule of last resort, "only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document." (*Reliance Petroleum Ltd. v. Stevenson*, [1956] S.C.J. No. 68, [1956] S.C.R. 936 at p. 953 (per Cartwright J.). This passage was cited with approval by Estey J. in *Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Company*, [1979] S.C.J. No. 133, [1980] 1 S.C.R. 888 at p. 901 and by Iacobucci J. (dissenting) in *Manulife Bank of Canada v. Conlin*, [1996] S.C.J. No. 101, [1996] 3 S.C.R. 415 at paragraph 80. It was also applied in *Scanlon v. Castlepoint Development Corp.*, 11 O.R. (3) 744, 99 D.L.R. (4th) 153, leave to appeal refused [1993] 2 S.C.R. x, docket 23427 (5 August 1993).

[41] In the present appeal, the Judge was able to ascertain the meaning and application of the CIFFA terms; no contractual ambiguity remained unresolved. I therefore find that the Judge did not commit any error in declining to apply the *contra proferentem* rule.

[42] For the appellants' last argument under the first ground of appeal, they rely on the Federal Court's decision in *Locher Evers* at paragraph 12 and submit that the applicable legal standard for the incorporation of terms and conditions into contractual dealings between Nalcor and Panalpina has not been met. They say that the reference to CIFFA terms and conditions must be "constant and consistent" and Panalpina must take "reasonable steps to draw those terms and

conditions to its customer's attention". They say that the Judge erred in law as he did not apply this legal standard and the facts do not support such a finding, constituting a factual error.

[43] I cannot agree with this argument. The words used by the Court in the *Locher Evers* decision do not establish a legal "test". No other jurisprudence purports to apply such a test. The Judge did not err in law; rather, he made specific findings of fact relating to the incorporation of the CIFFA terms and conditions. For the same reasons I stated in paragraphs [29] to [32] above, the appellants have not established that the Judge made any palpable and overriding errors.

B. *Did the Judge err in holding that the respondents did not consent to an extension of time or were not estopped from invoking the CIFFA or Sea Waybill terms?*

[44] Regarding the second ground of appeal, the appellants argue that the Judge ignored an explicit email communication from Panalpina stating that the standard time bar was two years and that requests for extension would be considered. They also argue that the Judge failed to recognize evidence establishing that the appellants had relied on Panalpina's statement to their detriment, the evidence in question being an email exchange involving Nalcor's loss adjuster from Charles Taylor Adjusting (Appellants' memorandum of fact and law at paragraphs 36-43). They submit that the failure to deal with the appellants' arguments is an error in law.

[45] Contrary to the appellants' assertions, the Judge did not fail to consider their arguments. He rejected them. The Judge did not accept the arguments on consent and estoppel on the basis that the emails in question were hearsay. He also concluded that the appellants had failed to establish all the necessary factors for a finding of estoppel (Reasons at paragraphs 74-75). The

Judge made no reviewable error in rejecting these arguments. The email in question was transmitted in the context of responses to undertakings, without any supporting affidavit. None of the emails emanated from or were addressed to the appellants. The appellants filed no affidavit evidence establishing a connection between the statements made by Charles Taylor Adjusting and the actions or decisions taken by the appellants. In light of the lack of evidence, it was open to the Judge to reject the appellant's arguments on consent and estoppel.

[46] In conclusion, on the first and second grounds of appeal, the Judge made no reviewable errors when he held that the CIFFA terms were applicable to the parties and the action against the three respondents was time-barred (Reasons at paragraphs 77-79).

C. *Did the Judge err in holding that the Sea Waybill terms applied and that all three respondents could benefit from them?*

[47] Having found that the Judge did not err in holding that the CIFFA terms applied and that there was no estoppel, I need not address the appellants' third ground of appeal. The Judge's comments were *obiter dicta* and thus afford no basis for intervention.

D. *Did the Judge err in holding that Desgagnés could benefit from a double costs rule?*

[48] Finally, on the issue of double costs awarded to one of the respondents, I find that the Judge did not commit any errors. It was within the Judge's discretion to award double costs, under Rule 420 of the *Federal Courts Rules*, S.O.R./98-106 in light of the offer that Desgagnés had made. Desgagnés' offer contained an element of compromise: it offered $1,000 and a waiver

of its costs. Indeed, costs continue to mount as the case progresses. Thus, it was open to the Judge to make a double costs award in favour of Desgagnés. I would mention for future reference that as the Federal Court issued a separate judgment on costs (2019 FC 850), a separate notice of appeal should have been filed to challenge the costs award.

V. Conclusion

[49] For these reasons, I find that this Court should not intervene in the absence of a palpable and overriding error. Having found none, I would dismiss the appeal with costs.

"Marianne Rivoalen"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	FEBRUARY 4, 2020

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