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HIGHLIGHTS

* A Justice of the Ontario Superior Court of Justice dismissed an application made by a farm implements dealer for an injunction to restrain an equipment manufacturer from terminating a Dealership Agreement until all disputes concerning the termination had been dealt with by the Agriculture, Food and Rural Affairs Tribunal pursuant to the provisions of the Farm Implements Act (Ontario) and the Regulations under this Act. The injunction application was dismissed firstly because the dealer had not brought mediation or any other proceedings under the Farm Implements Act before bringing its injunction application. The Court also dismissed the injunction application because it was the injunction was a "mandatory" injunction which required the manufacturer to continue to take positive actions such as supplying parts to the dealer, and that the dealer had not established the strong prima facie case necessary to obtain a mandatory injunction. The Court also found that any losses could be adequately addressed with monetary damages. (Delta Power Equipment Ltd. v. Kubota Canada Ltd., CALN/2018-016, [2018] O.J. No. 3046, Ontario Superior Court of Justice)

NEW CASE LAW

Delta Power Equipment Ltd. v. Kubota Canada Ltd.;

CALN/2018-016,

Full text: [2018] O.J. No. 3046;

2018 ONSC 3595,

Ontario Superior Court of Justice,

H. McArthur J.,

June 7, 2018.

Termination of Agricultural Equipment Dealerships -- Farm Implements Act (Ontario) -- Whether Injunctive Relief is Available Pending Tribunal Hearings.

Delta Power Equipment Ltd. ("Delta") applied to the Ontario Superior Court of Justice for an injunction to prevent Kubota Canaqda Ltd. ("Kubota") from terminating a Dealership Agreement between Kubota and Delta.

Kubota is a farm equipment manufacturer. Delta sells Kubota products at 3 of its 10 dealerships in Ontario. One of these dealerships is in Sparta, Ontario.

The Dealership Agreement for the Sparta location specified that the Agreement would terminate after 2 years, and that either side could terminate the Agreement on 90 days' notice.

Kubota gave notice to Delta that it intended to terminate the Agreement.

Delta took the position that the termination was contrary to the mandatory provisions of the Farm Implements Act, R.S.O. 1990, c. F.4 and Ontario Regulation 123/06. The Regulation sets out conditions under which a distributor may terminate or refuse to renew a Dealership Agreement. The Regulations provide that the these conditions are mandatory and that any provision in an agreement which limits, varies or attempts to waive these conditions is void.

The Agriculture, Food and Rural Affairs Tribunal (the "Tribunal") is a tribunal established by the Farm Implements Act and the Regulations to consider disputes regarding terminations of Dealership Agreements which are subject to the Act.

Delta argued that an injunction should be granted until a final determination of all disputes between Delta and Kubota before the Tribunal.

Delta had not filed a Statement of Claim with the Court. Nor had Delta commenced proceedings before the Tribunal. Nor had Delta taken any other steps to pursue the termination of the Dealership Agreement under the Farm Implements Act, including mediation provided for under s. 5(3) of the Act. Delta argued that it had not taken these steps because of a decision of the Ontario Superior Court of Justice, Divisional Court in Chesterman Farm Equipment Inc. v. CNH Canada Ltd., [2016] O.J. No. 1183, 2016 ONSC 698, which had been under reserve before the Ontario Court of Appeal since October, 2017.

Decision: McArthur, J dismissed Delta's claim for injunction [at para. 33]. McArthur, J considered the following issues:

> 1. Can Delta obtain an injunction if it has not commenced proceedings before the Tribunal?

McArthur, J observed [at para. 3] that an injunction is not a stand-alone remedy. Rather it is ancillary to a cause of action, relying on R. v. Canadian Broadcasting Corp., 2018 SCC 5, [2018] S.C.J. No. 5.

McArthur, J observed that the first step under the Farm Implements Act is to seek mediation in accordance with s. 5(3) of the Act and to thereafter apply for a hearing before the Tribunal, if the parties are unable to resolve their dispute with the assistance of a mediator [at para. 7].

McArthur, J rejected Delta's argument that it would be appropriate to hold off commencing proceedings before the Tribunal until the Chesterman case had been determined, as the facts in Chesterman were different, and because the Tribunal is particularly well suited to deal with dealership termination issues [at para. 9].

McArthur, J concluded that in any event, the motion must be dismissed because it was not ancillary to a cause of action, stating, at para. 10:

> [10] But even if Delta reasonably determined that it would be the best use of resources to hold off on starting a proceeding in the Tribunal, I do not think that assists Delta with respect to its efforts to obtain an injunction. Again, as the court made clear in Canadian Broadcasting Corp., at para. 25, "An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy." Here, the request for injunctive relief [sic] is not linked to a cause of action or proceeding. Delta is asking for a remedy that is not ancillary to any cause of action. In my view, the motion must be dismissed on this ground.

2. Whether injunctive relief should be granted in any event?

McArthur, J considered the following subissues:

> (a) Whether Delta was seeking a mandatory injunction, and whether Delta must demonstrate a strong prima facie case that it will succeed at trial?

McArthur, J observed that although the application for injunction was framed as a restraining injunction, the effect of the injunction would mean that Kubota must have to take positive action, such as supplying its products to Delta. She therefore concluded that what was being requested was a mandatory injunction, which meant that the more stringent test of demonstrating a strong prima facie case would apply [at para. 16].

McArthur, J concluded that Delta had failed to establish a strong likelihood of success on the law and the evidence based on the facts, observing, among other things, that the current arrangement was a limited 24 month contract which had been requested by Delta which stipulated that either party could terminate the agreement by giving 90 days' notice. McArthur, J observed that because the agreement had been proposed by Delta, it would be difficult for Delta to claim it was void, and that, in any event, the agreement complied with s. 2(3) of the Regulations which provides that a Dealership Agreement may be terminated with the consent in writing of both the distributor and the dealer. She therefore concluded that Delta failed to establish that it had a strong likelihood of success [at para. 20].

> (b) Whether Delta would suffer irreparable harm if an injunction were not granted?

McArthur, J considered this question, in the event the stringent mandatory injunction test did not apply, and that the lower test of whether the application was frivolous or vexatious applied [at para. 22 and 23].

She rejected the argument that Delta would suffer irreparable harm to its standing and reputation if the injunction was not granted [at para. 26] because it sells products at 7 of its 10 locations.

McArthur, J concluded that even if it lost the opportunity of further business, these amounts could be addressed through monetary damages [at para. 29].

> (c) Whether the balance of convenience favoured granting the injunction?

McArthur, J considered which of the two parties would suffer greater harm from granting or refusing the injunction pending a determination of the merits. She concluded that Kubota would be more adversely impacted because the injunction sought by Delta would effectively tie Kubota's hands in its dealings in or around Delta's territories. She also concluded, at para. 32:

> [32] Moreover, the injunction would be in effect for an unknown period of time. Delta has yet to start any process at the Tribunal. Delta could not say when it would start the process, saying that it would depend on what the Court of Appeal rules in Chesterman, and what it decides. The uncertainty of timing, which stems from Delta's failure to take steps towards starting the Tribunal process, militates towards finding that the balance of convenience favours Kubota.

CREDITS

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