

SUPREME COURT OF YUKON

Citation: 38274 Yukon Inc. v Borealis Fuels
2024 YKSC 11

Date: 20240322
S.C. No. 22-A0138
Registry: Whitehorse

BETWEEN:

38274 YUKON INC. dba SUPER SAVE PROPANE (YUKON)

PLAINTIFF

AND

BOREALIS FUELS & LOGISTICS LTD.

DEFENDANT

Before Justice K. Wenckebach

Counsel for the Plaintiff

Michael Hewitt

Counsel for the Defendant

Morgan Burris

REASONS FOR DECISION

Overview

[1] The Plaintiff, 38274 Yukon Inc., dba Super Save Propane (Yukon) provides propane to commercial and residential customers in the Yukon Territory through renewable term contracts. The defendant, Borealis Fuels & Logistics Ltd., also supplies propane to customers in the Yukon.

[2] Super Save has brought an action against Borealis, alleging Borealis induced certain Super Save customers to stop accepting propane from Super Save, and to enter into a propane and equipment contract with Borealis, thus breaching their contracts with

Super Save. In doing so, Super Save alleges that Borealis committed the tort of inducing breach of contract.

[3] Borealis has brought an application to strike Super Save's statement of claim, without leave to amend, on the basis that it discloses no reasonable claim. Borealis submits that Super Save has not pleaded sufficient material facts to support the claim of inducing breach of contract. Leave to amend should not be granted, moreover, because Borealis has already made a demand for particulars and Super Save is unable to provide the necessary sufficient material facts to make the statement of claim viable.

[4] For the reasons below, I dismiss the application to strike, but order that Super Save provide particulars to Borealis.

Issues

[5] In oral submissions Borealis expanded on its written submissions. Based on Borealis' oral and written submissions, the issues, as I understand them, are:

- A. Does the statement of claim contain sufficient material facts about the actions Borealis took to induce the breach of contracts?
- B. Does the statement of claim need to state which inducements caused the customers to breach their contracts?
- C. Does the statement of claim contain sufficient material facts that Borealis intended the customers to breach their contracts?
- D. Does the statement of claim contain sufficient material facts about Borealis' knowledge of the contracts?
- E. Does the statement of claim contain sufficient material facts about the nature of the breaches?

Law

Application to Strike

[6] Borealis has brought its application to strike under Rule 20(26)(a) of the *Rules of Court* of the Supreme Court of Yukon (the “*Rules*”), which permits the court to strike a pleading if it “discloses no reasonable claim.”

[7] The legal principles of Rule 20(26)(a) are uncontroversial. For the purposes of an application to strike, the court must accept the allegations in the statement of claim as true (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para. 22). Additionally, striking pleadings is a draconian solution (*Besic v Kerenyi*, 2012 BCCA 187 at para.16). The court will read the pleadings generously and give allowance for deficiencies in drafting (*Grove v Yukon (Government of)*, 2021 YKSC 34 (“*Grove*”) at para. 22). Moreover, it will only strike a statement of claim where the action is certain to fail because of a radical defect (*Beaugie v Yukon Medical Council*, 2012 YKSC 96 at para. 16).

[8] One reason the court may strike a statement of claim for disclosing no reasonable claim is if it does not contain sufficient material facts to support every element of the cause of action. In the case at bar, Borealis’ position is that the statement of claim does not contain the material facts necessary to support the elements of the tort of inducement of breach of contract.

Inducement of Breach of Contract

[9] The elements of inducement of breach of contract are:

- the plaintiff had a valid contract with the third party;
- the defendant knew of the contract between the plaintiff and the third party;

- the defendant conducted itself with the intention of inducing the third party to breach the contract;
- the defendant's conduct caused the third party to breach the contract; and
- as a result of the breach, the plaintiff suffered damages (*Correia v Canac Kitchens*, 2008 ONCA 506 ("*Correia*") at para. 99).

[10] In addressing the material facts needed to support the elements of inducement to breach, the court in *Savary v Tarion*, 2021 ONSC 2409 at para. 60, stated that the pleadings must contain: the date of the contract; the names of the parties to the contract; the subject-matter of the contract; the actions alleged to have induced the breach; the date of the breach; the nature of the breach; and the damages alleged to have been suffered because of the breach. It is necessary to include these facts in a statement of claim because they are all material in establishing one or more elements of the tort of inducement to breach.

[11] In *Dowd v Skip the Dishes Restaurant Services*, 2019 MBQB 63 at para. 157, the court provided a similar summary. However, it also stated that the plaintiff must provide facts about how the defendant knew it was inducing the breach. In my opinion, the court here was discussing the issue of intent. By showing how the defendant knew it was inducing the breach, intent can be inferred.

[12] Because inducement to breach is an intentional tort, the pleadings must provide a high degree of specificity in the material facts (*Ontario Consumers Home Services v Enercare Inc.*, 2014 ONSC 4154 at para. 25).

[13] In the case at bar, Super Save provided sufficient facts about the dates of the contracts, the names of the third parties, the subject-matter of the contracts, and of the damages. Borealis submits, however, that Super Save has not provided sufficient

material facts about: the actions alleged to have induced the breach; which inducement caused the breaches; Borealis' intention to induce the third parties to breach the contracts; Borealis' knowledge of the contracts; or of the nature of the breaches. I will address each of Borealis' arguments¹.

- A. Does the statement of claim contain sufficient material facts about the actions Borealis took to induce the breach of contracts?

[14] Borealis submits that Super Save's pleadings are deficient because the alleged inducements are not unlawful and the description of the inducements is too vague.

Super Save submits it is not a requirement of the tort of inducement that the inducements be unlawful. It also argues that the description of the inducements in the statement of claim are sufficiently specific.

[15] I conclude that Super Save has provided sufficient material facts on this issue.

Lawfulness of Inducements

[16] Super Save alleges that Borealis induced its customers to breach their contracts by: soliciting the customers of Super Save for business; placing measuring devices on the customers' propane equipment to identify Super Save's best customers, without Super Save's knowledge or consent; providing various inducements to the customers, including offering reduced rates for propane and equipment and free propane for a period of time; and offering to uninstall and return Super Save equipment to Super Save.

¹ The applicant provided, as a part of its submissions, discussion on the policy reasons for ensuring that torts that relate to the regulation of economic and competitive activity should not be unduly expanded. Public policy is not a consideration in the kind of applications to strike as the one being brought in the case at bar (*Anger v Berkshire Investment Group Inc*, [2001] OJ No 379 (ONCA) at para. 15). I will therefore not address these arguments in my analysis.

[17] Borealis submits that none of the alleged conduct is unlawful. Moreover, conduct such as soliciting customers and offering reduced rates or free propane for a period of time is not only acceptable but encouraged in a free enterprise economy. These inducements are not the kind of inducement that the tort of inducing breach is aimed at.

[18] I am not persuaded by this argument. The test for inducement of breach of contract does not require that the inducements be unlawful. It is the combination of knowledge of the contract, inducements, intention that the third party breach the contract and resultant breach that makes the conduct unlawful (*AI Enterprises Ltd v Bram Enterprises Ltd*, 2012 NBCA 33 at para. 27). Thus, the fact that the conduct by itself is lawful does not mean that it cannot form the basis for inducement to breach.

Vagueness

[19] I also conclude that the conduct described is not overly vague. When read together, the allegations of Borealis' conduct are that Borealis took measures to determine who Super Save's best customers were, then promised those customers that if they bought propane from Borealis, Borealis would give them reduced rates, free propane, and would remove Super Save's equipment from their property. The pleadings provide specific information about actions taken that could constitute inducements. They therefore provide the material facts of inducement to support the cause of action.

- B. Does the statement of claim need to state which inducements caused the customers to breach their contracts?

[20] Borealis submits that Super Save's pleadings must identify which inducements caused the customers to breach their contracts. As I understand it, Borealis argues that because it is alleged to have provided several different inducements, the statement of claim must state which of the inducements offered the customers acted upon.

[21] In my opinion, it is not necessary to state which inducements caused the customers to breach their contracts.

[22] Identifying the inducements that caused the customers to breach their contracts is not an element of inducement to breach. Rather, to establish inducement to breach, it is sufficient for the plaintiff to demonstrate that generally the inducements caused the breach. If it is not necessary to prove a fact to establish an element in a cause of action, it is not necessary to include the fact in the statement of claim. Super Save, therefore, is not required to include which inducements caused the third parties to breach in its statement of claim.

C. Does the statement of claim contain sufficient material facts that Borealis intended the customers to breach their contracts?

[23] Borealis submits that Super Save has not provided any facts to establish that Borealis intended that the third parties breach their contracts with Super Save. Super Save submits that the circumstances alleged in the statement of claim can lead to the inference that Borealis intended the customers to breach their contracts.

[24] I conclude that there are deficiencies in the pleadings. However, it may be possible to correct those deficiencies through the provision of particulars. The statement of claim need not be struck.

[25] There are no facts in the pleadings that directly explain how Borealis intended that the customers would breach their contracts. As I understand the argument, Super Save's position is that Borealis took measures to learn who Super Save's best customers were. They then provided inducements that were directly related to terms of the contract, knowing that they were directly related, and therefore knowing that the customers would be in breach of their contracts if they accepted the inducements. The

inference that Borealis intended the customers to breach can be drawn because Borealis knew the customers would be breaching their contracts by accepting the inducements but enticed them with the inducements anyway.

[26] Because there are no facts pleaded about intention directly, but is instead to be inferred, the analysis on this issue can be broken down further. First, is whether there are sufficient material facts to establish that Borealis knew specific terms of contracts, identified Super Save's best customers, and provided inducements that it knew would require the customers to breach their contracts with Super Save if they were to accept them. This requires analyzing the pleadings' discussion of the terms of the contracts, Borealis' knowledge of the contracts and inducements provided. Second, is whether, assuming all the necessary material facts are pleaded, they support the inference that Borealis intended the customers to breach their contracts.

Whether Sufficient Material Facts Are Pleaded

[27] I conclude that Super Save pleads sufficient material facts about the terms of contract and the inducements provided but fails to provide sufficient material facts about Borealis' knowledge of the terms of contract.

[28] The pleadings first describe several terms of Super Save's contracts with its customers. These terms are: the third parties agreed to buy propane exclusively from Super Save during the term of the contract; Super Save agreed to provide propane and propane equipment to the customers; Super Save would remove the equipment at the end of the contract; and the customers would not cause the equipment to be removed without Super Save's consent.

[29] The pleadings also include the inducements Borealis provided, as detailed above.

[30] Reviewing the inducements with the terms of contract, it is evident that, if the customers were to accept Borealis' inducements, they would breach their contracts with Super Save. Thus, by accepting propane from Borealis at a reduced rate, or free of charge for a period of time, the customers would be in breach of their agreement to buy propane exclusively from Super Save. In addition, by agreeing to permit Borealis to remove Super Save's tanks from the customers' property, the customers would be in breach of their agreement with Super Save that they would not cause Super Save equipment to be removed without Super Save's consent. Super Save's position about how intention can be inferred is therefore partially laid out in the statement of claim.

[31] The difficulty, however, is in the statement of claim's description of Borealis' knowledge of the Super Save's terms of contract. In particular, the pleadings state that Borealis knew: "the key terms [of the contracts], namely that Super Save was required to deliver propane to the Customers for a fee, during the term of the Contract." This statement is unclear. On the one hand, it states that Borealis had knowledge of more than one term of the contract. On the other hand, it then explicitly identifies only one term that Borealis knew.

[32] Reading the statement of claim generously, it seems to me that the pleadings suggest that Borealis knew more than one term of the contract. It is still unclear, however, which terms Borealis is alleged to have known.

[33] The ability to draw the inference that Borealis intended the customers to breach is dependant on Borealis having knowledge of the various terms of contract outlined in the statement of claim. Because the statement of claim is ambiguous on this issue, the statement of claim does not, at this point, provide sufficient material facts to substantiate the element of intent.

Whether There Would be a Sufficient Basis to Infer Intention if all the Material Facts are Plead

[34] I will assume here that Super Save seeks to allege that Borealis had knowledge that the customers agreed to purchase propane exclusively from Super Save during the term of the contract, that Super Save provided the propane equipment and that the equipment could not be removed without Super Save's consent. The next question is whether that knowledge would establish a sufficient basis in the pleadings for the inference that Borealis intended the customers to breach their contracts. I conclude that would be sufficient to support the element of intent.

[35] Borealis submits that the pleadings cannot sustain the element of intention because the plaintiff has a high bar to meet in proving intention. In inducement to breach, the plaintiff must establish that the defendant actually intended the third party to breach; it is insufficient to show that the breach would have been a foreseeable consequence of Borealis' actions (*Correia* at para. 99). Borealis submits that the allegations do not support this degree of intention.

[36] I agree that it will be challenging to prove that Borealis actually intended the third parties to breach. However, a statement of claim should be struck only if there is no reasonable prospect of success (*Grove* at para. 20). If the allegations are that Borealis knew the terms of Super Save's contracts with its customers, determined which customers were the Super Saves' best customers, and then provided the inducements as alleged, I cannot say that the claim has no reasonable prospect of success.

[37] At this point, however, the statement of claim is deficient. In my opinion, the deficiencies are not so significant that the statement of claim should be struck. I will

therefore make an order that Super Save provide particulars about Borealis' knowledge of the contracts.

- D. Does the statement of claim contain sufficient material facts about Borealis' knowledge of the contracts?

[38] At the oral hearing, counsel submitted that Super Save was required to explain how Borealis knew about Super Save's contracts with its customers. However, under Rule 20(25.1) of the *Rules*, a party is permitted to allege knowledge without pleading the circumstances from which the knowledge is to be inferred. The statement of claim states that since about 2021, Borealis knew that Super Save had valid contracts with the customers. Super Save has provided the facts required to make this aspect of the claim viable.

- E. Does the statement of claim contain sufficient material facts about the nature of the breaches?

[39] Borealis submits that Super Save has failed to identify how each customer breached their contract. I do not agree.

[40] Paragraph 12 of the statement of claims states:

As a result of the actions of Borealis, the Customers breached and refused to perform the Contracts with Super Save by:

- (a) disconnecting and removing the equipment supplied pursuant to the Contracts, and owned by Super Save, without the knowledge or prior written consent of Super Save;
- (b) purchasing propane product [as written] from Borealis, and not Super Save;
- (c) entering into a propane and equipment contract with Borealis;
- (d) refusing to accept propane deliveries pursuant to the Contracts with Super Save;

- (e) terminating the Contracts with Super Save without proper notice.

[41] If Super Save were alleging that the customers breached their contracts in different ways, then this paragraph would be insufficient: it would be necessary to specify how each third party breached their contract.

[42] However, that is not what Super Save is alleging. In the statement of claim the word “Customers” is a defined term. It describes all the customers identified in the statement of claim. Thus, the phrase “the Customers breached and refused to perform the contracts...” means all the customers named in the statement of claim. In its pleadings, Super Save is stating that all the customers breached their contracts as outlined in para. 12(a)-(e). I therefore conclude that Super Save has provided the material facts necessary to support the claim that the customers breached their contracts.

Conclusion

[43] Super Save has, on the whole, provided sufficient material facts to substantiate its claim of inducing breach of contract. I find, however, that the statement of claim is deficient in setting out Borealis’ knowledge of the contracts, which, in turn, affects whether there are sufficient facts to sustain the element of intent. I therefore order that Super Save provide particulars to Borealis, stating which terms of Super Save’s contracts Borealis had knowledge of. Super Save shall provide these particulars to Borealis within 30 days of this decision being issued.