DATE OF RELEASE: JANUARY 17, 1994 ***No. C933772***

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

)

REASONS FOR JUDGMENT

NEPTUNE BULK TERMINALS)

(CANADA) LTD.)

OF

)

PLAINTIFF)

MASTER BRANDRETH-GIBBS

)

AND:)

(IN CHAMBERS)

)

KILBORN ENGINEERING PACIFIC)

LTD. and KILBORN ENGINEERING)

(B.C.) LTD.)

)

F. G. Potts Appeared on behalf of the plaintiff

C. R. Thomson Appeared on behalf of the defendants

Heard at Vancouver: December 17, 1993.

This is the application of the defendants, Kilborn Engineering Pacific Ltd. and Kilborn Engineering (B.C.) Ltd. ("Kilborn") for an order pursuant to R. 19(16) of the Rules of Court, that the plaintiff, Neptune Bulk Terminals (Canada) Ltd. ("Neptune"), deliver further and better particulars of matters stated in their statement of claim and detailed in their reply to demand for particulars.

In this action, Neptune sues Kilborn for damages allegedly arising out of contractual arrangements. Kilborn was contracted to provide advice, expertise, design, and agency services for Neptune with respect to the construction of multi-million dollar works at Neptune's potash and reclamation facilities in North Vancouver. Counsel agree that, potentially, weeks of discovery will be necessary, followed by a very lengthy trial.

On July 6, 1993, Neptune filed its statement of claim which contains 81 paragraphs and is 21 pages in length. In August, Kilborn demanded particulars. In December, Neptune delivered a reply to demand for particulars. It is the position of Kilborn on this application that; (1) there is no indication of what is meant by the words "additional works and remedial works" as found in paragraphs 12, 14, 17, 19, 25, 27, 28, 30, 32, and 34 of the reply to demand for particulars of Neptune; (2) there is no indication what is meant by the words "the inability of the plaintiff's contractors to proceed with the construction in an orderly manner and the delay of completion of the project, all of which have resulted in the plaintiff incurring unnecessary and unexpected costs of construction of the project thereby", as found in paragraphs 11, 14, 17, 19, 25, 26, 27, 28, 30, 32, 33, and 34 of the reply to the demand for particulars. Counsel for Kilborn argues that Neptune must, for example, particularize in each instance what caused the delay, how works were impeded, how long was the delay, how many dollars of additional works and remedial works were incurred.

By affidavit filed December 6, 1993 Mr. Singleton, of defence counsel, deposed:

" That I do verily believe that the answers to the demand for particulars are important and will assist us in filing an appropriate defence on behalf of our clients and

also to our defence of this action on behalf of our clients."

After receipt of Kilborn's reply to request for particulars, Mr. Singleton further deposed by affidavit filed December 17, 1993:

" I do verily believe that the plaintiff's response to Exhibit "A" (the reply), in may cases does not assist in providing anything more than a pro-forma defence to the Statement of Claim delivered herein and does not for the most part help in narrowing the issues in this action."

Having had the opportunity to consider the factual arguments advanced in the context of the detail contained in the statement of claim and reply to demand for particulars, I find that Kilborn is not unable to pled without further particulars.

"Narrowing" of the issues is a proper consideration, but as a review of the authorities discloses, the emphasis on an application for particulars can shift depending upon the stage of the litigation. It is also to be noted that the authorities speak of defining the issues by particulars as distinguished from the term "narrowing" employed by Mr. Singleton. At a later stage, certainly approximate trial, further defining of the issues by narrowing thereof may receive large attention. However, on this application, Kilborn has not yet filed its defence. Kilborn, through the affidavit of Mr. Singleton, has not demonstrated an inability to plead without particulars, rather it is asserted that the defence may be pro-forma and, thus, I assume require amendment at later stage.

THE AUTHORITIES

Mexican Northern Power Co. v. S. Pearson & Son Limited O.W.N. (1914) 648. (The nature of the case was similar to the application at bar). Mr. Justice Middleton heard the appeal from the order of the senior registrar by which the plaintiff company was ordered to provide particulars. The plaintiff had acquired certain water privileges in Mexico and was desirous of having the necessary works located and constructed for the development of power. The plaintiff entered into a contract with the defendant, an English corporation, by which the defendant undertook to act as consulting and managing engineer for the design and construction of the works. In 1914 dollars, the damage claim was upwards of $1 million. The agreement's terms were in dispute, as was the design and construction undertaken by the contractor. It was litigation of magnitude which would require extensive preparation and discovery. The plaintiff resisted the demand for particulars on the basis that it was entitled to obtain the fullest possible discovery from the defendant before completely formulating the charges upon which it intended to advance its claim. Mr. Justice Middleton stated:

" Discovery is of necessity limited by the pleadings and by the particulars which may have been given under them. To order particulars at this stage would, I think, unfairly hamper the plaintiff. The plaintiff is entitled to search the conscience and the conduct of the defendant, its agent, to the utmost; and it is better that this should all be done before the final formulation of the particular charges to be investigated at the trial. If the particulars given in the pleadings turn out to be so vague and general as to be insufficient to direct the mind of the party to be examined for discovery to the real issues, this may create difficulty when the examination is on foot; but it seems to me to be better that this should be left to work itself out during the progress of the examination than that an attempt should be made unduly to tie the hands of the plaintiff at this stage.

As has often been remarked, the true function of particulars is dual: to give the information necessary for intelligent pleading by the opposite party and to define the issues to be dealt with at the hearing. Sometimes the one aspect completely overshadows the other. Sometimes the due conduct of the action indicates discrimination. In this case I think that there can be no difficulty in pleading to the statement of claim as it now stands. No doubt, the defendant intends to deny the charges made against it; in fact, its counsel said so, and intimated the intention to counterclaim for a large sum which is said to be due to the defendant upon the contract. When the plaintiff has had discovery, an order should, I think then be made, as I have already indicated, directing the issue to be more clearly raised by means of some supplementary particulars."

(emphasis added)

British Columbia Liquors Company Limited v. Consolidated Exporters Corporation Limited et al W.W.R. Vol. 2 1930 379.

This was an appeal from the order of the chambers judge who had ordered particulars in a case where the plaintiff's claim included fraud. MacDonald, C.J.B.C., for the court, allowed the appeal so that the discovery of the plaintiff would not be unduly limited, notwithstanding the plea of fraud. His Lordship stated:

" When the plaintiff alleges fraud*prima facie* it ought to particularize, but

the Courts are careful to avoid making an order which might preclude him from proceeding when there is evidence that the defendants themselves are the sole depositaries of the particulars asked for. The order appealed from is, with respect, futile, because, if it orders discovery, it confines that to those matters of which particulars have already been given and are not wanted, and does not permit the plaintiff to inquire into the matters in respect to which it requires the information which would enable it to answer the demand for particulars, and may find it in the sole possession of the defendants who are demanding them."

In***Big Bay Timber Ltd. v. Arkinstall Logging Company Limited*** 7 B.C.L.R. 69 (1978) the Court of Appeal dismissed an appeal from the chambers judge dismissing an application by the defendant that the plaintiff provide further particulars. For the majority, Mr. Justice McFarlane stated:

" ...Whatever practice may have developed under the former rules or in other jurisdictions, it seems to me the quide to the exercise of discretion under R. 19(16) is to be found in the words "where particulars may be necessary" in R. 19(11). For the purposes of this case I think the word "necessary" should be applied with reference to enabling a defendant to plead and to the defining of issues."

(emphasis added)

The defendant's application had been brought prior to delivery of statement of defence, on the basis that particulars were needed to enable a defence to be plead. The Court of Appeal found that the chambers judge had dismissed the application on the basis that the particulars requested were not necessary and that exercise of discretion was not disturbed.

Cominco Ltd. v. Westinghouse Can. Ltd. et al (1) 6 B.C.L.R. 25 (1978). The defendant, Northern Telecom Limited, applied for an order that the plaintiff deliver further and better particulars of its statement of claim. Pleadings were closed and the action was set for trial eleven months hence. Mr. Justice Bouck referred to and relied upon the decision of Middleton J. in***Dixon v. Trusts and Guardian Co.*** (1914) 5 O.W.N. 645 at 647 whereat it was stated:

" Particulars should be ordered whenever necessary for the protection of the opposite party; but an order for particulars is not intended as a means to preclude a plaintiff from obtaining adequate discovery from the defendant...."

Mr. Justice Bouck also relied on***Anglo Canadian Timber Products Limited v. B.C. Electric Company*** (1960), 31 W.W.R. 604, 23 D.L.R. (2d) 656 (B.C.C.A.) wherein it was held:

" ...that an examination for discovery is not a substitute for particulars and an application for particulars should not be defeated by an argument that the applicant can get the same particulars by way of the examination for discovery."

Mr. Justice Bouck distinguished the application because the plaintiff was not suggesting that the defendant ought to obtain the information through discovery, but rather the plaintiff was asserting that many of the facts which the defendant was seeking were not known to the plaintiff at the time. Mr. Justice Bouck stated (at page 29):

" ...But in some cases the material may reveal a basis for the plaintiff's general allegation and the particulars sought are exclusively or almost exclusively within the knowledge of the defendant and not within the knowledge of the plaintiff. In these instances the law gives the court a discretion in postponing an order for delivery of particulars by the plaintiff until after his discovery of the defendant: ***Golightly & Knight Ltd. v. Irwin***, [1952] O.W.N. 89 at 90; and***Ross v. Blakes Motors Ltd.***, [1951] 2 All E.R. 689 (C.A.)."

(Unlike the application at bar, the defendant in***Cominco*** had pled and indeed the matter was scheduled for trial).

In***Dillingham Corporation Limited v. Finning Tractor and Equipment Co. Ltd. et al***, unreported July 14, 1983, C10891 Vancouver Registry and in***Marble Arts Canada Limited v. Molimo Investments Limited et al***, unreported February 7, 1986, F853964 Vancouver (Co. Ct.) it was held that the purpose of particulars are not to obtain evidence from the plaintiff prior to the discovery processes.

In***GWL Properties Ltd. and Bentall Properties Limited v. W. R. Grace & Co. of Canada Ltd. et al***, C900884 Vancouver Registry, January 21, 1992, Mr. Justice Drost dismissed an application by the defendants for particulars. First, relying upon***Nesbitt and N & N Produce Co. Inc. v. Wintemute et al*** (1978) 8 B.C.L.R. 147 he held that the fact that a statement of defence had been filed, was not in itself reason to dismiss such an application. However, the question asked by the defendants was when the plaintiff first

became aware of the existence of the alleged asbestos contamination in their towers. The date the plaintiff became aware of the asbestos was relevant to the defendants plea that the plaintiff's claim was barred pursuant to the provisions of the***Limitation Act*** R.S.B.C. 1960 c370 or***Limitation Act*** R.S.B.C. 1979 c236. Defence counsel described that request as one for a "material fact". His Lordship held that the defendants were looking for evidence to support their defenses, which is not a proper function of particulars.

Safeway Stores Limited v. Thompson et al (1947) Vol. 2 W.W.R. 93. On appeal from an application concerning particulars the court held, per Robertson J.A.:

" ...There is a difference between the necessity for particulars for the purpose of pleading and for the purpose of trial -- see***Canada Starch Co. v. Lawrence Starch Co.*** [1936] OR 261, at 277, 65 CCC 270, and***Fairburn v. Sage*** (1926) 56 OLR 462, at 464 -- and particulars may be ordered after defence which might not be ordered before. See***Sachs v. Spielman*** (1887) 37 Ch D 295, 57 LJ Ch 658. There must also be noticed the differences between an order for particulars before defence and an order for particulars after defence."

(emphasis added)

CONCLUSION

Although the language of the particular rules has changed since 1947, the current provision that particulars will be ordered "where particulars may be necessary" encumbrances the purposes long defined for an order for particulars.

Interestingly, the authority closest to the application at bar, on its facts, is that of***Mexican Northern Power Company v. S. Pearson & Son Limited*** (supra) a decision made in 1914. The nature of the relationship between the parties was similar, the magnitude of the works involved was similar, and the court recognized that prior to trial, precision would be necessary to ensure a fair trial. However, it was held that the defendant had no difficulty in pleading to the statement of claim delivered, and that the plaintiff ought not to be unduly hampered at this early stage of the litigation.

This application is brought by the defendants prior to the filing of the statement of defence. It is not asserted that a defence cannot be filed without the particulars sought, rather that the defence would be more fulsome. ***Big Bay Timber*** (supra) and***Safeway Stores*** are authority for denying the defendants' application at this juncture. In litigation of this magnitude it is likely that the defence will be amended in any event. At this early stage of the litigation it is inappropriate to tie the hands of the plaintiff further than already set out in the statement of claim and reply to demand for particulars. This was the course taken by the court in***Mexican Northern Power*** and is, in my view, applicable to the application at bar. After discovery, the defendants have liberty to reapply. It should also be stated that nothing in the plaintiff's pleadings presently appears to be in the nature of a "fishing expedition" such as would justify an early termination to part or all of the plaintiff's claim.

Costs to the plaintiff of this application as costs in the cause.

Dated at Vancouver, British Columbia this 17th day of January, 1994.

"Susan Brandreth-Gibbs"

Susan Brandreth-Gibbs

Master