

CANADA / JUDGMENT

Skretting Canada Inc. v. Westaqua Commodity Group Ltd. et al.

2010 BCSC 1614

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Skretting Canada Inc. v. Westaqua Commodity Group Ltd. et al.,

2010 BCSC 1614

Date: 20100525

Docket: S081881

Registry: Vancouver

Between:

Skretting Canada Inc.

Plaintiff

And

Westaqua Commodity Group Ltd.

Defendant

And

ChemNutra Inc., Diversified Ingredients Inc., and

Steve Miller and Sally Miller

Third Parties

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment

Counsel for Plaintiff

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G.D. Phillips

Counsel for Defendant

M. Skorah

S. Jacob

Place and Date of Hearing:

Vancouver, B.C.

May 21, 2010

Place and Date of Judgment:

Vancouver, B.C.

May 25, 2010

Introduction

- [1] The defendant, Westaqua Commodity Group Ltd. [Westaqua], applies for the following relief:
- (a) that the trial of this matter be heard by the court without a jury, pursuant to Rules 39(25) and 39(27); and
 - (b) that the plaintiff pay Westaqua the costs incidental to this application in any event of the cause, pursuant to the provisions of Rule 57.
- [2] Westaqua submits that the jury notice either must be or should be set aside on the following grounds:
- (a) by mandatory operation of Rule 39(25)(f), which prohibits a jury trial where it relates to the setting aside or cancellation of a deed or written instrument;
 - (b) by mandatory operation of Rule 39(25)(j), which prohibits a jury trial where the sole or principal issue relates to the construction of a contract; and
 - (c) by discretionary operation of Rule 39(27)(a)(ii), on the grounds that the issues are of an intricate or complex nature.
- [3] For the reasons that follow, I grant Westaqua's application to set aside the jury notice on ground 'c', that is, pursuant to Rule 39(27)(a)(ii).

Background - Review of the Parties' Pleadings

- [4] This is a product liability case regarding the sale of wheat gluten originating in China. The plaintiff, Skretting Canada Inc. [Skretting], alleges that Westaqua sold to it Chinese wheat gluten contaminated with melamine. Skretting further alleges that it used the gluten to manufacture fish feed and suffered loss as a result of selling the contaminated fish feed to its customers.
- [5] Westaqua has filed a statement of defence denying liability and has filed an amended third party notice against two American companies:
 - (a) ChemNutra Inc. [ChemNutra], a Nevada-based business, the activities of which have included the importation of Chinese wheat gluten into the United States; and
 - (b) Diversified Ingredients Inc. [Diversified], a Missouri-based business, the activities of which have included the export of Chinese wheat gluten to Canada.
- [6] In turn, Diversified filed a third party notice against ChemNutra and against the principals of ChemNutra, Steve Miller and Sally Miller [the Millers].
- [7] Westaqua's statement of defence raises contractual defences which limit or exclude liability. Skretting's reply takes the position that any limitation or exclusion of liability clauses set out in the contract do not apply, and in the alternative that it would be unfair to apply such clauses.
- [8] Diversified alleges that any relevant transaction with Westaqua incorporates the laws of the State of Missouri. Westaqua denies this allegation and says that any relevant transaction is governed by contractual terms and conditions set out in a Westaqua contract.
- [9] ChemNutra and the Millers were investigated by the criminal investigations branch of the Food and Drug Administration in the United States, and pleaded guilty to charges contained in a federal indictment related to wheat gluten contaminated with melamine.
- [10] Westaqua is a company incorporated under the laws of B.C. Skretting is a company incorporated under the laws of Canada.
- [11] Skretting's statement of claim alleges that in or about July 2006 it entered into a contract to purchase wheat gluten from Westaqua. It goes on to allege that the wheat gluten was, as Westaqua knew, to be mixed with other ingredients by Skretting so as to form fish feed which Skretting would then offer for sale to fish farms and hatcheries. Skretting alleges that material purporting to be wheat gluten was thereafter delivered to Skretting by or at the direction of Westaqua, and in any event, purportedly under the contract. It alleges that the material originated in China and contained quantities of melamine. It further alleges that the presence of melamine in the material that was delivered, in the quantities in which it was present, made that material unsuitable for use in fish feed, or in the alternative, unsuitable without modification. Skretting alleges Westaqua knew or ought to have known of these facts.

[12] It is alleged in paragraph 9 of the statement of claim that the delivery of the wheat gluten material constituted a breach of contract by Westaqua. I pause to observe that Skretting does not say in its statement of claim anything about a written contract or set out in any detail what the terms of the contract that it alleges are.

[13] Skretting alleges in paragraphs 10 to 12 of its statement of claim as follows:

10. The plaintiff was unaware of the presence of the melamine in the material that was delivered to it, and mixed it with other ingredients to form fish feed ("the melamine-containing feed"), which it would not have done if it had known the facts.
11. The plaintiff sold some of the melamine-containing feed to its customers, almost all of which were in the United States.
12. As a result of the discovery of melamine and certain food sold in the United States, which seemed to come from ingredients which originated in China, investigations were made and in May 2007 the United States Food and Drug Administration advised the plaintiff, correctly, of the presence of melamine in the feed that the plaintiff had made with the material delivered to the plaintiff under its contracts with the defendant.

[14] The statement of claim goes on to allege losses with respect to the delivery of the contaminated product and says in paragraph 15:

As a result the plaintiff had to, and did, offer to replace the melamine-containing feed that it sold and delivered to customers who had not yet utilized it and were therefore able to return it.

[15] Paragraph 16 alleges that Skretting was required to retrieve melamine-containing feed and replace it with other feed at its own cost. Paragraphs 17 through 20 set out various out-of-pocket losses incurred by Skretting for transportation costs, replacement costs, regulatory expenses, and refunds or credits that were provided to customers. It is alleged those out-of-pocket losses total about US\$1.4 million.

[16] Paragraph 21 is as follows:

The plaintiff has also experienced a reduction in the business that it would otherwise have had, when its reputation was damaged by the publicizing, to its customers, of the fact that it had sold melamine-containing feed.

[17] Paragraph 23 is as follows:

Furthermore, the defendant knew or ought to have known that the material that it was delivering, or causing to be delivered, to the plaintiff contained melamine or some other unacceptable material, or that there was a serious risk that this might be the case. But the defendant, by delivering or causing the melamine-containing material to the plaintiff as wheat gluten under the contract, explicitly or implicitly represented that it contained no such material and that there was no reason for the plaintiff to think that it might. The plaintiff relied on that misrepresentation in paying the purchase price to the defendant and in mixing the material that was delivered to it

with other ingredients so as to create the melamine-containing feed, which in turn led it to suffer all the damages to which reference has already been made in this Statement of Claim.

- [18] Skretting's claim for relief sets out claims for special damages, "general damages or the injury to its reputation" (which might be, I am inferring, general damages for the injury to its reputation) and costs.
- [19] As has already been adverted to, Westaqua's statement of defence sets out various contractual defences.
- [20] Skretting, as will be apparent, is claiming damages in tort as well as contract. There is no specific pleading of fraud, but there are allegations in the statement of claim that Westaqua had actual knowledge of the fact that the wheat gluten contained melamine, so it seems to me there is a possibility of such a claim.
- [21] During the course of argument, Skretting's counsel advised that Skretting will likely be amending its statement of claim to add claims under the Sale of Goods Act, R.S.B.C. 1996, c. 410 [Sale of Goods Act], in relation to breach of the implied conditions of fitness for purpose and of merchantability as set out in that statute.
- [22] Westaqua, in its statement of defence, at paragraph 3, says that it agrees that it entered into a contract with Skretting, whereby Westaqua supplied the wheat gluten meal to Skretting. It alleges various contractual provisions set out in a written contract. Specifically, paragraph 4 of the statement of defence provides as follows:

The Contract contained the following provisions:

- a) "Buyer waives all claims unless made in writing and delivered to Seller within 10 days after receipt of products."
- (the "Waiver of Claim");
- b) "The Seller shall not be liable in any respect for failure or delay in the performance of the contract if hindered or prevented directly or indirectly by ... causes reasonably beyond the Seller's control.", and
- c) "The sole and exclusive liability of the Seller and the sole and exclusive remedy of the Buyer for any breach of any provision of this contract by the Seller are limited exclusively to replacement of the affected commodities, or, at the option of the Seller, payment of the fair market value of the affected products at the time of the breach. The Seller shall not be liable under any circumstances for any incidental, consequential or other damages. Buyer assumes all risk and liability for results obtained by the use of the product covered by this contract, whether used singly or in combination with other products."

(the "Limitation of Liability"); and

- d) "The Seller warrants that the products sold hereunder shall conform to the description of the front side thereof. The Seller makes no other warranty of any kind, express or implied, including without limitation no warranty of merchantability, or fitness for a particular purpose. There are no oral agreements or warranties collateral to or affecting this contract."

(the "Warranty").

[Collectively, the "Written Terms"]

- [23] Westaqua says in paragraph 6 that it has carried on business in accordance with reasonable standards of practice and procedure, and in accordance with accepted industry standards, and with reasonable care, skill, diligence, and without fault or neglect.
- [24] Paragraph 8 of the statement of defence says that if the wheat gluten material was deficient, then the deficiencies were caused wholly or in part by the acts, omissions, negligence, or a combination thereof of Skretting. That same paragraph goes on to outline various allegations of contributory negligence or fault on the part of Skretting, including failing to properly transport the wheat gluten material; failing to properly handle the material; instructing Westaqua to supply wheat gluten meal from a less expensive source based in China, which led to Westaqua supplying Skretting the wheat gluten in question; failing to perform reasonable or any due diligence in selecting suppliers; failing to adhere to safe and prudent manufacturing procedures; failing to adhere to a safe and prudent quality assurance program; and other matters.
- [25] In paragraph 9, Westaqua states that it relies on the Negligence Act, R.S.B.C. 1996, c. 333 [Negligence Act].
- [26] Paragraph 10 of the statement of defence says that Skretting had the ability or capacity to subject the wheat gluten to testing and analysis to confirm its suitability, which Skretting failed to perform adequately or at all.
- [27] Westaqua places further reliance on the written contract towards the end of its statement of defence. There is also an allegation, among other things, of failure to mitigate by Skretting.
- [28] As I mentioned, Skretting has filed a reply to Westaqua's statement of defence. The reply is very brief; it is one paragraph:

In answer to paragraphs 4 and 12 of the "Statement of Defence of the defendant Westaqua", Skretting says that if any of the clauses that Westaqua mentions did form part of the contract (which Skretting says is not the case), and if they would - except for their unfairness - give Westaqua a defence (which Skretting also says is not the case), it would be unfair for Westaqua to use them to escape liability in this case and therefore they do not give Westaqua a defence.

- [29] That single paragraph raises three issues. First, what are the terms of the contract? Westaqua claims that the Written Terms are part of the contract between the parties. I gather that there is also a reliance on past practices between the parties and perhaps custom in the trade. The second issue concerns the construction of the contract; that is, whether the

Written Terms, if applicable, raise the contractual defences that Westaqua says they do. Third, if the Written Terms apply and serve to defeat or reduce liability on their correct interpretation, would they be enforceable in the circumstances?

- [30] In relation to the third issue, I was advised that since the filing of the reply the Supreme Court of Canada released its decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 [Tercon cited to SCC]. I was advised that Skretting would be amending its reply to plead unenforceability of the contractual defences relied on by Westaqua upon the ground of unconscionability, or in the alternative upon what is called in that decision the "unruly horse" of public policy. Of course, I do not have the proposed amended reply in hand so I cannot be entirely sure as to its nature.
- [31] In *Tercon*, the majority decision, written by Mr. Justice Cromwell, held that the claims of the plaintiff were not excluded by the terms of the contract, properly interpreted in context. The dissenting judgment, written by Mr. Justice Binnie, held that the exclusion of liability clause applied. The dissent provides a review of the law relating to the setting aside of otherwise applicable contractual terms that limit or exclude liability.
- [32] Skretting advises that it expects to rely upon the law set out in the dissent. I was referred to paragraph 118 of Mr. Justice Binnie's reasons in *Tercon*, which provides as follows:

There are cases where the exercise of what Professor Waddams calls the "ultimate power" to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker's conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

- [33] Mr. Justice Binnie summarizes the law of contracts in relation to unconscionability and public policy at paragraphs 121 to 123:
- [121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
- [122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence [original emphasis]. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this

analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (Hunter, at p. 462). This second issue has to do with contract formation, not breach.

- [123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely, whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.
- [34] Thus, there are potentially three issues in this respect: the interpretation of the Written Terms, the matter of unconscionability, and the possible application of public policy.
- [35] Westaqua has filed a third party claim, as I mentioned at the outset, against Diversified (the company with which it contracted) and ChemNutra (the company that sourced the product in China).
- [36] Turning to the amended third party notice of Westaqua, Westaqua alleges that it entered into a contract dated July 20, 2006 with Diversified. It refers to certain quality levels stipulated in the contract. Westaqua alleges that it was an implied term of the contract that the wheat gluten would be free from defects and deficiencies. It alleges that the material that purported to be wheat gluten was supplied by ChemNutra to Diversified and thereafter to Westaqua. It alleges at paragraph 5 of the amended third party notice that:

In the event that the Product is found to be defective, such defect was caused or contributed to by the fault, breach of duty, breach of contract or negligence of ChemNutra or Diversified or both...

- [37] And then eight particular instances of contributory negligence on the part of ChemNutra or Diversified or both are set out:
- a. failing to properly store the Product;
 - b. failing to properly transport the Product;
 - c. failing to ensure that the Product complied with all specifications, industry standards, and statutory requirements;
 - d. failing to ensure that the Product was free from defects and deficiencies;
 - e. failing to ensure that all necessary examinations, tests and inspections were performed to ensure that the Product complied with the Contract;
 - f. failing to warn Westaqua of any defects and deficiencies in the Product;
 - g. failing to perform reasonable or any due diligence in selecting suppliers; and
 - h. failing to adhere to a safe and prudent quality assurance program.

[38] In its statement of defence to the amended third party notice of Westaqua, ChemNutra alleges at paragraph 6 that if Skretting suffered any loss as alleged, then the fault lies with Skretting or others for whom ChemNutra is not responsible in law. ChemNutra also pleads the Negligence Act.

[39] In its statement of defence, Diversified agrees that there is a written contract between it and Westaqua dated July 20, 2006. It alleges contractual defences (the enforceability of a limitation of liability term), and refers to a choice of law clause in the contract that says:

It is agreed that this contract is made in the County of St. Louis, State of Missouri, and all matters relating to this contract shall be governed by the laws of the State of Missouri.

[40] A number of other particular claims are made, including allegations against Westaqua of various faults and neglect.

[41] Diversified has also filed a third party notice against ChemNutra and the Millers, which largely follows its previous pleadings. Paragraphs 5 and 6 are as follows:

5. Steve and Sally Smith, and each of them, represented and warranted to Diversified and its agents that the Product would be free from defects and deficiencies, fit for its intended purpose and of merchantable quality, and failed to disclose any information to suggest or indicate otherwise. Those representations and warranties induced Diversified to purchase the Product from ChemNutra.
6. In the event that the Product is found to be defective:
 - (a) Steve and Sally Smith, and each of them, knew or ought to have known of such defects or deficiencies in the Product yet continued to hold out and represent to Diversified and its agents to the contrary;
 - (b) Steve and Sally Smith, and each of them, acted fraudulently, recklessly, maliciously, negligently and/or for a collateral purpose in making misrepresentations to Diversified, namely for the purpose of enriching themselves, contrary to the best interests of ChemNutra and to the detriment of Diversified, without observing the duty of good faith and fair dealing and duty of care owed by them to Diversified in presenting information and specifications concerning the Product and its composition, which in turn caused Diversified to suffer damages;

[42] Diversified took no position on Westaqua's application to set aside the jury notice; it filed no response. ChemNutra and the Millers consented to the application.

[43] No trial date has been set in the matter. Counsel suggested that a ten-day trial would be expected without a jury. And, it was suggested, during the course of argument, that perhaps trial would be 15 days with a jury.

Issues

[44] The issues on the application before me are whether to set aside the jury notice on any of the three grounds relied upon by Westaqua, which I outlined at the commencement of this judgment.

Analysis & Discussion

General Principles

[45] Westaqua refers me to *MacPherson v. Czaban*, 2002 BCCA 518, 218 D.L.R. (4th) 363, at paragraph 17 of BCCA, for the general proposition that a jury trial is a presumptive right and it is only where the judge is satisfied that the issues cannot be tried fairly by a jury that the jury notice should be struck. The onus of persuasion is on the applicant. The onus is not easily satisfied.

[46] I was also referred to a fairly recent decision by Madam Justice Griffin, *Han v. Cho*, 2008 BCSC 1192, 297 D.L.R. (4th) 621 [Han cited to BCSC]. The relevant cases and principles are gathered at paragraphs 12 to 15:

[12] There is a common law right to a jury. A party ought not to be deprived of this important right except for cogent reasons: *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528 at 533.

[13] In *Nichols v. Gray* (1978), 9 B.C.L.R. 5 (C.A.), Craig J.A. explained the plaintiff's entitlement to a jury in civil cases (at 10):

A plaintiff is entitled to trial by jury, except in certain types of cases specified in the Rules, and he can be deprived of this right only if a party opposing a trial by jury establishes "clearly" that one of more of the exceptions in R. 39(20) [the predecessor to Rule 39(27)] is applicable. *McDonald v. Inland Natural Gas Co* (1966), 57 W.W.R. 87 at 95.

[14] In *McDonald v. Inland Natural Gas Co.* (1966), 57 W.W.R. 87 (B.C.C.A.), Branca J.A. commented at 95 that "while the right of a trial by jury goes back far and is imbedded deeply in the history of our law, and while a litigant is not to be deprived of that right unless he is clearly within an exception created by law, where such an exception applies, that right should be refused."

[15] The onus is on the applicant seeking to set aside a jury notice to show that the party who selected trial by jury is not entitled to that mode of trial: *Creasy v. Sweny* (1942), 57 B.C.R. 457, [1942] 3 W.W.R. 457 (C.A.).

[47] Westaqua also referred me to the decision in *Kotai v. Queen of the North (Ship)*, 2008 BCSC 1398, [2008] B.C.J. No. 1973 (QL). At paragraphs 63 and 64 of BCSC, Mr. Justice Joyce states that an applicant faces a heavy onus to satisfy the court that the plaintiff should be deprived of his or her substantive right to have his or her case heard by a jury, and that if the case falls within Rule 39(25), the court has no discretion and must strike the jury notice.

[48] To the contrary on the question of discretion under, specifically, the combination of Rules 39(25)(j) and 10(1)(b) is the decision of Mr. Justice McEwan in *Rehmat v. Transamerica Life Canada*, 2009 BCSC 495, [2009] B.C.J. No. 738 (QL), at paragraph 8 of BCSC:

The assessment of this type of application involves an exercise of discretion. The pleadings, on their face, put the interpretation of the contract in issue. The theoretical spectrum in determining whether "the sole or principal question at issue" is the "construction of an enactment, will, deed and/or written contract or other document" in relation to insurance claims, ranges from cases where the facts are generally uncontested and the meaning of the contract in relation to those facts must be assessed as a matter of construction on interpretation, and those where the meaning of the contract is not controversial but the question is whether facts bring the claim within or without the agreed meaning of the contract. The point at which one predominates the other can be difficult to assess.

[49] In any case, there was common ground between the parties before me that Rule 39(27)(a), which is also relied on by Westaqua, unequivocally involves the exercise of the court's discretion.

Issue 1 - Does Rule 39(25)(f) apply?

[50] The first issue is whether the trial is expected to relate to "the rectification, setting aside or cancellation of a deed or other written instrument" within the meaning of Rule 39(25)(f).

[51] It is common ground that a contract comes within the meaning of "deed or other written instrument".

[52] Skretting argues that the phrase "relates to" in Rule 39(25) means that the main or central question at issue at trial will be one of the enumerated matters; and, I am directed to *Han* at paragraphs 16 to 19, citing in particular *Whiteway v. Nyack*, [1980] B.C.J. No. 993 (QL) (C.A.).

[53] Skretting also argues that the words "setting aside" and "cancellation" have their roots in the law of equity. As noted by Griffin J. in *Han* at paragraphs 21 to 33, the historical roots of Rule 39(25) can be traced to the English Supreme Court Judicature Act, 1873, 36 & 37 Vict. c. 66 (U.K.), by which the English courts of equity, in other words the Court of Chancery, and the courts of common law were fused. At that time, the equitable remedies of 'setting aside' or 'cancellation' were reserved for the new Chancery Division of the court and were to be decided without a jury.

[54] Skretting argues that it does not seek "setting aside" or "cancellation" as those remedies would be known to a court of equity.

[55] Westaqua argues that "cancellation" in equity included contracts set aside or cancelled on grounds of public policy. On this point, I was referred to Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, 13th ed. by Melville M. Bigelow (Boston: Little, Brown, and Company, 1886), Volume 2, p. 6-7:

695. Without attempting to go over the different classes of cases of fraud (which have been already enumerated), it may be stated that Courts of Equity will generally set aside, cancel, and direct to be delivered up agreements and other instruments, however solemn in their form or operation, where they are voidable and not merely void, under the following circumstances: First, where there is actual fraud in the party defendant, in which the party plaintiff has not participated. Secondly, where there is a constructive fraud against public policy, and the party plaintiff has not participated therein. Thirdly, where there is a fraud against public policy, and the party plaintiff has participated therein, but public policy would be defeated by allowing it to stand. And lastly, where there is a constructive fraud by both parties, but they are not in *pari delicto*.
- [56] Westaqua argues that the remedy of setting aside or cancellation of the written contract is what Skretting apparently seeks or will seek in answer to Westaqua's arguments on the contractual defences, given Skretting's reliance on the Tercon decision.
- [57] In my view, the words "setting aside" or "cancellation" should be given a contemporary meaning in accordance with the general modern principles of statutory interpretation, and in accordance with the object of the rules of court set out in Rule 1(5), that is "to secure the just, speedy and inexpensive determination of every proceeding on its merits".
- [58] While reference to the historical roots of the terms "setting aside" or "cancellation" is of interest and may aid in interpretation, their meaning should not depend upon our present day assessment of how they might have been understood in equity jurisprudence more than 100 years ago. No such fossilized definition is mandated by the rules of court. The meaning of practically all words in a language changes over time. The law itself including the law of equity is constantly evolving as illustrated by the Tercon decision, the very case Skretting says it will rely on.
- [59] Here, Skretting does not seek to set aside or cancel in its entirety or have declared void ab initio the written contract for the sale of goods. It relies on what it contends was a verbal contract. Skretting says that if Westaqua succeeds in establishing that the Written Terms are applicable, then the terms which serve to limit or exclude liability would be unenforceable.
- [60] In my view, in such circumstances, it cannot be said that the trial will relate to the setting aside or cancellation of a contract as I would interpret those terms as found in Rule 39(25)(f) in its modern context, and accordingly, Rule 39(25)(f) does not apply.
- [61] It is therefore unnecessary to go on to consider whether setting aside or cancellation of the contract would be the main or central issue at the trial.

Issue 2 - Does Rule 39(25)(j) apply?

- [62] The second issue is whether the trial will relate to a matter referred to in Rule 10(1)(b), that is, whether "the sole or principal question at issue is alleged to be one of construction of an... oral or written contract".

[63] Westaqua argues that there are varying authorities on the question of whether issues of interpretation of the contract must be the sole or principal issue at the trial. I was referred to *Peters v. Co-Operators Life Insurance Co.*, 2007 BCSC 1103, 74 B.C.L.R. (4th) 161, at paragraph 24 of BCSC, in which Mr. Justice Frankel held that if the case involves an issue of interpretation of the contract, then a jury trial is not available and it does not matter how central that question is to the litigation.

[64] On the other hand, *Parmar v. Blenz the Canadian Coffee Company Ltd.*, 2008 BCSC 1338, [2008] B.C.J. No. 1891 (QL), Madam Justice Gropper denied the defendant's application to set aside the jury notice. In the course of doing so, she reviewed the case law and concluded as follows, at paragraph 29 of BCSC:

In that regard, I refer to the test in the decisions of *Manley* and *Penner*: is the construction of the contract the sole or principal issue? Those cases, in my view, accord with the wording of Rule 39(25) and Rule 10(1)(b) and are consistent with the jurisprudence. I agree with the plaintiffs that the test adopted in *Peters* is too strict. If the conclusion in *Peters* was the test to be applied, clearly a jury trial would not be available in this case; however, as per *Manley* and *Penner*, the test is that construction of the contract must be the main or central question in the litigation. This interpretation represents the state of the law today and accords with the words of Rule 39(25) and Rule 10(1)(b).

[65] Westaqua noted that an application for leave to appeal Madam Justice Gropper's decision was allowed (indexed at 2008 BCCA 534, 263 B.C.A.C. 106); but it appears that the appeal did not proceed.

[66] In *Han*, at paragraph 37, Madam Justice Griffin held that:

A review of the case law interpreting Rule 39(25), the historical origins of the Rule, and principles of statutory interpretation leads to the conclusion that whether a trial "relates to" a matter pursuant to the Rule means something more than "touches on or is in any way concerned with" one of the excluded matters. The Rule must be read as meaning that one of the excluded matters is the main or central focus of the trial.

[67] It is clear that the question of the construction of the contract will not be the sole issue at trial. There are many other issues as I will set out in more detail later on.

[68] Will it be the principal issue? That is difficult to assess. But in my view construction of the contract will not be the principal issue.

[69] There is no dispute that a contract was entered into between *Skretting* and *Westaqua*. There does not seem to be much dispute regarding the fact that the product supplied was contaminated. There is a significant and important issue, which may ultimately turn out to be the sole or principal issue at trial, as to whether the Written Terms apply. If so, then the contract terms may require interpretation. The reply of *Skretting* so contends. But on the application before me no argument was made concerning competing interpretations of the Written Terms.

[70] Accordingly, I am unable to conclude that the sole or principal issue at trial relates to construction of a contract, and therefore I conclude that Rule 39(25)(j) is not applicable.

Issue 3 - Does Rule 39(27)(a)(ii) apply?

[71] The third issue is whether the jury notice should be set aside on the grounds that "the issues are of an intricate or complex character" pursuant to Rule 39(27)(a)(ii).

[72] In *Andersen v. Porter*, 2000 BCSC 1000, [2000] B.C.J. No. 1362 (QL), at paragraph 14 of BCSC, Mr. Justice R. D. Wilson of this Court referred to a non-exhaustive list of factors which are indicative of issues of an intricate or complex character in the context of determining suitability for a jury trial. He stated:

Absent a universal referent for "intricate or complex", prior decisions have identified a constellation of factors, quantitative and qualitative, which may assume the character "intricate or complex". See *World Wide Treasure Adventures Ltd. v. Ralph*. Examples of those factors include:

1. Multiplicity of parties.
2. Duration of trial.
3. Volume of expert testimony.
4. Multiplicity of standards of care.
5. The use of unfamiliar medical terms.
6. Apportionment of fault.
7. The assessment of future loss.
8. Novel applications of the law.
9. Deliberation time.
10. Preservation of the civil jury system.

[case references following each of the above factors have been deleted]

[73] I also refer to the decision of Mr. Justice Murphy in *Marshall v. Longpre*, 1991 CanLII 419, [1991] B.C.J. No. 2629 (QL) [Marshall cited to CanLII]. He referred to a prior decision of Mr. Justice Craig on the Court of Appeal, *Nichols v. Gray* (1978), 9 B.C.L.R. 5, [1978] B.C.J. No. 818 (QL) (C.A.). On page 18, Mr. Justice Murphy said this:

Since Mr. Justice Craig gave no reasons as to why he was of the opinion that the issues in that case were of an intricate and complex character if the respondents intended to proceed to trial on the basis that there was a breach of contract and a breach of warranty, as well as negligence, on the part of the appellant, I assume that he was stating the obvious i.e. that instructing a jury in the difference between the legal concepts and the difference in awarding damages are in themselves issues of an intricate and complex character.

[74] In Marshall, he went on to say on page 21 that:

In addition I conclude, as did the late Mr. Justice Craig, that as this is a claim for breach of contract as well as negligence, that the issues arising from the circumstances of this case are of an intricate and complex character.

[75] Skretting argues in response that the issues are not so intricate and complex that the case would be unsuitable for a modern jury, which must be presumed to be intelligent and educated. Skretting argues that many cases of significant factual and legal complexity are tried by a judge and jury, such as cases of medical malpractice.

[76] A non-exhaustive list of significant factual, legal or mixed factual and legal issues apparently presented by this case are as follows:

1. What were the terms of the contract; i.e., do the Written Terms apply?
2. With respect to each of the four Written Terms relied upon by Westaqua, on their proper construction and on the facts, do they exclude or limit liability?
3. If an exclusion or limitation of liability clause applies, to what extent does it apply?
4. Does the written warranty term exclude the operation of the conditions of fitness for purpose and merchantability set out in the Sale of Goods Act?
5. As regards the third party claims, what are the effects of the International Sale of Goods Act, R.S.B.C. 1996 c. 236?
6. If the Written Terms are otherwise applicable, are they enforceable in whole or in part? Should they be set aside or their effect ameliorated on grounds of unconscionability or public policy?
7. Was Westaqua guilty of negligent misrepresentation or fraud?
8. If Westaqua is liable in tort, do the exclusion or limitation of liability clauses apply?
9. Is there contributory negligence on the part of Skretting; if so, on what basis?
10. What is the contractual or tortious liability of the third parties to Westaqua and to each other?
11. Is contributory negligence applicable to the claims in contract?

12. Is contributory negligence applicable to the third party claims?
 13. Is Diversified entitled to rely on the limitation of liability clause that it alleges in its contract with Westaqua?
 14. What law is applicable to the contract between Westaqua and Diversified? If it is the law of Missouri, what is that law? How does Missouri law, if proven in evidence, affect the outcome of the case?
 15. If Skretting succeeds in establishing liability in contract, or in tort, and if the Written Terms are not applicable, what are its damages?
 16. Is Westaqua liable for damages in contract, in tort or in both contract and tort for Skretting's "loss of reputation"?
 18. If Skretting is entitled to damages, how are such damages quantified?
- [77] In a case like this it can be difficult enough for a judge sitting alone to properly instruct himself or herself as to the law applicable to the decision to be made. A judge sitting alone is able first to determine the real and necessary issues of fact and law applicable to the case. However, a judge sitting with a jury must charge the jury on one occasion on all of the law that may be applicable, depending upon what view of the numerous issues the jury may take. In this case, there is such a multiplicity of issues that the task of a judge in charging the jury would be all but impossible. In turn, the task of the jury would be overwhelming. Moreover, since the jury gives no reasons for its decision, no matter the result there is likely to be a difficult appeal.
- [78] In this regard, I refer to the comments of Master Bolton in *Oakleigh Properties Ltd. v. Kebet Holdings Ltd.*, [1993] B.C.J. No. 247 (QL), 1993 CarswellBC 2973 [Oakleigh cited to QL]. He says at paragraph 2:

The plaintiffs allege in their statement of claim that they entered into an agreement to lease premises in Richmond from the defendants for a term of 10 years. They allege that the defendants repudiated the agreement. They further plead that the defendants owed them "a fiduciary duty, as well as a general duty of care", and that the breaches of the lease are also breaches of "their fiduciary duty and general duty of care", and claim general damages "for breach of contract, breach of fiduciary duty and negligence", as well as special and punitive or exemplary damages.

[79] Master Bolton goes on to say at paragraph 10:

In addition to the question of the existence of a contract, there are issues with regard to the existence of a duty of care and more questions as to the existence of a fiduciary duty. These are essentially questions of law, although, of course, they rely ultimately on proof of a factual basis for the legal theory. Questions of a breach of the alleged duty of care and fiduciary duty should present a jury with no more difficulty than questions of breach of contract, but when it comes to the assessment of damages, the trial judge may well have to instruct the jury on the almost

metaphysical distinctions between damages in contract and in tort. The jury will also have to be instructed on the issues of estoppel, waiver and acquiescence. The room for misunderstanding and confusion here is almost limitless; to give one fairly simple example, counsel were at odds before me on whether the pleadings here allege that a contract was created by estoppel, and whether any contract can be created by estoppel or whether estoppel only prevents a party from raising certain defences to the existence of the contract.

[80] At paragraph 11, he then refers to the decision of Mr. Justice Murphy in *Marshall* to which I have already referred.

[81] At paragraph 15, Master Bolton says:

Counsel for the plaintiffs has pointed to certain decisions where jury notices have been allowed to stand in cases which he contends are similar to this.

[82] He goes on to refer to one such case which was referred to me as well, *57134 Manitoba v. Palmer et al.* (1984), 53 B.C.L.R. 250, [1984] B.C.J. No. 1510 (QL) (C.A.), wherein the Court of the Appeal upheld the plaintiff's right to a jury trial even though damages were claimed in tort, breach of contract and breach of fiduciary duty. At paragraph 15, Master Bolton distinguishes *57134 Manitoba v. Palmer et al.* by stating that "In that case, however, the causes of action were quite separate".

[83] I find the reasoning of Master Bolton to be applicable to the case before me. The case before me appears to involve issues which are significantly more complex and more factually and legally interconnected than the case of *Oakleigh* which involved only two main contending parties.

[84] I conclude that the issues in this case are of an intricate or complex nature within the meaning of Rule 39(27)(a)(ii), and that the jury notice should be set aside on that basis.

Conclusions

[85] In conclusion, the jury notice is set aside.

[86] As to costs, Westaqua has been successful on the application. Westaqua shall receive costs in any event of the cause. The costs are not payable forthwith.

"The Honourable Mr. Justice F. Verhoeven"

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