NOVA SCOTIA COURT OF APPEAL
Citation: *Monett v. TRC Hydraulics Inc.*, 2005 NSCA 95

Date: 20050617
Docket: CA 239049
Registry: Halifax

Between:

M. Garry Monett

Appellant

v.

TRC Hydraulics Incorporated and
The Standard Life Assurance Company

Respondents

Judge(s):	MacDonald, C.J.N.S.; Roscoe and Hamilton, JJ.A.
Appeal Heard:	May 17, 2005, in Halifax, Nova Scotia
Held:	Appealed dismissed, per reasons for judgment of MacDonald, C.J.N.S.; Roscoe and Hamilton, JJ.A. concurring.
Counsel:	Bruce W. Evans, for the appellant J. René Gallant, for the respondent TRC Hydraulics Darlene Jamieson for the respondent Standard Life

Reasons for judgment:

[1] McDougall, J. of the Supreme Court denied in part the appellant's application to amend his statement of claim. The appellant now seeks leave and if granted appeals this decision. After considering the record and the submissions of counsel, I see no reason to disturb McDougall, J.'s discretionary ruling. I would grant leave but would dismiss the appeal with costs to both respondents.

Background

[2] The appellant claims to have been wrongfully dismissed by the respondent TRC Hydraulics Incorporated ("TRC"). He was first hired by TRC as a sales representative in 1999. In early 2002, the appellant injured his shoulder during a fall at home. This apparently limited his ability to perform his job. That May, TRC gave the appellant notice of termination, effective June 2002. On June 28, 2002 the appellant promptly filed his originating notice and statement of claim. He claimed special damages for unpaid commissions, mitigation expenses, and "lost earnings and benefits which the plaintiff would have received had he been provided with reasonable notice...".

[3] TRC maintains that the claim proceeded as a straight-forward wrongful dismissal action. The pleadings closed, documents were exchanged and discoveries were completed. In January of 2004, TRC filed a notice of trial. The appellant objected to this notice, maintaining that the matter was not yet ready for trial. In addition to seeking some further documentary disclosure, the appellant then confirmed an intention to amend his pleadings. Among other things, he wanted to pursue a long term disability ("LTD") claim against the respondent Standard Life Assurance Company, TRC's group carrier at the time. Specifically, the appellant's proposed amendments would have added two additional forms of relief. Firstly he wanted to claim these benefits directly by adding Standard Life as a party. Alternatively, if the wrongful termination rendered him ineligible under the Standard Life policy, he wanted to claim this relief from TRC.

[4] Both respondents objected and maintained that it was too late in the process to add an entirely new claim involving an entirely new party. The appellant then applied to McDougall, J. for relief. The judge agreed with the respondents and while he allowed some proposed amendments, those involving the LTD claim were denied. Thus, we have the appeal to this court.

The Chambers Decision

[5] In his oral judgment, McDougall, J. recognized that while there was some overlap between the wrongful dismissal action and the potential LTD claim, it was insufficient to justify a joinder at that stage of the process. He stated:

> ... In my opinion, to allow the defendant Standard Life Assurance Company to be joined as a co-defendant at this stage particularly where the original action made on behalf of the plaintiff Mr. Monett against the defendant TRC Hydraulics Incorporated has been in existence for quite some time, and indeed, at least based on the position of one of the counsel, counsel for the defendant, he feels that this matter is ready to proceed to trial. ... at this stage of the game, to allow the second defendant to be named, quite frankly, I think it does create a prejudice to both defendants without any prejudice ... to the plaintiff ... The claim against TRC Hydraulics Incorporated is a separate claim for alleged wrongful dismissal, and the claim, the proposed claim against Standard Life Assurance Company arises out of an alleged contract, or if not alleged contract but a contract of insurance, including long-term disability insurance and the issues, although I guess there is some overlap, I don't think it's sufficient. There's not the intertwining that would be necessary to allow the application to be granted. ...

[6] Originally, it appeared as though the judge was prepared to allow the alternative claim against TRC to go forward with the existing wrongful dismissal action. Following his oral decision and in response to a question, he said:

> ... If you wish to amend the statement of claim to clarify your client's potential claim against TRC for long term disability or failure to continue coverage, then those changes will be permitted. I neglected to say that.

[7] However when this statement is considered in the context of the entire record, the judge's bottom line is evident. He would not allow any amendment that could effectively result in Standard life being added as a party. The judge clarified this when counsel sought assistance in settling the order. It then became apparent that TRC might add Standard Life as a third party in the event the appellant's LTD claim against TRC was added to the main action. In a letter to counsel dated December 10, 2004, the judge made his position clear:

> I will, once again, attempt to provide some clarity so that counsel can properly prepare the order which reflects my earlier decision.

> *Any amendments to the plaintiff's statement of claim are not to involve Standard Life, either as a named defendant or as a third party,* which would be the result if the Court decided to grant the draft order prepared by Mr. Evans. If the plaintiff feels he has a legitimate claim against Standard Life then that must be pursued separately. In other words, any amendment that could either directly or indirectly require the involvement of Standard Life is not permitted. [Emphasis added.]

[8] The appellant acknowledges that it was within the judge's province to clarify his decision before issuing the order. See **Burke v. Sitser et al** (2002), 208 N.S.R. (2d) 337. The order was settled accordingly, prompting the present appeal.

The Issues on Appeal

[9] The appellant seems to have significantly overestimated the consequences of McDougall, J.'s decision. He mistakenly feared that this ruling jeopardized or at least limited his future LTD claim. Among other things he was concerned that either or both respondents would meet such claims with defences of *res judicata* and *issue estoppel*. The following excerpts from his factum demonstrate his [mis] apprehension:

> [60] It is submitted that the Chambers Judge erred in law, in concluding that his decision caused no prejudice to the Appellant, when the result of the order appears to be that the Appellant is completely prevented from claiming damages from TRC Hydraulics Incorporated, for lost long term disability benefits, which the Appellant would have been able to claim from the Standard Life Assurance Company, had TRC Hydraulics Incorporated continued the Appellant's employment until the end of the period of reasonable notice and such claim against TRC Hydraulics Incorporated, being an alternative claim, to a claim against The Standard Life Assurance Company for Long Term Disability benefits, can not be finally determined until the claim against Standard Life has been determined and a separate action against The Standard Life Assurance Company can not determine the alternative claim against TRC Hydraulics Incorporated.
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> . . .
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> [62] Once the existing claim in paragraph 10 of the June 28, 2002 Statement of Claim has been determined at trial if Mr. Monett attempts to commence a separate action against TRC or to join TRC in a separate action, claiming contract or tort damages from TRC for lost long term disability benefits to which Mr. Monett would have been entitled from Standard Life, if Mr. Monett had been provided

> with reasonable notice of termination before his employment terminated, Mr. Monett will be arguably barred by *res judicata* (cause of action estoppel and issue estoppel).
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> . . .
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> [86] ... As the result of the refusal to provide leave to amend may have the effect of preventing the issues raised by the amended pleadings ever being judicially determined, it is appropriate for the Court of Appeal to conduct a rehearing and to exercise its own discretion on the issue particularly if the chambers judge made errors of law:

[10] Yet neither the judge nor opposing counsel ever suggested that the appellant's future LTD claim would be limited by this disposition. In his decision, the judge stated:

> ... They are really two separate actions or claims in my opinion. And to allow the application to go forward, and I said this before, I think it does create a prejudice to both defendants and in my opinion there is no prejudice to the plaintiff. ...

[11] In its factum, TRC confirms:

> [35] As found by Justice McDougall, there was no prejudice to the Appellant in the rejection of his Application because he is free to pursue the new causes of action in a new lawsuit against both Respondents if he so desires. Justice McDougall's decision respects the right of TRC to have the wrongful dismissal litigation concluded in a relatively just and speedy manner
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> . . .
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> [74] In fact, the result of the decision of Justice McDougall is that the Appellant will have to commence another action to pursue those matters wholly unrelated to his current wrongful dismissal action. In so doing he can pursue long term disability payments from Standard Life, and in the alternative from TRC. There is no basis to suggest that Justice McDougall's decision will prevent any issue raised by the Appellant from being judicially determined.

[12] Standard Life as well acknowledged that the appellant could down the road pursue his LTD claim. It wrote in its factum:

> [46] ... Justice McDougall was satisfied that the claims against TRC and Standard Life were two separate claims and that Mr. Monett has the option of commencing a separate action against Standard Life if he so desires. ...

[13] Yet the appellant proceeded under this misapprehension right up to and including oral argument before us. It was only after respondents' counsel re-confirmed their respective positions on the record that appellant's counsel finally realized the impugned order was much less prejudicial to his client than he had thought.

[14] Unfortunately this misunderstanding prompted the appellant to take an unnecessarily complex approach to this appeal. It rendered many of the issues set out in his notice of appeal and factum moot. In fact, the issue before McDougall, J. was much more focused. A notice of trial had been filed in a wrongful dismissal action. The plaintiff then sought leave to introduce a new head of damage involving a new party. At that stage in the process, the judge had to decide whether the claims ought to be heard together or separately. The issue for us therefore becomes much more basic. Did the judge commit reviewable error by deciding in those circumstances that the claims should be heard separately?

Analysis

Standard of Review

[15] This is an interlocutory appeal where the chambers judge exercised discretion. It is not for us to displace that discretion by directing what we would have done in the circumstances. Instead we should interfere only if, (a) the chambers judge erred regarding a legal principle, (b) committed a palpable and overriding error of fact, or (c) if the decision constitutes a patent injustice. See **Cluett v. Metro Computerized Bookkeeping Ltd**., [2005] N.S.J. No. 179.

The Relevant Civil Procedure Rules

[16] The appellant in seeking this relief relied on Civil Procedure Rules **15.01**, **15.02** and **5.04**:

> **Amendment of a document filed in a proceeding**

15.01. A party may amend any document filed by him in a proceeding, other than an order,

(a) once without the leave of the court, if the amendment is made at any time not later than twenty (20) days from the date the pleadings are deemed to be closed or five (5) days before the hearing under an originating notice;

(b) at any other time if the written consent of all the parties is filed;

(c) at any time with the leave of the court.

Amendments by the court

15.02. (1) The court may grant an amendment under rule 15.01 at any time, in such manner, and on such terms as it thinks just. [E. 20/5(1)]

(2) Notwithstanding the expiry of any relevant period of limitation, the court may allow an amendment under paragraph (1),

(a) to correct the name of a party, notwithstanding it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake was genuine and not misleading or such as to cause any reasonable doubt as to identity of the party intending to bring or oppose the proceeding; [E. 20/5(3)]

(b) to alter the capacity in which a party brings or opposes a proceeding if the capacity, after the amendment is made, is one in which at the date of issue of the originating notice, third party notice, or the making of the counterclaim, the party might have brought or opposed the proceeding. [E. 20/5(4)]

(3) The court may allow an amendment under paragraph (2) notwithstanding the effect of the amendment will be to add or substitute a new cause of action, if the new cause of action arises out of the same or substantially the same facts as the original cause of action. [E. 20/5(5)]

Misjoinder and nonjoinder of parties

5.04. (1) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of any party or person, and the court may determine any question or issue in dispute in a proceeding so far as it affects the rights and interests of any party, saving the rights of any person who is not a party. [E. 15/6(1)]

> (2) At any stage of a proceeding the court may, on such terms as it thinks just and either of its own motion or on application,
>
> > (a) order any party who is not, or has ceased to be, a proper or necessary party, to cease to be a party;
> >
> > (b) *order any person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added as a party*; but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as the court may order. [E. 15/6(2)] [Emphasis added]

[17] Because the appellant seeks to raise a new head of damage involving a new party, Rule **5:04** is the most pertinent provision. See **Fraser v. Westminer Canada Ltd.** [2003] N.S.J. No. 24 and **Blair v. Alderney Consultants 1987 Ltd.** (1995), 149 N.S.R. (2d) 184.

[18] The purpose of Rule **5.04** was discussed by this court in **P. A. Wournell Contracting Ltd. and Wournell v. Allen** (1980), 37 N.S.R. (2d) 125. MacDonald, J.A. noted:

> [5] Rule 5.04 is similar to Order 15, Rule 6 of the *English Rules of the Supreme Court*. The scope of such rule is explained in Vol. 1 of the *Supreme Court Practice* 1976, at pp. 177-8, as being intended to prevent an action being defeated by the misjoinder, or nonjoinder, of parties and provides for any necessary amendment in respect of the parties to an action being made at any stage of the proceeding; and that
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> > this rule should be construed so as to effectuate what was one of the great objects of the *Judicature Acts*, namely, to bring all parties to disputes relating to one subject matter before the courts at the same time so that the disputes may be determined without the delay, inconvenience and expense of separate actions and trials ... under it the court has power to carry out the intention of the *Judicature Acts*, namely, to secure the determination of all disputes relating to the same subject matter, without delay and the expense of separate actions.
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> > The court retains a discretionary power to refuse the order ... and may elect to deal with the matter as regards the rights of the parties before it,

> especially if the action has proceeded to trial without objection as to parties ... if serious embarrassment would be caused to the plaintiff, the order may be refused ... but generally speaking, the court will make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute ... The court will not, however, decide questions of right on an application under the rule. (My emphasis)

[6] As to adding or substituting plaintiffs the authors of the *Supreme Court Practice* 1976, say at p. 178:

> The tendency of modern practice is to allow the amendment where the defendant can be safeguarded as to costs, and the addition or substitution is necessary to enable the question at issue to be determined. So a plaintiff or plaintiffs whose presence is necessary can always be added. The question whether the new plaintiff has a cause of action or not will not be considered on the application to add him, the object of the rule being, not that the party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated on whether in his favour or not. (per Fry, J., in *Long v. Crossley* (1879), 13 Ch.D., at p. 391).

[19] Relevant to this appeal, Saunders, J. (as he then was) in **Royal Bank of Canada v. Woloszyn** (1991), 105 N.S.R. (2d) 366, expressed concerns about this rule being used to advance a separate cause of action late in the process. Beginning at para. 28, he noted:

> [28] Without expressing any definitive opinion, I have grave doubts whether C.P. Rule 5.04(2)(b) contemplates the application brought by Woloszyn. Rather, I think it speaks of the situation to which Lord Denning referred to in **Gutner**, supra - in other words to add a defendant who might ultimately be obliged to respond if the plaintiff were to succeed or who wasn't joined initially due to inadvertence, or lack of evidence which has now surfaced so as to permit the joinder. For example allowing the addition of an insurance agent as a defendant as well as the underwriter; or permitting the addition of a named surgeon, personally alleged to have been negligent if it be determined that the surgeon was not an employee of the defendant hospital.
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> [29] This is different. The proposed form of order would show Woloszyn as the only defendant, but would add Blackhawk and PJ as new plaintiffs by counterclaim. They would thereby seek to impose themselves on this proceeding.

> [30] *The admirable object of the C.P. Rules to secure a just, speedy and inexpensive resolution of disputes (C.P.R. 1.03) ought not be cited as a means or reason for circumventing the rules, particularly where, as here, an injustice would result. I have found that the proposed counterclaim is a separate cause of action.* Extensive discovery examinations have already been undertaken in the Province of Alberta. I have no doubt that the Bank's theory of their case and their instructions to counsel will be based entirely in contemplation of the pleadings as they existed. At the time of those pleadings and discovery examinations Blackhawk and PJ were nonentities as far as the Bank was concerned. If Woloszyn's application were to be granted, the Bank would undoubtedly face further discovery examinations and have to redirect witnesses' attention to new issues and heads of damage. The bank will have lost any benefit of fresh memory and recollection on the part of those witnesses. I accept the Bank's submission that Woloszyn has already been extensively questioned regarding the damages he advanced in his 1987 counterclaim. [Emphasis added]

Conclusion

[20] Considering that this ruling did little to limit the Appellant's right to pursue his LTD claim against either or both respondents, any prejudice to him is limited. I do acknowledge that he must now go through the delay and expense of a second action. Yet, even if the relief sought had been granted, the appellant would likely still have been called upon to compensate both respondents for their costs flowing from the late amendment. Furthermore, from the record I see no risk of inconsistent findings should a second action go forward. The only potential inconsistent finding involves the date of the alleged disability. Yet, any disability would have been triggered, at the very latest, within two weeks of his termination. Thus, even if the dismissal is found to have been unjust, the disability would in any event have occurred within the notice period. The respondent TRC acknowledges this in its factum:

> [79] There is no dispute that Mr. Monett's surgery, which he alleges to be the cause of his long term disability, occurred during the notice period. Therefore there is no risk of inconsistent findings should the wrongful dismissal claim proceed to its natural conclusion, and a separate claim for LTD benefits against the insurer be pursued.

[21] Finally, Standard Life would have little or no interest in the main wrongful dismissal action. Yet had the amendments been granted, it would have been forced to participate in a longer more complex procedure. In other words, instead of one

longer more comprehensive action, there may now be two simpler proceedings. Thus the judge faced pros and cons with either approach.

[22] Again it is not for me to direct what I would have done in the circumstances. I am satisfied that the judge committed no error in legal principle, no palpable and overriding error of fact and his ruling does not give rise to a patent injustice.

Disposition

[23] I would grant leave but would dismiss the appeal with costs of $1,000 to each respondent, together with their reasonable disbursements to be taxed.

MacDonald, C.J.N.S.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.