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HIGHLIGHTS

* The New Brunswick Court of Appeal has upheld the decision of a Trial Judge who concluded that a contract for the supply of seed potatoes contained an implied term that the buyer of the seed potatoes could reject the seed potatoes if it was determined that any portion of the potato grower's farm was not free of Bacterial Ring Rot, even if the field from which the potatoes were produced was free of Bacterial Ring Rot. The Court of Appeal concluded that there was evidence to imply this term based on the custom in the industry, and that based on this custom, the term could be presumed to have been part of the intentions of both parties when they entered into the contract. The Court upheld the decision of a Trial Judge who dismissed the seed grower's claim for breach of contract based on this implied term. (Briggs v. Desjardins Seed Farms Ltd., *CALN/2019-009*, *[2019] N.B.J. No. 2*, New Brunswick Court of Appeal)

NEW CASE LAW

Briggs v. Desjardins Seed Farms Ltd.;

New Brunswick Court of Appeal,

B.V. Green, B.L. Baird and R.T. French JJ.A.,

January 10, 2019.

CALN/2019-009
[2019] N.B.J. No. 2 | *2019 NBCA 2*

Seed Potatoes — Implied Terms in Supply Agreements — Bacterial Ring Rot.

Richard Briggs ("Briggs") appealed to the New Brunswick Court of Appeal from the decision of a Trial Justice who dismissed Briggs' claim for breach of contract against Desjardins Seed Farms Ltd. ("Desjardins").

Desjardins was in the business of cultivating and marketing seed potatoes, and had entered

into a contract to supply Hostess Frito-Lay with proprietary seed potatoes which would then be supplied to commercial growers authorized by Frito-Lay to provide processing potatoes for Frito-Lay, for use in Frito-Lay's various snack food products.

Briggs did not grow potatoes exclusively for Desjardins. In 2006 Briggs also grew a Spunta variety of potatoes from seed provided to him by Tobique Farms Ltd.

Desjardins had subcontracted with Briggs to grow a percentage of Frito-Lay seed potatoes from 2004 to 2006.

In mid-November, 2006, Briggs received news from the Canadian Food Inspection Agency ("CFIA") that the field being used for the cultivation of the Spunta potatoes was contaminated by Bacterial Ring Rot.

Following the discovery of the Bacterial Ring Rot, Desjardins took the position that it would not accept seed potatoes from any grower whose operation was contaminated with Bacterial Ring Rot. Desjardins maintained this position with Briggs even though the field which had been contaminated with Bacterial Ring Rot was not used to grow the Frito-Lay potatoes and was not adjacent to any fields growing Frito-Lay potatoes.

Desjardins took the position that the inherent risks (such as farm equipment used in various fields and storage concerns) were too great.

Briggs commenced an action against Desjardins for breach of contract.

The Trial Judge concluded that there was an implied term in the contract that Desjardins could reject potatoes from a farm that had any field contaminated with Bacterial Ring Rot and that Desjardins had therefore not breached its contractual obligations to Briggs.

Before the Court of Appeal, Briggs argued that the Trial Judge erred in finding that there was an implied term of the contract that the potatoes could be rejected from a farm that had any field contaminated with Bacterial Ring Rot and that the potatoes in question were being marketed from a field which had been infected with Bacterial Ring Rot.

Decision: Green, JA delivered the judgment of the New Brunswick Court of Appeal.

Green, JA dismissed Briggs' appeal with costs [at page 5].

Green, JA summarized the issue before the Court was as follows [at page 3]:

> Does the factual finding of the trial judge that the parties' agreement was subject to an implied right to reject the delivery of a crop where there was any contamination of the farm amount to palpable and overriding eerror so as to warrant review on appeal?

Green, JA then reviewed the findings of fact made by the Trial Judge [at page 4]:

> - That is well-known in the seed market business that it is extremely difficult to market potatoes from a farm in which any field has been infected with Bacterial Ring Rot.
>
> - It is reasonable to presume that no growers will accept seed potatoes from a farm if they are told that any one of the fields, regardless of which seed lot, was infected with Bacterial Ring Rot.
>
> - Both parties knew or should have known that reclassifying the potatoes would make it difficult to market them from a farm with Bacterial Ring Rot.

- Frito-Lay was particularly stringent about the seed potatoes they would purchase and that even though the CFIA had said that Briggs' other fields were "unlikely to be infected", Frito-Lay would never buy unless the farm was Bacterial Ring Rot free, and that all seed farms knew this.

- It was common knowledge of both parties at the time of the execution of the contract that the seed potatoes would be rejected from a farm that had been contaminated with Bacterial Ring Rot and that, in the study for the Potato Growers of Alberta, it was concluded that if Bacterial Ring Rot was found in any seed lot on a seed farm, all the seed lots must be decertified.

- If the lots in question were decertified, then Briggs would have no potatoes to sell to Desjardins.

Green, JA observed [at page 4] that with respect to the law governing the interpretation of contracts, the Trial Judge was guided by the Supreme Court decision in Sattva Capital Corp. v Creston Moly Corp., *2014 SCC 53*, *[2014] 2 S.C.R. 633*, in which Rothstein, J directed courts "to have regard for the surrounding circumstances of the contract".

Green, JA also observed [at page 4] that in Her Majesty the Queen in Right of the Province of New Brunswick v Brad Gould Trucking & Excavating Ltd. and Bird Construction Company, *2015 NBCA 47*, *438 N.B.R. (2d) 274*, the Court of Appeal had relied upon Sattva in determining that contractual interpretation involves a question of mixed fact and law, and thus attracts a deferential standard of review based on palpable and overriding error.

Green, JA also observed [at page 5] that the Trial Judge had concluded that "a court will find an implied term of a contract based on the presumed intention of the parties where the term is necessary to give business efficacy to the contract" [at page 5], relying on Double N Earthmovers Ltd. v Edmonton (City), *2007 SCC 3*, *[2007] 1 S.C.R. 116* and MJB Enterprises Ltd. v Defence Construction (1951) Ltd., *[1999] 1 S.C.R. 619*, *[1999] 1 SCR 619*, *[1999] S.C.J. No. 17* (QL), in which the Supreme Court set out the following test to be employed when determining whether to imply a contractual term:

> ...The general principles for finding an implied contractual term were outlined by this Court in Canadian Pacific Hotels Ltd. v. Bank of Montreal, *[1987] 1 S.C.R. 711*, *[1987] 1 S.C.R. 711*. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage: (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed"...

Green JA concluded [at page 5] that it was clear that the Trial Judge was justified to hold the contract contained the implied term that the potatoes to be provided had to emanate from a farm that was free of Bacterial Ring Rot, and that this conclusion was justified both because there was evidence of custom to support it, and that because based on custom, the term can be presumed to have been part of the intention of the parties when they entered into their contractual relationship.

CREDITS

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