

SUPREME COURT OF NOVA SCOTIA

Citation: *Scholten's Hanwell Ltd. v. Wilson Fuel Co. Ltd.*, 2017 NSSC 36

Date: 20170224

Docket: Hfx No. 419064

Registry: Halifax

Between:

Scholten's Hanwell Ltd., a body corporate, 031019 N.B. Ltd., a body corporate,
Nashwaak 6-12 Ltd., a body corporate, Scholten's Grand Bay Ltd., a body
corporate, Scholten's Oromocto Ltd., a body corporate, and Scholten's Somerset
Ltd., a body corporate

Plaintiffs

and

Wilson Fuel Co. Limited, a body corporate

Defendant

Decision

Judge: The Honourable Justice Jamie Campbell

Heard: February 14 and 15, 2017, in Halifax, Nova Scotia

Counsel: Daniel Leger and Dominic Caron, for the plaintiffs
Douglas Tupper, Q.C. and Chris Wilson, for the defendant

[1] This is a dispute between a group of gasoline retailers and their former supplier about the interpretation of the contract that set the price to be paid for the product.

[2] Scholten's is a group of six companies that sell gasoline in New Brunswick. The companies are operated separately but came together to negotiate the purchase of petroleum products. Wilson Fuel sells gasoline at its own stations and supplies other retailers.

[3] In 1998 Scholten's started getting their petroleum products from Imperial Oil. They became Esso branded retailers. That means that they sold Esso products but were not owned by Imperial Oil, the company that owns the Esso brand. Wilson Fuel entered agreements in 2003 and 2004 with Imperial Oil. Wilson Fuel agreed to take over some Imperial Oil owned Esso gasoline stations and to supply petroleum products to independent retail stations that sell Esso products.

[4] Scholten's could have remained with the original contract with Imperial Oil, assumed by Wilson Fuel. They could have terminated the contract. Or they could, and did, negotiate an entirely new agreement with Wilson Fuel. The pricing terms of that new agreement are the source of the dispute. According to the contract Scholten's were required to buy all of their petroleum products from Wilson Fuel for 5 years. The contract was renewed in 2009 with no changes. The price to be charged was set in clause 1 and clause 2(c) of the contract.

[5] Clause 1 reads:

Wilson's appoints the Dealer a Wilson's Dealer, and the Dealer agrees to act as a Wilson's Dealer for the sale of petroleum products on the premises. The Dealer shall purchase its entire requirement of petroleum for sale at the Premises from Wilson's. The Dealer agrees to distribute all such petroleum products which Wilson's may sell, provided that these products are competitively priced with similar products for sale by gasoline dealers and are of a quality equivalent to those distributed by other dealers.

[6] Clause 2(c) reads:

Wilson's agrees to the following:

...

(c) To sell the Dealer its entire requirements of petroleum products including lubricants at the Saint John NB unbranded Reseller Rack Rate plus applicable freight and terminal charges (at Wilson's cost) in effect at the time and place of

sale (the “Dealer Price”) which price shall be inclusive of all applicable taxes thereon charged by any governmental authority. The Dealer may at any time during the term of the contract decide to contract and pay the cost of freight to their location. Should the Dealer choose this, then the amount Wilsons charges for freight shall be removed from the price.

[7] The parties agree that the terms of the contract are not ambiguous. They each say that the terms have one reasonable interpretation - theirs. Even though considerable evidence was put forward about the negotiation of the contract both parties say that there is no need to refer to it. Contracts should be interpreted based on the wording the parties have used if that is at all possible. Going outside the contract to negotiations, subjective understandings and various versions of the contract document only lend uncertainty to a process that thrives on certainty. Not only is there no need to refer to extrinsic evidence, it is inadmissible.

[8] To a person with no familiarity with the industry the contract doesn't mean much at all. There are concepts used that are important in the document but that are expressed in the jargon of the industry. To interpret the contract a person needs to know what those terms mean. With no knowledge of the industry a person reading the document doesn't know the kinds of things that each party to that kind of contract in that industry would generally want to address. That requires a general sense of how the industry works. That's not going outside the contract. It is reading the contract in its proper context. Whenever context is raised the question seems to be where the context ends. Context does not include the parties' subjective understanding of what the contract meant to them. It does not include the negotiations between the parties. With no allegation of misrepresentation or fraud, it does not include assertions as to what either party might have suggested that the contract would mean in practical terms. The contract is what says what the contract says.

[9] Pricing in the oil industry reflects the volatility of the market. Wholesalers do not want to be tied to sell oil at a price that within a few days may no longer reflect the value of the commodity because of changes to the world price of oil. They have to be able to address changes on a daily basis. That would leave the purchaser at the mercy of the wholesale dealer. The compromise is a provision that ensures that the price to be charged is competitive with others in the industry. If other local retailers are being charged a similar rate for products the retailer's competitive position is maintained.

[10] The “rack rate” for oil is the price that is paid when it is picked up at a location from the wholesaler. The rack is where custody changes hands. The purchaser then pays for transportation of the product to the location. In 2005 there were 5 other wholesalers in the area, Imperial, Ultramar, Petro Canada, Irving, and Shell. Each of those suppliers referred to their prices as their “rack rate”. Imperial, Ultramar and Petro Canada rates were published. The others were not. But they all had a rack rate. The rack rate is the price that the wholesaler sets for the sale of its product. Whether it publishes the rate or not is a business decision. Some wholesalers may want to attract buyers with the price while others may not want to become a target for others who may try to undercut their price. Wholesalers generally do not advertise or publish how their rack rates are set. The rack rate does not refer to a formula but to a price.

[11] The unbranded rack rate refers to the lowest rate with no additional charge for the benefits of branding. The retailer pays the branded rate to pay the owner of the brand for the kinds of things that are seen as drawing customers to that brand. Those might include things like loyalty reward programs. In this contract Wilson Fuel offered the unbranded rack rate and did not pass on the branding costs to Scholten’s.

[12] Before entering a contract with Wilson Fuel, Scholten’s got their oil from Imperial Oil using a different pricing system. Imperial Oil would deliver product to the Scholten’s location and would then tell Scholten’s the price. Scholten’s would make their profit on the margin between the price paid and the retail price to the customer as well as a per litre rebate from Imperial Oil. The price had to be competitive within the local market, so that the price paid by a retailer in one part of New Brunswick might be different than what was paid in another because of Imperial’s decision to respond to local pricing trends. The deal with Wilson Fuel was different. It was based on a rack pricing system. The price is set at the rack in the location identified in the contract, in this case Saint John. Scholten’s would pay the freight charges to get the product to their location from Saint John.

[13] Wilson Fuel was obligated under the contract to provide Scholten’s with Esso products. They were a wholesaler of Imperial Oil products and Scholten’s was an Esso or Imperial Oil retailer. Wilson Fuel had a contract to buy product from Imperial Oil at a price set by that contract. Wilson Fuel however is not Imperial Oil. Wilson Fuel operates its own retail operations in New Brunswick and they compete with Scholten’s. Part of the context or background here is that Scholten’s would have reason to be concerned that they not be at the mercy of

Wilson Fuel in establishing the price to be paid for Imperial Oil/Esso products. It is equally true that Wilson Fuel would make its profit by getting products from Imperial Oil at a lower price than they sold them to Scholten's.

[14] For the first five years Scholten's got oil from Wilson Fuel at a price that matched the Imperial Oil Saint John unbranded rack rate. That would have been a published and well known price. The contract was renewed in 2009. Between 2009 and December 20, 2012, Wilson Fuel continued to charge Scholten's prices that matched the Imperial Oil unbranded rack rate. When Imperial Oil stopped publishing their rack rate Wilson Fuel gave the quote of the daily Imperial Oil rack rate to Scholten's. That changed on December 21, 2012. Wilson Fuel then began charging a different rate that was no longer the Imperial Oil rack rate.

[15] This came as a bit of a shock to Scholten's. They had been paying the Imperial Oil rack rate for years. They say that the contract means that they were to be charged the Imperial Oil Saint John unbranded rack rate. They argue that Wilson Fuel had no right to change that to "Wilson's rack rate" when it suited them. There is no mention of Wilson's rack rate in the contract. Wilson Fuel's response is that there is no mention of an Imperial Oil rack rate either. When the contract says "the" Saint John NB unbranded rack rate it must refer to Wilson Fuel's own rack rate.

[16] The contract refers in clause 1 to the requirement that Scholten's buy all its petroleum products from Wilson Fuel, provided that the products are "competitively priced" for equivalent quality. That clause is included to protect against the wholesaler raising the price through its rack rate to be so high as to be uncompetitive. It reflects the industry reality that sellers need to adjust their prices without the agreement of purchasers. Prices are variable. Clause 2(c) says that Wilson Fuel will sell Scholten's the products "at the Saint John NB unbranded Reseller Rack Rate." That term is not defined in the contract.

[17] To a person who is not familiar with the industry that could appear to be an industry standard price for products in Saint John. The definite article is used suggesting that there is one rate. That is not the case at all. There is no single Saint John rack rate. Sellers of the products set their rack rates to retain their own margins and in response to world oil prices. A reasonable business person, familiar with the industry and aware of the general circumstances surrounding the formation of this contract would be aware that the rack rate is the price set by each individual seller. If Wilson Fuel did not have a rack rate what could the price

otherwise be? There is no industry wide rack rate. It must relate to one company. It would be peculiar if a contract with Wilson Fuel priced product at the Ultramar or Petro Canada rack rate.

[18] Scholten's says that it's the Imperial rack rate, even though Imperial pricing is not referenced at all. It is after all a contract between a wholesaler selling Imperial/Esso products to Esso branded retailers. They may well have believed that it was the Imperial rack rate. The problem with that interpretation is that it would read a term into the contract that defeats the purpose of clause 2(c). Rack rates are intended to provide the wholesaler with flexibility subject to providing competitively priced products. If Wilson Fuel were tied to the Imperial Oil rack rate it would have no flexibility at all. If the Imperial Oil rack rate were to become, for whatever reason, uncompetitively high, Wilson Fuel would be required to provide products at that rate under clause 2(c) but under clause 1 would have to provide products that are competitively priced. If the Imperial Oil rack rate were to become extremely low, Wilson Fuel would be required to sell to Scholten's at that low price while still having to acquire the product from Imperial Oil under whatever pricing mechanism is in place in its own contract with Imperial Oil. There is no evidence that it is tied to the rack rate.

[19] If clause 2(c) is read as requiring Wilson Fuel to sell at the Imperial Oil rack rate the requirement under clause 1 for competitive pricing would either be meaningless or potentially inconsistent with clause 2(c). The contract cannot be read as providing for the lower of the Imperial rack rate or a competitive price.

[20] The insistence that the rack rate is the Imperial Oil rack rate suggests a misunderstanding of the concept of a rack rate. It is not a single set rate that binds the seller and it is not a rate set by a regulatory body or other company. Another way of saying it is that the Saint John rack rate is "what we charge when you pick up products in Saint John". The contract does not tie Wilson Fuel to the Imperial Oil rack rate. Wilson Fuel was free to establish its rack rate however it wanted provided that the products were offered to Scholten's at a competitive price. If it tracked Imperial Oil rack rates for several years for its own business reasons that did not limit its ability to use another system also for its own business reasons. The obligation was to provide competitively priced products not Imperial Oil priced products or the lowest priced products.

[21] Wilson's did not breach the contract. Scholten's did.

[22] The parties have agreed that if the interpretation argued by Wilson's is found to be correct the damages owed by Scholten's would be \$160,000 plus interest. An order for cost should issue as well.

[23] If the parties are not able to agree on the interest rate to be charged or on the amount of costs I will retain jurisdiction to deal with those matters.

Campbell, J.