SUPREME COURT OF NOVA SCOTIA

Citation: *DICE-Design Import Consulting Experts Ltd. v. Kuehne + Nagel Ltd.*, 2017 NSSC 97

Date: 20170407
Docket: Hfx. No. 446203
Registry: Halifax

Between:

DICE-Design Import Consulting Experts Ltd.

Plaintiff

v.

Kuehne + Nagel Ltd.

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Michael J. Wood
Heard:	March 30, 2017, in Halifax, Nova Scotia
Written Decision:	April 7, 2017
Subject:	Conflict of Laws – Attornment Clause in Agreement – *Forum Non Conveniens*
Summary:	DICE hired K+N as customs broker and agent. Agreement included provision that DICE attorn to the courts of province where K+N had principal place of business which was Ontario. DICE sued K+N in Nova Scotia for negligence in relation to work as agent and broker. K+N brought motion to dismiss action on basis of attornment clause which it argued gave Ontario exclusive jurisdiction.
Issues:	Should Nova Scotia decline jurisdiction over proceeding?

Result: Clause in agreement was interpreted as simple attornment and did not give exclusive jurisdiction to Ontario courts. K+N did not establish that Ontario was clearly more appropriate jurisdiction for litigation. Motion dismissed.

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Judge: The Honourable Justice Michael J. Wood

Heard: March 30, 2017, in Halifax, Nova Scotia

Counsel: Adam D. Crane, for the plaintiff
Michael Dery, for the defendant

By the Court:

[1] DICE-Design Import Consulting Experts Limited ("DICE") is a Nova Scotia company that operates as a wholesaler, importer and distributor of construction materials. For more than ten years it has used Kuehne + Nagle Limited ("K+N") as its agent and customs broker for goods imported into Nova Scotia. K+N is a multi-national corporation with offices throughout Canada. It offers its clients a range of services, including acting as agent and customs broker.

[2] For several years DICE has been importing stainless steel sinks from China through its agent K+N. In May 2012, a new duty was imposed on these products by the Canadian International Trade Tribunal. DICE alleges that K+N had an obligation to inform it of the new duties on sinks from China and did not do so, resulting in DICE being responsible for more than $160,000 in duties, interest, penalties and other charges.

[3] In December 2015, DICE commenced these proceedings against K+N, seeking damages for negligence and breach of fiduciary duty. K+N has responded by making this motion under *Civil Procedure Rule 4.07* requesting dismissal of the action on the basis that the court does not have jurisdiction. In its submissions K+N acknowledges that Nova Scotia has territorial jurisdiction over the subject matter of this proceeding, but argues that it should decline to exercise this jurisdiction in the circumstances.

[4] In 2006, DICE and K+N entered into a General Agency Agreement and Power of Attorney which authorized K+N to act on DICE's behalf in relation to the importation of goods into Canada. That agreement was signed by DICE in Nova Scotia and delivered to K+N's Halifax office. The central issue in this motion is the interpretation of Clause 9 of the standard conditions attached to the contract which reads as follows:

> 9. GOVERNING LAW:
> These conditions shall be governed by the laws of the Province within Canada, or Territory, within which the Customs Broker has its principal place of business and the Client hereby irrevocably attorns to the Courts of such Province or Territory. The General Agency Agreement and these conditions shall enure to the benefit of and be binding upon the parties and their respective executors, administrators, successors and assigns.

[5] The question is whether this amounts to an agreement that the courts of Ontario have exclusive jurisdiction over all disputes under the contract since that is where K+N has its principal place of business. If it is interpreted to be an exclusive jurisdiction clause, K+N relies on case authorities which say that courts should show significant deference to that choice of forum made by the parties. This means that the party seeking to litigate the dispute in another jurisdiction must provide evidence showing a "strong cause" for doing so. The leading case on this point is **Z.I. Pompey Industrie v. ECU-Line N.V.**, 2003 SCC 27.

[6] If Clause 9 is not interpreted to give the Ontario courts exclusive jurisdiction, the issue of whether Nova Scotia should decline jurisdiction will be determined by application of the principles of *forum non conveniens* which are incorporated in the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2. Under these rules K+N would have to establish that Ontario is a clearly more appropriate jurisdiction in which to litigate this dispute. Mr. Dery on behalf of K+N says that the evidence on this motion shows that Nova Scotia and Ontario are roughly equivalent in terms of appropriateness with the relative inconvenience and expense to the parties being the same.

[7] In his oral submissions Mr. Dery acknowledged that if Clause 9 is not interpreted as giving exclusive jurisdiction to the Ontario courts, the defendant's motion will fail.

[8] Mr. Crane on behalf of DICE says that the evidence clearly shows that Nova Scotia is the preferred forum for this litigation and that factors such as inconvenience and expense strongly favour his client. He says that even if Clause 9 gives exclusive jurisdiction to Ontario, the circumstances of this case rise to the standard of a "strong cause" for Nova Scotia retaining jurisdiction.

Interpretation of Clause 9

[9] The interpretation of a contract involves determining the objective intention of the parties based upon the contract language and circumstances of the agreement. It is not relevant what either party subjectively thought the agreement meant. In any event, I do not have any evidence on subjective intention on this motion.

[10] Clause 9 deals with two issues, choice of applicable law and attornment. Attornment is an agreement by a party to be bound by the jurisdiction of a particular court. In this case DICE has attorned to the courts of Ontario.

[11] When parties wish to specify that disputes must be resolved in a specific jurisdiction they will typically use language which clearly indicates this. For example in **Pompey Industrie**, supra, the forum selection clause read:

> … The contract evidenced by or contained in this bill of Lading [sic] is governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith ***shall be determined by the courts in Antwerp and no other Courts.*** (emphasis added)

[12] In **Expedition Helicopters Inc. v. Honeywell Inc.**, 2010 ONCA 351, the clause read:

> … The parties (i) agree that any state or federal court located in Phoenix, Arizona ***shall have exclusive jurisdiction*** to hear any suit, action or proceeding arising out of or in connection with this Agreement, and consent and ***submit to the exclusive jurisdiction of any such court*** in any such suit, action or proceeding … (emphasis added)

[13] In **Frey v. Bell Mobility Inc.**, 2011 SKCA 136, the contract included the following forum selection clause:

> 36. This agreement shall be governed by and construed in accordance with the laws applicable in the province in which it was signed and ***shall be subject to the exclusive jurisdiction of the courts*** of that province. (emphasis added)

[14] In none of these cases was there any dispute about whether the clause established exclusive jurisdiction with respect to resolution of disputes.

[15] Mr. Crane on behalf of DICE relies on a number of cases where clauses were not held to create exclusive jurisdiction. Examples of such clauses are as follows:

> This agreement shall be construed in accordance with the laws of the State of Maine, U.S.A., and each of the parties hereby submits itself to the jurisdiction of the Courts of Maine for the adjudication of all matters arising herefrom. (**CKF Inc. v. Huhtamaki Americas Inc.**, 2009 NSSC 21)

> GOVERNING LAW
> This Agreement will be governed by and interpreted in accordance with the laws of the Province of British Columbia, Canada and the parties will attorn to the jurisdiction of the Courts of the Province of British Columbia, Canada. (**Old North State Brewing Company v. Newlands Services Inc. (1998)**, 113 B.C.A.C. 186)

[16] Both of these clauses are very similar to Clause 9 of the contract between DICE and K+N. They indicate that the parties will attorn to a particular jurisdiction but make no reference to that forum having exclusive jurisdiction.

[17] K+N puts significant weight on the British Columbia Court of Appeal decision in **B.C. Rail Partnership v. Standard Car Truck Company**, 2003 BCCA 597, where the following clause was under consideration:

> 19(g) This Agreement shall be governed in all respects, whether as to validity, construction, capacity, performance or otherwise, by and under the laws of Nova Scotia, Canada (without giving effect to principles of conflicts of laws). Lessee irrevocably and unconditionally submits to the jurisdiction of and venue in, federal and provincial courts located in Nova Scotia, Canada for any proceeding arising under this Agreement, and TO THE EXTENT PERMITTED BY APPLICABLE LAW, LESSOR AND LESSEE EACH WAIVES ALL RIGHTS TO TRIAL BY JURY IN ANY LITIGATION ARISING HEREFROM OR IN RELATION HERETO.

[18] The Court of Appeal found that this clause established exclusive jurisdiction in the courts of Nova Scotia. In doing so it made an important distinction between such clauses and those by which the parties simply attorn to another jurisdiction. The significance of this distinction is reflected in the following comments:

> 6 The narrow issue is whether this clause correctly interpreted is a forum selection clause by which the parties intended to give the Nova Scotia courts exclusive jurisdiction over all proceedings commenced by either party arising from the lease or, conversely, an attornment clause by which BC Rail merely agreed not to dispute the jurisdiction of the Nova Scotia courts if proceedings under the lease were commenced against it there. The learned chambers judge interpreted the clause as an attornment clause that did not preclude BC Rail from commencing proceedings against Greenbrier in British Columbia.

[19] The court distinguished its earlier decision in **Old North State Brewing Company,** supra, primarily on the basis of the difference in wording between the two clauses. The differences and their significance are illustrated in the following passages:

> 15 … The appellants submit that the case is distinguishable on that basis because they submit that the clause in issue differs materially in wording from clause 19(g). The ***Old North State*** clause set out above is explicit in its reference to attornment and does not address jurisdiction apart from attornment.
>
> …

> 17 In any event, I find nothing in the judgment of this Court in ***Old North State*** that requires us to adopt a literal construction against exclusivity in the interpretation of the clause before us. I am satisfied that the clause in Old North State was sufficiently different in its wording that it does not govern the interpretation of the clause before us. The chambers judge noted the difference in wording in her reasons and correctly concluded that ***Old North State*** did not determine the interpretation issue.
>
> 18 Turning to the clause itself, I am of the opinion that objectively interpreted it was intended by the parties to be an exclusive jurisdiction clause and not simply an attornment clause.
>
> 19 Clause 19(g) refers to Nova Scotia "venue" as well as jurisdiction and to "<u>any proceeding</u> arising under this agreement" [emphasis added]. Given their ordinary meaning, I think that "any proceeding" must be intended to mean proceedings commenced by either party to the lease and not merely those commenced by Greenbrier. There is no limiting reference to attornment as in the ***Old North State*** clause. If clause 19(g) was not interpreted to extend to proceedings by either party, the clause would in effect be silent on proceedings commenced by BC Rail in British Columbia or any other jurisdiction having jurisdiction *simpliciter*. I do not think that it is commercially reasonable to conclude that the parties did not intend to bring proceedings by BC Rail as well as by Greenbrier within the express words of the agreement.

[20] It is apparent that the British Columbia Court of Appeal placed weight on the reference to submitting to the venue of Nova Scotia for any proceedings under the agreement. This addition converted what would otherwise be an attornment clause to one establishing exclusive jurisdiction.

[21] In my view, Clause 9 is a simple attornment clause and does not create exclusive jurisdiction in Ontario. When it is compared with the various contractual terms which I have cited, it is essentially identical to those where exclusive jurisdiction has been rejected.

[22] In the context of this agreement it is obvious that K+N is a national company with clients across Canada and they want to be able to initiate litigation against those clients in Ontario where their head office is located. That is the purpose of Clause 9. While there may also be advantages to requiring clients to sue in Ontario there is nothing in the contract which says this and I do not think it is reasonable to imply such a term when it could have been clearly expressed.

[23] Clients such as DICE who deal with a national company with offices throughout Canada would reasonably expect that they could take their contractual disputes to their home jurisdiction in the absence of a clear agreement to the contrary.

Conclusion and Disposition

[24] Having decided that Clause 9 of the agreement does not establish exclusive jurisdiction in the courts of Ontario I must dismiss the motion of K+N. The result is that DICE's action against K+N will continue in this province. Under *Civil Procedure Rule 4.07(3)* I am required to specify a date by which K+N's defence must be filed. They have been aware of this proceeding for many months and therefore I will fix May 5, 2017, as the date by which their defence must be filed.

[25] DICE is entitled to its costs of successfully defending the motion. Under Tariff C of *Civil Procedure Rule 77* a hearing of less than a half day attracts costs of $750 to $1,000. I set the amount at $1,000 which shall be payable by K+N forthwith.

Wood, J.