

CITATION: Vale Canada Limited v Royal & Sun Alliance
Insurance Company of Canada, 2021 ONSC 6377
COURT FILE NO.: CV-666020
DATE: 20210924

ONTARIO SUPERIOR COURT OF JUSTICE

RE: VALE CANADA LIMITED (f/k/a INCO LIMITED, f/k/a INTERNATIONAL NICKEL COMPANY LIMITED), VALE JAPAN LIMITED, PT VALE INDONESIA TBK, AND VALE EUROPE LIMITED

Plaintiffs

-and-

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA (f/k/a ROYAL INSURANCE COMPANY OF CANADA), OMEGA GENERAL INSURANCE COMPANY (as successor to BRITISH NORTHWESTERN INSURANCE COMPANY), LLOYD'S UNDERWRITERS, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON (listed in Schedule A), SOMPO JAPAN INSURANCE INC. (f/k/a THE NIPPON FIRE & MARINE INSURANCE COMPANY LIMITED), GENERAL REINSURANCE CORPORATION, THE NORTH RIVER INSURANCE COMPANY, ZURICH INSURANCE COMPANY LIMITED (UK BRANCH) (as successor to EAGLE STAR INSURANCE COMPANY LIMITED), RIVERSTONE INSURANCE (UK) LIMITED (as successor to MIDLAND ASSURANCE LIMITED), EMPLOYERS INSURANCE COMPANY OF WAUSAU (f/k/a EMPLOYERS INSURANCE COMPANY OF WAUSAU, A MUTUAL COMPANY), ALLSTATE INSURANCE COMPANY (f/k/a NORTHBROOK EXCESS & SURPLUS INSURANCE COMPANY), FIREMAN'S FUND INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, and the JOHN DOE INSURANCE COMPANIES.

Defendants

BEFORE: F.L. Myers J.

COUNSEL: *Hovsep Afarian and Christopher Hubbard* for Vale Canada Limited (f/k/a Inco Limited, f/k/a International Nickel Company Limited, Vale Japan Limited, Pt Vale Indonesia Tbk, and Vale Europe Limited.

Mark M. O'Donnell and Cameron L. Foster, for Royal & Sunalliance Insurance Company of Canada (F/K/A Royal Insurance Company of Canada).

Douglas Stewart, Deepshikha Dutt, and Rebecca Curcio for Travelers Insurance Company of Canada, Travelers Casualty & Surety Company (f/k/a The Aetna Casualty & Surety Company), and St. Paul Mercury Insurance Company.

Marcus B. Snowden, for AIG Commercial Insurance Company of Canada, as successor for American Home Assurance Company.

Joshua Henderson and Roderic McLauchlan, for The North River Insurance Company, Lloyd's Underwriters, and Certain Underwriters At Lloyds, London.

Christopher J. Rae, David C. Rosenbaum, and Mahdi Hussein, for Employers Insurance Company of Wausau.

Tom Donnelly and Joyce Tam, for Fireman's Fund Insurance Company.

Douglas O. Smith and Sarah Sweet, for Allstate Insurance Company (f/k/a Northbrook Excess & Surplus Insurance Company) and General Reinsurance Corporation.

David Wilson and Anthony Gatensby, for Riverstone Insurance (UK) Limited (as successor to Midland Assurance Limited), Zurich Insurance Company Ltd. f/k/a Midland Assurance Ltd., Zurich Insurance Company Limited (UK Branch) (as successor to Eagle Star Insurance Company Limited).

Kim E. Stoll and Rui Fernandes, for Sompo Japan Nipponkoa Insurance Inc. (aka Sompo Japan Insurance Inc.), f/k/a Nippon F&M (The Nippon Fire & Marine Insurance Company Limited).

Marc D. Isaacs and Arie Odinocki for Omega General Insurance Company (as successor to British Northwestern Insurance Company).

HEARD: September 24, 2021

ENDORSEMENT

Background

- [1] I convened a case conference in this matter at the request of counsel for Allstate and General Re.
- [2] Also before me are related actions under Court File Nos. CV-21-664805 and CV-21-665931.
- [3] All three actions seek to determine which, if any, insurers are liable to indemnify Vale Canada Limited (formerly Inco Limited) for environmental damage.

Traveler's Sudden US Lawsuit

- [4] I am told by counsel that discussions have been underway between and among Vale and the insurers from at least 2018 if not before. In 2018, Vale and at least some of the insurers entered into a form of standstill agreement to toll the limitation periods while discussions ensued (among other things).
- [5] Recently, and allegedly without prior notice, Travelers Casualty & Surety Company and/or Travelers Insurance Company of Canada terminated the standstill agreement and commenced a lawsuit against Vale in New York.
- [6] In the action in this court with Court File No. CV-21-664805, Vale sued just Travelers and St. Paul quickly. Vale brought this more comprehensive proceeding a few weeks later. At the same time, Royal & Sunalliance Insurance Company of Canada brought a claim with Court File No. CV-21-665931 against Vale and the other insurers.

Defences are due in this Proceeding

- [7] Vale, previously Inco, is a major Canadian concern. Its head office is in Toronto. As the names of other plaintiffs disclose, Vale has interests through affiliates elsewhere.
- [8] The defendants are insurance companies headquartered here or abroad. A few have defended the claims against them already. Our *Rules of Civil Procedure* provide extra time for foreign defendants to deliver their statements of defence (or to contest the jurisdiction of the court). The time limits for the foreign defendants' statements of defences have run out fairly recently.

- [9] I am told that six or seven of the foreign defendants are in default of the time limits for the delivery of their statements of defence.
- [10] The plaintiffs have noted in default Omega General Insurance Company. It did not contact the plaintiffs or have counsel do so at all. It just let the clock run past the due date for its statement of defence. As it is “noted in default” it cannot participate further in the lawsuit and it is at risk of default judgment issuing against it unless or until it obtains an order lifting the noting in default.
- [11] In Ontario, counsel are required to cooperate on procedural matters to ensure a fair hearing process for all parties.¹ The case law frowns upon using the rules applicable to defaulting defendants tactically.² For example, where counsel are in a *bona fide* dispute about some aspect of procedure, it would be quite improper for a plaintiff to note a defendant in default rather than bringing the substance of the dispute to a judge or an associate judge.
- [12] In addition, as good professional colleagues, it is common for plaintiffs’ counsel to grant indulgences to the defendants’ counsel who ask for more time to deliver their clients’ statements of defence. This can allow time for investigations or settlement discussions or perhaps just lighten a colleague’s load where time is not of the essence.
- [13] In view of our law’s disdain for use of default proceedings for tactical purposes, the test to set aside a noting in default is not a difficult one to meet.³ Counsel know that much laxity can be forgiven in the name of seeking a just resolution on the merits of a claim.
- [14] But loose rules focusing on just outcomes on the merits leave the system susceptible to gaming by those seeking to achieve tactical goals. To protect civility for the benefit of all, the court must provide a remedy against those who might game the system.

¹ See Commentary 1 under Rule 5.1-1 of the *Rules of Professional Conduct* of the Law Society of Ontario.

²*Nobosoft Corporation v. No Borders, Inc.*, 2007 ONCA 444 (CanLII), adopting *McNeill Electronics Ltd. v. American Sensors Electronics Inc.* (1996), 5 CPC (4th) 266 (Ont. Gen. Div.), reversed on other grounds (1998), 1998 CanLII 17693 (ON CA).

³ *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 (CanLII)

- [15] In *Canadian Imperial Bank of Commerce v. Petten*, 2010 ONSC 6726 (CanLII), Corbett J. wrote at para. 9

Certainly where the court can conclude that there is an oblique motive by a defendant in failing to defend a claim, then a motion to set aside a default is unlikely to succeed.

- [16] I am not called upon today to rule on whether anyone has behaved wrongly or seeks to use the *Rules of Civil Procedure* or the *Principles of Civility* improperly. Rather, I am simply asked by the plaintiffs to move this case forward with due alacrity while guarding against a risk of prejudice to them.

The Issue

- [17] The defendant insurers, especially those who are not domiciled in Canada, seek more time to defend or to bring motions to challenge the jurisdiction of this court to hear claims by Vale on policies of insurance issued to it and its affiliates in the ordinary course of business.
- [18] The defendants did not have their local counsel accept service of the statements of claim here. They forced Vale to take the time and incur the expense of conducting technical service abroad. Many were not ready with litigation counsel retained here before Travelers brought its claim in the US and Vale and RSA brought their claims here.
- [19] Vale is quite rightly not threatening to note in default any party who has retained counsel even if they are currently in default of the time for delivering their statements of defence. Vale just asks to receive their defences or motions to contest the court's jurisdiction on a timely basis.
- [20] Vale cannot be criticized for noting in default Omega who did not contact it at all. I am told that since Vale noted Omega in default, the other defendants have appointed counsel who have now made contact with Vale's counsel.
- [21] Moreover, Vale has indicated a willingness to consent to an order to lift the noting in default of Omega provided it too delivers its statement of defence or a motion to contest jurisdiction shortly.
- [22] The defendants, in the main, ask the court to wait for the outcome of a motion being brought by Vale in the US Court in Traveler's proceeding. In the motion, Vale contests either the jurisdiction of the US Court or the convenience of the US forum.

- [23] I am told that the responses to Vale’s motion in the US Court are due on October 5, 2021 and the motion is formally scheduled to be heard on October 12, 2021 (although that may be a placeholder date only).
- [24] Vale fears that the defendants are intending to use their own inaction in this proceeding as a positive argument to keep the matters before the US Court.
- [25] It is telling to note that counsel who advise that their clients need time to defend here have apparently been able to deliver all necessary pleadings and proceedings in the US case for an early motion and for discovery to be ready to go this fall.

Analysis

- [26] This court is not in competition with our US counterparts.
- [27] The US Court will deal with its proceedings as it sees fit and can expect the same full faith and credit from this court as we always receive from our neighbour. Similarly, this court will exercise jurisdiction in accordance with our law and will deal with convenient forum arguments likewise.
- [28] However, I reject the submission that this court should wait for the US proceedings before determining whether to proceed. Just as we do not compete with our coordinate courts south of the border, neither does either court determine outcomes for the other. It is not appropriate for this court to wait for a US Court to determine whether matters will proceed here or not.
- [29] The US Court will decide what will happen there. This court will decide what happens here. And it would be equally inappropriate for a party to defer pleading or to seek collegial indulgences here to try to affect either outcome.
- [30] I reject Mr. Stewart’s submission that “there is no first past the post” principle or that any extension of time here is “without prejudice to Vale’s rights”. Neither Mr. Stewart nor counsel for any other defendant undertook that their clients would refrain from arguing before the US Court that this case is behind that case in requiring pleadings or discoveries as a basis for making their arguments about proceeding there. Our law does recognize as a factor in a *forum non conveniens* analysis (albeit a small one) issues concerning which action commenced first and the relative progress of each. See, for example: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII), at para. 110. In other words, the insurers may well intend to enhance their arguments in the US Court and to prejudice Vale’s rights here by deferring their pleadings and asking this court to slow this proceeding as they have done.

- [31] I agree with counsel who argued that this case is not urgent in its substance. The issues involve payment of money among large companies. The issues span decades and resolution will take some time as well. The only sense of urgency has been brought about by Travelers seemingly trying to steal a march on Vale by commencing a lawsuit in the US Court on the sudden followed by the defendants' lackadaisical responses here.
- [32] As sophisticated, large corporate parties, they defendants could have accepted service here rather than requiring personal service on their head offices abroad. All were capable of defending on a timely basis if they chose to do so. It seems more than coincidental that many defendants are currently in default of procedural timelines and seek yet more time only here.

Outcome

- [33] In my view, it will not prejudice the defendants to require them to respond to this proceeding on a timely basis. They have already benefited from extra time.
- [34] It is also appropriate to take steps to guard against the possibility of a misuse of the *Rules* and counsel's civility to obtain tactical advantages.
- [35] Accordingly, I direct that by 12:00 noon E.D.T. on October 4, 2021, all defendants who have yet to defend shall deliver either their clients' statements of defence or motion records for motions to contest jurisdiction or *forum non conveniens*. The plaintiff is at liberty to note in default any defendant who chooses not to do one or the other by the set time.
- [36] Full evidentiary support is to be contained in any motion records served under the prior paragraph. The motions will be returnable on a date to be fixed by me at a case conference for that purpose.
- [37] Counsel are directed to confer and agree on a timetable for the delivery of responding motion material and cross-examinations, if any, on the proposed motion(s). I will break any scheduling disagreements (i.e. split the difference) and book the motions at a case conference to be scheduled through my Judicial Assistant for the week of October 18, 2021.
- [38] I expect to hear the motions in late October or early November. Parties should be working on their affidavits of documents in the interim. Documentary discovery will commence shortly after the resolution of the motion.

[39] No costs.

F.L. Myers J.

Date: September 24, 2021