

Citation: Bigfoot Inc. v. Alberta Safety First Ltd. et al., 2025 NBKB 104

Date: April 23, 2025

Docket: FC-230-2021

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

BIGFOOT INC.,

Plaintiff

– and –

ALBERTA SAFETY FIRST LTD. c.o.b. ALPHA PLUS
SANTÉ SÉCURITÉ / ALPHA PLUS HEALTH and
SAFETY, FANNY CÉCILE PALLOT, ANDREW
ROLAND LIBBY, and HONEYWELL LIMITED /
HONEYWELL LIMITÉE

Defendants

Date of Hearing: April 17, 2025

Date of Oral Decision: April 23, 2022

Subject Matter: **Motion to Amend**

Before: Justice Terrence J. Morrison

At: Burton, New Brunswick

Appearances:
Edwin G. Ehrhardt, K.C., for Alberta Safety First Ltd. and Fanny
Cécile Pallot, Defendants;

Ryan P. Burgoyne, for the Defendant, Honeywell Limited

DECISION

Morrison, J. (*orally*)

I. INTRODUCTION

[1] Bigfoot Inc. (“Bigfoot”) brought an action against the Defendants for breach of contract.

II. BACKGROUND

[2] Essentially, Bigfoot had a contract with Alberta Safety First Ltd. (“ASF”) for delivery of 500,000 N95 respiratory masks with a value of approximately \$1.3 million. ASF did not deliver the masks and did not return the monies advanced by Bigfoot.

[3] ASF claims that it was a distributor for the Defendant, Honeywell Limited (“Honeywell”) who was the ultimate supplier of the masks. There was no direct contract between Bigfoot and Honeywell. Bigfoot’s claim against Honeywell is based on false and fraudulent misrepresentation.

[4] ASF cross-claimed against Honeywell seeking contribution and indemnity for damages and costs it may have to pay Bigfoot.

[5] In the course of the discovery process, ASF claims it discovered that Honeywell was undermining ASF’s reputation and diverting business away from ASF to one of Honeywell’s wholesalers contrary to its obligations to ASF as one of Honeywell’s authorized distributors.

[6] The question of whether ASF was or is an authorized dealer of Honeywell, is an issue in the action as currently framed. Honeywell denies that ASF was ever one of its authorized distributors and says that any representation made by ASF to the contrary are fraudulent or negligent misrepresentations.

[7] ASF now moves to amend its cross-claim against Honeywell to claim loss of profits and general damages for their inability to fill other orders for other customers.

III. ANALYSIS AND DECISION

[8] As mentioned in ASF's brief, I recently had occasion to address the issue of amendments in the case of *671617 NB Ltd. v. 722951 NB Inc.* 2025 NBKB 26 at paragraphs 13 to 18. I will not read the entire excerpt but I will re-iterate some of the pertinent points.

[9] The law with respect to the amendments was succinctly summarized by Justice Walsh in *ALGO Enterprises and NBP Enterprises v. REPAP New Brunswick* and he referred firstly to the New Brunswick Court of Appeal decision in *Triathlon Leasing Inc. v. Juniberry Corp.* where it said:

As such, a Court should interpret and apply the rules to ensure to the greatest extent possible, that there is a determination of the substantive law unless the application of the rules would result in serious prejudice or injustice. Accordingly, amendments to pleadings are generally allowed.

[10] It goes on in part to quote from another Court of Appeal decision in *Moore v. State Farm Fire & Casualty Company*:

While leave to amend is a discretionary right, the practice is for the court to allow adjustments to pleadings whenever it can be done without injustice to the other side and where it is necessary to determine the issues between the parties. Generally speaking, an amendment should be allowed, however, negligent or careless may have been the first omission and however late the proposed amendment, if it can be done without injustice to the other side;

[11] The upshot of the cases that I've referred to is this:

1. Amendment provisions of the Rules are to be interpreted generously and broadly;
2. Amendments to pleadings are generally allowed;
3. Amendments should be allowed; however negligent or careless and however late the proposed amendment; and
4. The amendment must be allowed unless it will result in prejudice that cannot be remedied by costs or an adjournment.

[12] However, there are circumstances, very limited, where amendments may be denied. They are:

1. Where the amended pleading raises a cause of action that is statute-barred.
2. If the amendment would bring into the mix a clearly irrelevant fact or an inappropriate statutory provision;
3. Amendments that do not comply with the *Rules of Court* with respect to pleading and result in a pleading that does not disclose a reasonable cause of action and would be struck if a motion was brought to do so.

[13] Honeywell raises all three of these grounds in opposition to the motion.

[14] I will point out at the outset that Honeywell does not argue that the amendment will cause any prejudice that cannot be remedied by an adjournment or costs. Indeed, discoveries have not yet been completed, document production appears to be ongoing, and the matter has not yet been set for trial. It does submit, however, that if the amendment is permitted it will vastly expand the scope of the litigation resulting in delay and significant additional costs for all parties.

Limitation Period

[15] As mentioned, where the proposed amendment would be statute-barred, the amendment should be denied (*Levesque v. New Brunswick*, 2011 NBCA 48). The Court of Appeal has directed that where an amendment is opposed on the basis of a limitation defense, the Court is to consider the limitation issue first before applying the general and broad principles applicable to amendments as set out in Rule 27.10 (*Larke v. Vitalité Health Network Grandfalls General Hospital*, 2021 NBCA 26, at paragraph 44).

[16] Section 5(1)(a) of the *Limitations of Actions Act*, provides that no claim shall be brought after two years from the date on which the action was discovered.

[17] The discoverability rule was codified by the Supreme Court of Canada in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 and clearly applies to s. 5(1)(a). A cause of

action arises for purposes of s. 5(1)(a) when the material facts upon which it is based have been discovered or ought to have been discovered by the Plaintiff in the exercise of due diligence. The *Grant Thornton* case sets out the three criteria for discoverability. It states that a claim is discovered when the plaintiff (or party advancing the claim – in this case ASF) has actual or constructive knowledge that:

1. The injury loss or damage occurred.
2. The injury loss or damage was caused by an act or omission.
3. The act or omission was that of the defendant.

[18] In order to determine whether the claim was known or knowable at any given time it is important to first understand the claim that is being advanced. The claim is set out in paragraphs 17 and 18 of the Proposed Amendment (Appendix “A” to the Notice of Motion). I will not read those paragraphs as they are well-known to counsel. However, I will summarize the thrust of the claim. ASF alleges that in 2020 Honeywell failed to fulfill an order for masks that had been paid for and failed to refund the purchase price for nine months placing ASF in a cash flow crisis. ASF alleges that as a result it did not have funds available to make payments of its normal business expenses and could not meet its expenses as they fell due and could not continue to carry on its business. ASF says that not only was it unable to refund Bigfoot but was unable to fulfil ongoing and proposed orders for other unnamed customers. In the Proposed Amendment ASF claims that it missed out on orders valued at approximately \$31 Million resulting in a loss of potential profits of \$12.4 Million. The basis of liability is Honeywell’s breach of contract, breach of fiduciary duty and breach of its duty of honest performance.

[19] Honeywell points to the fact that the Proposed Amendment deals entirely with events that occurred in 2020. Honeywell says that the last date that ASF ordered masks was July 2nd, 2020. By December 30th, 2020, Honeywell had terminated its relationship with ASF and refunded its money. Honeywell says ASF had all material facts that they rely on for the proposed amendment by December 30th, 2020, and therefore the claim is statute-barred.

[20] ASF says through the document production received on October 3rd, 2022, it became aware that Honeywell was diverting customer business away from ASF and it wishes to explore what Honeywell was doing in July 2020 that caused economic damage to AFS.

[21] There are several problems with ASF's argument on this issue. First, there is nothing in the Proposed Amendment which deals with the diversion of customers away from ASF. The claim is for losses suffered by ASF as a result of Honeywell's failure to issue a refund all of which occurred in 2020. The fact that ASF learned in October that Honeywell was diverting customers cannot be used to bootstrap its limitation argument for an entirely different claim. Had the Proposed Amendment asserted the diversion claim then AFS's argument may have some traction. But it does not.

[22] Second, the affidavit of Cameron Tardoff, National Sales Manager for Honeywell, is that the last order placed by AFS was on July 2, 2020. The outstanding refund was made on December 30, 2020. It is that refund which underlies the claim in the Proposed Amendment. So, by December 30, 2020 ASF knew or ought to have known all the material facts needed to support the claim that is advanced in the Proposed Amendment: namely that

Honeywell had delayed the return of the deposit, that it had suffered financial setbacks as a result and was unable to fulfill its obligations to its customers and had suffered loss of profits. All these events are alleged to have occurred in 2020.

[23] This conclusion is confirmed by the letter of ASF's legal counsel to Honeywell dated September 22, 2020. In that letter ASF's lawyer recounts the failure of Honeywell to deliver the masks ordered and the fact that the Honeywell has retained the payment. The letter reads in part:

“This situation is highly detrimental to our client and places her [the defendant Ms. Pallott, owner of ASF] in a difficult position with regard to her own customers, who are becoming increasingly impatient.

Therefore, you are formally notified to proceed with the delivery of the goods ordered and paid for by our client and to inform us of the projected delivery date within 5 days of receipt of this letter. Failing this, our client will undertake all legal recourse it deems appropriate and claim from you all the damage it has suffered or may suffer as a result of the situation”

[24] In my view, it is clear that ASF had actual knowledge of the essential facts and elements of the claim advanced in the Proposed Amendment by September 22, 2020, and certainly by December 30, 2020 when the relationship with Honeywell was brought to a complete close with the refund of the purchase price.

[25] I conclude that the limitation period expired on December 30, 2022. ASF brought this motion on June 4, 2024, well outside the limitation period. The claim advanced in the Proposed Amendment is therefor statute-barred. That is grounds enough to deny ASF's motion to amend its cross-claim.

[26] As mentioned, that is enough to dispose of the matter but I will go on to address the other issues raised in this motion.

Unrelated Claim

[27] Honeywell submits that the claims advanced in the Proposed Amendment are completely unrelated to the underlying claim and should therefore not be permitted. There are two provisions of the Rules of Court that are engaged on this issue.

[28] First Rule 27.10 gives the Court the discretion to grant all such amendments that “are necessary for the purpose of determining the real questions in issue”. That raises the question: What are the real questions in issue?

[29] In the original action, Bigfoot brought an action against the defendants (principally ASF and Honeywell) claiming that ASF was a distributor for Honeywell. Bigfoot ordered masks through ASF, made payment for them in the amount of approximately \$1.3 Million, did not receive the masks and did not receive reimbursement of the monies paid. Bigfoot is essentially seeking recovery of the \$1.3 paid together with other related damages.

[30] ASF defended the Statement of Claim denying fault and cross-claimed against Honeywell for contribution and indemnity for any amounts owing to Bigfoot with respect to its order for masks for which it paid the \$1.3 Million. The claim in the original action is for breach of a contract, the contract which was comprised of two invoices described at paragraph 8 of the

Statement of Claim. That is, the order for masks placed by Bigfoot. In its original cross-claim ASF seeks indemnity for the damages that flow from the alleged breach of that contract.

[31] As mentioned earlier, the claim set out in the Proposed Amendment is to the effect that as a result of Honeywell’s failure to refund ASF it suffered financially and was unable to fulfil ongoing and proposed orders for other unnamed customers. In the Proposed Amendment ASF claims that it missed out on orders valued at approximately \$31 Million resulting in a loss of potential profits of \$12.4 Million. In my view, the Proposed Amendment goes beyond the question in issue in the underlying action – that is, Bigfoot’s claim with respect to the orders it placed for masks in the two invoices referred to in paragraph 8 of its Statement of Claim. It goes beyond that issue to claim for orders or potential orders lost to other, yet to be identified customers. Those other allegedly lost customer orders are not in issue in the underlying action.

[32] In *Enbridge Gas New Brunswick Inc. v. Modern Construction*, 2003 NBCA 78 the Court of Appeal stated at paragraph 16 that an amendment should not be permitted if it would bring into the mix a clearly irrelevant fact or an inapplicable statutory provision. In that case, Modern Construction was hired by Enbridge as a subcontractor to provide asphalt and paving on certain “highways”. Modern Construction sued Enbridge alleging it was not paid. Modern Construction sought to amend its Statement of Claim to plead certain provisions of the *Mechanics Lien Act*. The Court of Appeal agreed that if the pleading of the *Mechanics’ Lien Act* was intended to engage substantive provisions of that *Act*, it would have been prohibited as it does not apply to work on “highways”. However, Modern was referencing the *Mechanic’s Lien*

Act, not for the purpose of a claim under the *Act*, but only as a guide for the establishment of a holdback regime. The Court of Appeal upheld the amendment.

[33] The situation in *Enbridge* was crystal clear. If pleading the *Mechanics Lien Act* had unequivocally raised irrelevant facts or a clearly inapplicable statutory provision, that would justify displacing the very broad and liberal approach to allowing amendments. That is not the case here. The court is not confronted with a clearly inapplicable statutory provision. Nevertheless, the Proposed Amendment would result in bringing into the mix facts and issues not contemplated in the underlying action. The question becomes whether the new factual matrix justifies deviating from the general rule that amendments are generally permitted.

[34] That brings into play the second provision of the Rules of Court relevant to this issue. Rule 29.01 permits a defendant to cross-claim for relief not specifically related to the liability of the plaintiff provided the cross-claim is for relief “relating to” the subject matter of the main action. In *Merrithew v. RBC Dominion Securities Inc.*, 2022 NBKB 241 the term “related to” was given a very generous and broad interpretation. However, that case involved interpretation of those words as they appear in section 21 of the *Limitation of Actions Act*.

[35] Counsel for Honeywell referred the court to *Givogue v. Burke*, 2020 ONSC 5075. In that case the plaintiffs’ sought to amend their Statement of Claim to allege that trustees of a pension fund breached their fiduciary obligation to commence a lawsuit against a third party. The defendants opposed the amendment on the ground that it raised a new, unrelated cause of action. And I’m quoting from paragraph 32 of the *Givogue* Decision:

“A ‘cause of action’ has been defined as a ‘factual situation the existence of which entitles one person to obtain from the court a remedy against another person’. The key is whether substantially all of the material facts giving rise to the ‘new cause of action’ have previously been pleaded or whether new facts are sought to be added that are relied upon to support a new cause of action. A new cause of action is not asserted if the amendments simply plead an alternative claim for relief arising out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based.”

[36] In that case the court concluded that failure to sue was a completely new theory of liability and not simply additional facts upon which the original cause of action was based and denied the amendment.

[37] In this case, although the underlying action and the Proposed Amendment have some facts in common, the essence of the claim asserted in the Proposed Amendment is based on new and different facts., namely that ASF was unable fulfil customers’ orders totaling approximately \$31 Million resulting in loss of profits of approximately \$12.4 Million. These facts are not related to Bigfoot’s claim.

[38] In its submissions ASF argues that the amended cross-claim is related to the underlying action because both allege that there was a distributorship relationship between ASF and Honeywell and both allege a breach of Honeywell’s contractual and fiduciary obligations and breach of its duty of fair dealing.

[39] In my view, the fact that both claims allege the same relationship and similar breaches is not enough to conclude that they are related claims. The claim advanced in the Proposed Amendment relates to issues and facts not pleaded in the underlying action.

[40] The practical effect of the Proposed Amendment would be to dramatically expand the scope of this litigation. The financial exposure of Honeywell to damages would increase from approximately \$1.3 Million to over \$12 Million. Instead of being confined to the two purchase orders in the Bigfoot claim, the litigation would be expanded to include, not one customer as presently pleaded, but potentially numerous customers. This would require the identification of the allegedly lost customers and production and scrutiny of new and perhaps voluminous contracts, purchase orders and communications relating to those customers. In my view, the entire character of the litigation would be transformed by the Proposed Amendment. Some discoveries have already been completed and others scheduled. Both counsel concede that the discovery schedule would have to be abandoned to accommodate the amended claim and possibly discoveries already completed would have to be re-done to address the claim in the Proposed Amendment.

[41] In *Daigle v. Martin*, 2010 NBQB 14 Justice Lavigne stated at paragraph 11:

(...) The court should allow all amendments that are necessary to determine the real issues in dispute. However, the court should refuse amendments that would amount to circumventing the judicial process, or that would have effect of unduly complicating or delaying the action unduly.

[42] In my view, the Proposed Amendment raises a new cause of action, one that is unrelated to the claims in the underlying action. This is one of those very rare cases where the amendment should not be permitted.

Non-compliant Pleading – No reasonable Cause of Action

[43] Although not necessary to my decision in this matter, I will briefly address the final issue raised by Honeywell. It submits that the Proposed Amendment purports to assert a claim based on breach of fiduciary duty but has failed to properly plead the material facts to support the claim and therefore the proposed amendment does not disclose a reasonable cause of action. I had reason to address this issue in the case of *671617* referred to earlier. The test for determining whether a pleading discloses a cause of action is that which is applied in motions to strike under Rule 23.01(b). That test is whether it is “plain and obvious” that the pleading does not disclose a cause of action. It is also clear that that is the test to be applied where a motion to amend pleadings is opposed on the ground that the proposed amendment does not disclose a reasonable cause of action (*Enbridge Gas* at paragraph 21).

[44] Further, to go beyond that would result in the impermissible “morphing” of a motion to amend into a motion for Summary Judgement (*Sewell v. Ing Insurance Company of Canada*, 2007 NBCA 42 at paragraph 26). In my view the Proposed Amendment could be more clearly pleaded. However, I am of the view that it, at least arguably, establishes a claim for breach of fiduciary duty. Therefore, it is not plain and obvious to me that it does not disclose a reasonable cause of action. If this had been the sole basis upon which Honeywell resisted the

amendment its opposition would have failed. As mentioned, this issue would more properly be the subject of a motion for Summary Judgement.

[45] The motion to amend brought by AFS is denied with costs to Honeywell in the amount of \$1,500.

DATED at Burton, New Brunswick, this 30th day of April, 2025.

Terrence J. Morrison,
J.C.Q.B.