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Docket: CI 20-01-27780
(Winnipeg Centre)
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Cited as: 2023 MBKB 160

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

M.B.T. HOLDINGS LTD., HERCULES MANAGEMENTS LTD. OPERATING AS FRIENDLY FAMILY FARMS LTD. 2454327 MANITOBA LTD., HANOVER FARMS INC.	)	Stuart J. Blake Aaron W. Challis Amber L. Harms for the plaintiffs
plaintiffs,	)	
- and -	)	
STONERIDGE CONSTRUCTION LTD.	)	Raya Sidhu for the defendant
defendant,	)	
	)	Judgment Delivered: November 6, 2023

MARTIN J.

INTRODUCTION

[1] Stoneridge Construction Ltd. (Stoneridge) seeks to withdraw an admission of liability for a fire, thereby enlarging the scope of the impending trial from damages only to liability (causation) and damages. It says the risk of the trial changed, in that it viewed the maximum damages to be the policy limits of its insurance, $5 million, but in

April and May 2023, based on new expert reports, the estimate of the damages changed to over $8 million.

[2] For the reasons that follow, I deny the motion. The trial will proceed as scheduled on the issue of damages only.

[3] The background leading to the motion is relatively straightforward. It is comprised from two affidavits, and related cross-examinations: one for Stoneridge, sworn by one of its trial counsel; and one for MBT Holdings Ltd., along with the other plaintiffs (collectively MBT), by a representative who also testified on examination for discovery.

EVIDENCE ON THE MOTION

[4] In its July 2020 Statement of Claim, MBT says in September 2018 they engaged Stoneridge to do demolition work, including removal of steel beams, at its seed processing plant in Winnipeg. Stoneridge used torches and cutting equipment on the beams. Allegedly, metal slag dripped from the hot works causing a fire, resulting in substantial damage.

[5] In its Statement of Defence, Stoneridge denied the fire occurred, denied involvement with the cause of the fire and put MBT to the strict proof thereof. It also claimed to have exercised reasonable care in the circumstances. Although MBT did not specify in its Statement of Claim the quantum of damages it sought, Stoneridge pled the relief sought was "exaggerated, grossly excessive and remote". Alternately, Stoneridge claimed contributory negligence, among other defences.

[6] The key damages report, in support of MBT's position, was produced before examination for discovery (the MKA Report, April 28, 2020). The estimated summary for costs for repair was approximately $5.5 million, adjusted by depreciation of 9.71% to a total actual cash value cost of $4.963 million.

[7] The matter appeared before me on February 25, 2022 for a pre-trial conference. Based on discussions with counsel, my follow-up memorandum set out a number of salient matters:

- "… While notionally disputing liability (at this point), the Defendant denies the extent and quantification of damage claimed …";
- "The critical issue for trial will be proof of the nature, extent and value of the loss suffered …";
- "The claimed value exceeds $6 million"; and
- "Limited expert reports have been received and exchanged. Both parties will consider the need for supplemental or new reports after the discoveries."

[8] Examinations for discovery of MBT's representative took place about a month later, in March 2022.

[9] In his affidavit on this motion, the MBT representative stated he gave evidence on discovery that (paras. 22 – 25):

- the MKA Report "excluded whole categories of additional costs" as the Report only dealt with the seed processing building, not "costs relating to the equipment, and the manipulation, decommissioning and cleaning thereof";

- described these additional costs at discovery as "big, very large, and enormous on at least three separate occasions", that total damages "far exceeded $5 million" and "could go over $7 million"; and
- these comments were clearly heard and understood by Stoneridge's counsel.

This evidence was neither challenged nor contradicted. Indeed, it was agreed to on cross-examination of the Stoneridge affiant, one of the trial counsel. He conceded the MBT representative offered that damages could be $8 million, but attempted to temper this by stating the figure was "no more than his [the representative's] opinion".

[10] At some point, Stoneridge produced a defence expert report. It was understood that MBT would obtain a rebuttal report.

[11] At the third pre-trial conference on January 20, 2023, numerous matters were discussed. One issue was that Stoneridge would attempt to advise by the end of February whether liability would be at issue. As well, the memorandum notes MBT's rebuttal report was outstanding. There is no reference to other expert reports.

[12] About a month later, on February 27, 2023, Stoneridge's counsel wrote to MBT's counsel respecting a number of matters. In part, they stated, "[A]dditionally, I can confirm our client will admit liability for the fire loss of September 19, 2018 such that this matter will proceed on the issue of damages alone." This admission was not qualified in any respect. Stoneridge counsel also inquired as to when the rebuttal report would be available.

[13] On April 21, 2023, MBT provided an expert report respecting restoration costs of machinery and equipment, estimated to be $3,184,000. Stoneridge says they had no

notice that such a report was forthcoming. On May 24, 2023, the rebuttal report was provided. It affirmed the initial MKA Report damages of $4.9 million. Thus, the total damage claim for the building and equipment is about $8 million.

[14] In August 2023, Stoneridge counsel received instructions to set aside the admission of liability because the $8 million claim was far in excess of its insurance policy limits, which they assert created a new risk. One of the same two counsel who have appeared throughout these proceedings for Stoneridge (its insurance counsel) appeared on the motion, while the other was the deponent of Stoneridge's affidavit in support of their motion. Counsel arguing the motion confirmed that Stoneridge itself, as distinct from its insurer who has had conduct and defence of the litigation, was not taking a position on the motion.

ISSUES

[15] The main issue is whether Stoneridge has established on evidence that under the circumstances it should be allowed to withdraw its admission of liability.

[16] Two preliminary observations are necessary.

[17] One, despite Stoneridge's position that the trial need not be adjourned if it is allowed to withdraw its admission, the practical reality is that it would need to be adjourned. Notably, there is insufficient time for either or both parties to obtain any relevant reports respecting liability, let alone any further examinations, especially as Stoneridge wants to put duty of care in issue. Further, I am not prepared to bifurcate the trial by doing a damages case first, and sometime later the liability portion.

For efficiency and expediency, trials in Manitoba are not bifurcated, absent extraordinary circumstances.

[18] Two, as noted, the only evidence Stoneridge led on the motion was an affidavit filed by one of the two trial counsel who have conduct of the proceedings on its behalf. This is unusual and inappropriate. Indeed, MBT pressed that I should exclude that evidence and summarily rule in MBT's favour, which I declined. Nonetheless, the circumstances are worthy of comment.

[19] Jurisprudence and the Law Society of Manitoba Professional Code of Conduct, s. 5.2, can be summed up simply as: the general rule is that counsel in a proceeding must not become a witness in the proceeding, or any part of the proceeding, except possibly if the subject matter is purely formal or not controversial.

[20] Here, the matter was controversial; the affidavit was the only evidence in support of a motion critical to Stoneridge. Awkwardly, MBT trial counsel had to cross-examine Stoneridge trial counsel. Moreover, Stoneridge counsel invoked solicitor-client privilege to refuse to answer some of MBT counsel's questions. As well, Stoneridge counsel's affidavit evidence, and subsequent cross-examination, had the potential to put his credibility at issue. These points amply demonstrate the rational for counsel not becoming a witness in a proceeding they are conducting.

[21] That said, I move on to the analysis.

PARTIES' POSITIONS

[22] Stoneridge relies on Court of King's Bench Rule 51.05, and an analogous case from Ontario, in asserting that their admission should be withdrawn. The Rule states:

> 51.05 An admission made in response to a request to admit, a deemed admission under rule 51.03 or an admission in a pleading may be withdrawn on consent or with leave of the court.

As noted, fundamentally, Stoneridge says they would not have made the admission of liability had they known the full quantum of the damages claimed.

[23] MBT says, strictly speaking, KBR 51.05 is inapplicable because the admission was neither made in response to a request, nor is it a deemed admission, nor was it made in a pleading. Rather, MBT says the principles of promissory estoppel apply, which they acknowledge are similar to those used to interpret KBR 51.05. Regardless, they say Stoneridge has not met either test and all in, the evidence "clearly demonstrates that the defendant was aware, or should reasonably have been aware prior to its admission of liability, that the amount of damages exceeded $5 million" (Plaintiff's Motion Brief, para. 29).

ANALYSIS

[24] I agree with MBT that principles respecting promissory estoppel may apply in a situation such as this (see ***Anderson v. Miner***, 1996 CanLII 1061 (BCSC), at paras. 26 – 30). I also agree that Stoneridge's admission of liability does not strictly fall within the three categories of admissions set out in KBR 51.05.

[25] Here, the admission of liability was a matter discussed at the pre-trial conferences. As expressly addressed in the January 2023 pre-trial conference

memorandum, albeit informally, Stoneridge was requested to give an answer whether to admit liability, within a certain time, which it did. In that respect, the admission is akin to a formal request to admit, but without potential consequences for failing to answer. Considering a just, liberal and common sense interpretation of KBR 51.05, I agree with Stoneridge that their motion should be determined in accordance with that Rule. If I were to follow the promissory estoppel approach, the result would be the same nonetheless.

[26] In Manitoba, a leading authority respecting KBR 51.05 is ***Tymkin v. Ewatski et al***, 2003 MBQB 164, as affirmed by the Manitoba Court of Appeal adopting "… without reservation the reasons of the motions judge with respect to the motion to withdraw the admission in the statements of defence…" (***Tymkin v. Ewatski et al***, 2004 MBCA 187, at para. 2). While most cases dealing with this specific topic of civil procedure, like ***Tymkin***, deal with a request to withdraw admissions in pleadings, the test is no different for other types of admissions contemplated by KBR 51.05.

[27] The motions judge in ***Tymkin*** framed the issue, and hence the test, as follows:

> [23] The issue then is whether it would be in the interests of justice to permit the defendants to withdraw their admission of paragraph 23 of the statement of claim. This requires a consideration and weighing of the following three criteria:
>
> (i) whether there is a triable issue;
>
> (ii) whether the admission was inadvertent or the solicitor wrongly instructed or, if not, the explanation offered for the amendment; and
>
> (iii) whether the withdrawal will prejudice the other parties in a manner that cannot be compensated by costs.

The "interests of justice" aspect of this formulation make the Manitoba test somewhat different than that in Ontario, but not materially so. The policy rational behind

withdrawal of admissions, most often explained related to pleadings, attempts to balance resolution of a claim on its merits against a disposition that is just, expedient and least expensive. This is what I understand the "interests of justice" formulation to mean. Further, as explained by Garry Watson, Q.C. and Derek McKay, *Holmested and Watson: Ontario Civil Procedure*, (Toronto: Ontario: Thomas Reuters, 1988, loose-leaf), pt 2, ch §71:15, Withdrawing Admissions: Rule 51.05, para. 2 Background and Policy (date accessed 6 November 2023):

> … In this context the court is understandably attuned to pragmatic factors. If a party has in a formal document admitted fact X, it is not unreasonable to expect the party to give some explanation for his or her change of position as a condition to granting leave to withdraw the admission. Moreover, the court appears to be cognizant of the tactical advantages that could be achieved by unscrupulous defendants if such amendments were freely available as of right. Many defendants are little interested in a speedy resolution or in making the proceeding inexpensive for their adversary. A request to withdraw an admission, particularly if it comes after discovery, can significantly delay the proceeding and add to costs.

[28] I now apply the test to this situation.

Is There a Triable Issue?

[29] In ***Tymkin***, the court explained at para. 24 that "[A] triable issue arises where there is sufficient evidence available to make the new position one that will produce a triable issue". In determining whether a triable issue exists, the court should not conduct a detailed analysis to gauge likely success, but rather only to determine whether there is a live issue to be resolved.

[30] I do not find Stoneridge has shown that a triable issue exists. They assert in argument, as they did in their Statement of Defence, that there may be issues

respecting duty of care and/or contributory negligence. However, they provided no evidence in support of this position. It is a bald position.

[31] For a triable issue to be a live issue, it requires more than a theoretical notion; it must be grounded on some credible evidence. Stoneridge's evidence, at face value from its affidavit, is simply that it perceives a new, increased financial risk. With respect, such risk does not address evidence or facts related respecting liability in causing the fire. There is no evidence cited providing real viability to support duty of care and/or contributory negligence theories as live issues. This is critical. On the other hand, MBT has cited evidence to the contrary.

Explanation for the Admission

[32] As noted, Stoneridge takes the position that it believed damages would be in the range of $5 million and it was thus surprised, or taken unawares, by the April 2023 report estimating the damage to equipment and for cleaning at over $3 million.

[33] I find that throughout the litigation it should have been clear that the damages claim would exceed $5 million, by a significant margin.

[34] Leaving aside the value set out in the MKA Report, in January 2022, I noted the claim exceeded $6 million, based on counsel's discussions at the pre-trial conference. Then there are all the comments of MBT's representative at the examination for discovery distinguishing the MKA Report as quantification of damage to the building and fixtures, and other significant damages for equipment and cleaning of same, all of which in total would exceed $7 million. Likewise, Stoneridge's affiant conceded being aware, after examinations for discovery in 2022, that damages could be up to $8 million.

[35] I recognize the admission of liability did not come for another year after examinations for discovery in 2022, and in that time, no further plaintiff's expert reports were provided. Nonetheless, at least one rebuttal report was still anticipated. More critically, Stoneridge would have been aware from the MKA Report it had received, and as flagged by MBT's representative at discovery, that categories of damages (such as for equipment) had not yet been accounted for in any report.

[36] Finally, I have no evidence from Stoneridge that the admission of liability was as a result of inadvertence, wrong instructions from client to counsel, or any other valid reason. They simply say that if had they realized the total magnitude of the claim, they would not have offered the admission. This position must be considered in context. As gleaned from the pre-trial conference memorandum, the value of damages was always understood to be the key issue for trial, if not the only real issue. Further, especially after examinations for discovery, it is an implicit inference underpinning the admission of liability that liability was not a real or live issue.

[37] In concluding as I have on this issue, I wish to be clear that I do not doubt that counsel for either party have acted fairly, either in the timing of the delivery of reports in 2023, or any ulterior motivation for this motion.

Prejudice by Allowing Withdrawal of the Admission

[38] If I allowed the admission to be withdrawn, in all likelihood this trial, which has been booked for the last 20 months, would be scuttled and adjourned for a new date 18 - 20 months from now. As well, if this trial proceeds as anticipated, on damages only, MBT will recover some amount, potentially a significant amount. To postpone

MBT's day in court would be to delay its inevitable judgment. Having said this, I recognize that such delay could likely be compensated by way of costs, but that is a poor alternative to simply having the trial proceed and determine the real issues sooner than later.

Interest of Justice

[39] As noted, no triable causation or liability issue has been shown. This is a determinative point weighing against allowing Stoneridge to withdraw its admission of liability. Further, weighing and balancing all of the criteria and evidence required for KBR 51.05, I would not exercise my discretion to allow the admission of liability to be withdrawn.

Antipas v. Coroneos

[40] Finally, I find this situation materially distinct from ***Antipas v. Coroneos***, [1988] O.J. No. 137, a precedent Stoneridge relies upon. The facts involved a three car collision.

[41] In brief, Coroneos was driving northbound when he veered into the southbound lane, colliding with southbound driver Ovadia. Southbound driver Antipas and Ovadia then collided. Antipas sued Coroneos for $150,000, who had insurance up to $200,000. His insurer admitted liability after learning Ovadia had no injuries. Later, Ovadia sued Coroneos for $500,000, and Antipas increased his claim. The insurer denied liability to Ovadia and sought to withdraw the admission of liability respecting Antipas. On appeal, the motions judge allowed the admission to be withdrawn.

[42] First, he found that the affidavit evidence and cross-examination of the affiant for Coroneos, coincidentally his lawyer, met the triable issue test in that "there may at

least have been some contributing negligence on the part of either or both Ovadia and Antipas", ... "an issue that can only be determined at trial." Here, there is no evidence to show liability is a live issue.

[43] Second, while he found that Antipas's increasing their claim alone was sufficient justification for the insurer to reconsider the admission of liability, he explained, "it was reasonable for the insurer to reconsider the admission in light of all the evidence and to seek to withdraw it if it believes there is a possibility of no liability or of contributory negligence." Thus, the "new situation" of a claim beyond policy limits was connected to the finding of a triable issue. That is different than here. Further, the situation here is reversed, in that Stoneridge's pleading squarely put liability at issue and then, after examinations for discovery, it conceded liability.

[44] Third, the motion judge found there was no prejudice that could not be financially compensated. I have commented on this earlier, with a different emphasis.

[45] In sum, for specific reasons applying the criteria, and generally assessing the case in the interest of justice, I do not agree that ***Antipas*** is an analogous precedent. It is certainly not binding and I do not find it persuasive.

CONCLUSION

[46] The motion is denied. Costs will be in the cause.

_____ J.