Date: 19981020 C.A. No. 147084

NOVA SCOTIA COURT OF APPEAL

Cite as: Point Tupper Terminals Company v. Global Petroleum Corporation, 1998 NSCA 174

Freeman, Hallett and Bateman, JJ.A.

BETWEEN:

POINT TUPPER TERMINALS COMPANY Appellant - and - GLOBAL PETROLEUM CORPORATION Respondent	)	David P.S. Farrar for the appellant Robert W. Carmichael for the respondent Appeal Heard: October 6, 1998 Judgment Delivered: October 20, 1998

THE COURT: Appeal dismissed with costs in the cause per reasons for judgment of Bateman, J.A.; Freeman and Hallett, JJ.A. concurring.

BATEMAN, J.A.:

This is an appeal from an interlocutory order of Justice Jill Hamilton of the Supreme Court granting to Global Petroleum Corporation (the respondent) leave to amend its defence to a counterclaim.

Background:

The appellant (defendant and plaintiff by counterclaim) Point Tupper Terminals Company (**PTTC**) owned a marine terminal and petroleum storage facility (the **Terminal**) at Point Tupper, Nova Scotia.

The respondent (plaintiff and defendant by counterclaim) Global Petroleum Corporation (**Global**), an American petroleum and gas trading and distribution company used the terminal facility for the storage of heating fuel and for blending gasoline.

In December of 1993 Global, alleging defects and deficiencies in the design and operation of the blending facilities at the Terminal, sued PTTC to recover a quantity of its heating oil and for damages for losses suffered as a result of the blending operation at the Terminal (the first action). PTTC defended and counterclaimed for amounts owing by Global to PTTC for use of the facilities. In addition PTTC claims that Global breached an agreement to lease a quantity of gasoline storage and tankage at the Terminal. The original claim by Global is in the millions of dollars as is the counterclaim by PTTC. Global filed a defence to the counterclaim on March 29, 1994.

On January 2, 1996 Global commenced an action against PTTC (now Statia Terminals Point Tupper, Incorporated) and a number of affiliated companies alleging fraud, fraudulent misrepresentation, deceit and breach of fiduciary duties in relation to a joint venture involving PTTC, Global and other companies, to reactivate and operate the Terminal. This action was discontinued and replaced by a new action (the second action) containing the same allegations but including additional plaintiffs, one being Scotia Synfuels Limited.

In September of 1996 Global sought leave of the court to amend the defence to the counterclaim (**Civil Procedure Rule 15.01(c)** and **15.02**) in the first action to include an allegation that any agreement by Global to lease tankage at the Terminal was vitiated by fraud. Global is and was represented by Cox, Hanson, O'Reilly Matheson. PTTC is and was represented by Stewart McKelvey Stirling Scales. Three other applications were heard at that time:

(i) an application by Scotia Synfuels, a plaintiff in the second action, for an order disqualifying Stewart McKelvey from acting against the company in that action;

(ii) an application by Global to consolidate the first and second actions;

(iii) an application by the defendants in the second action to strike the statement of claim in that action or stay the proceeding.

Nunn, J., in Chambers, declined to order a consolidation of the two actions, finding that ". . . the actions are quite separate. There are different parties involved; different

issues involved . . . it would not be just, in my view, to consolidate those two actions at this time". He denied the application to amend the defence to the counterclaim.

On the application to stay the second action Justice Nunn found that "because of the possibilities of conflict of interest of counsel which may be raised . . . the second action should be stayed until the first action is complete". Accordingly, he did not specifically deal with Scotia Synfuel's application to prohibit Stewart McKelvey from acting in the second action.

The stay of the second action was overturned on appeal. On that same appeal, this Court upheld the decision of the Chambers judge to refuse the amendment to the counterclaim.

After the appeal, Scotia Synfuels agreed to withdraw its objection to the involvement of Stewart McKelvey in the second action on agreement by that firm to maintain confidential any information disclosed to lawyers in the firm who previously acted for Synfuels.

Global again made application to amend its defence to the counterclaim in the first action. PTTC unsuccessfully opposed the application and now appeals.

Issues:

(a) Did the Learned Chambers Judge err in failing to find that the Respondent's application was barred by the doctrine of *res judicata?*

(b) Did the Learned Chambers Judge err in failing to find that the Respondent's proposed amendment did not disclose a triable issue?

(c) Did the Learned Chambers Judge err in failing to find that the Respondent was acting in bad faith?

(d) Did the Learned Chambers Judge err in failing to find that the Appellant would suffer prejudice for which it could not be compensated in costs?

Analysis:

Chipman, J.A. wrote in **Minkoff v. Poole and Lambert** (1991), 101 N.S.R. (2d) 143 ". . . this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice will result . . . " (at p. 145).

Civil Procedure Rule 15 provides in relevant part:

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

....

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

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

The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice

which cannot be compensated in costs. (**Baumhour v. Williams** (1977) 22 N.S.R. (2d) 564 (C.A.))

(i) Res judicata;

The appellant argues that Justice Hamilton erred when she found that the prior decisions of Justice Nunn and of the Court of Appeal did not amount to *res judicata* and thereby preclude her from entertaining the application to amend. In the absence of a material change of circumstances, the appellant submits, Justice Hamilton erred in considering the respondent's application to amend. In the opinion of the appellant, there was no such material change. On this issue Justice Hamilton said (decision reported at [1998] N.S.J. No. 195):

> 9 I am satisfied I can reconsider the application on its merits. Both the prior chambers judge and the Court of Appeal specifically refer to the possibility of a later application being made, the Court of Appeal more clearly than the chambers judge, albeit with reference to an application for consolidation at the same time. While they do not use the words "dismissed without prejudice" in their decisions, this seems to be what they intended from the few words used in their decisions.
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> 10 While it is not certain from the prior chambers judge's reasons for his decision, if he dismissed the prior application because of the conflict issue, which only applies to the second action not the first action; a reading of the transcript that I have been provided with suggests this is a reasonable conclusion. I am satisfied, as well, that the withdrawal of Scotia Synfuels' objection to Stewart McKelvey Stirling Scales acting for CBI in the second action, is a material change in circumstances and not merely a failure of Global, at the time of the first application, to present certain material arguments that it now wishes to raise.

In my view *res judicata* does not arise in these circumstances. Both Justice Nunn in Supreme Court chambers and Justice Matthews, writing for the Court of Appeal, in denying the application to amend the counterclaim qualified their remarks. Neither purported to make a final determination on the question of the amendment. After refusing to consolidate the two actions Nunn, J. said:

> . . . But I am of the view that granting the amendment to the first action very substantially changes the action from what it was by introducing the particular notion of fraud, which is the same issue that is raised in the other case. And, it seems to me the that would not be an appropriate amendment at this stage of the proceeding. (Emphasis added)

Repeating the above quoted remarks from Justice Nunn, Justice Matthews writing for the Court on the appeal said:

> . . . Here, it is noted that the chambers judge commented that the amendment would not be appropriate "at this stage of the proceeding". It appears to this Court that at some later date, an application to amend may be made, if appropriate, particularly if an application is then made to consolidate.

I would adopt the following statement of the law from **Pocklington Foods Inc. v. Alberta (Provincial Treasurer)** (1993) 25 C.P.C. (3d) 292 (Alta.Q.B.), per MacDonald, J. at p 296: ". . . a ruling on an interlocutory application, which in the ordinary case does not adjudicate on issues of fact or law raised by the pleadings in an action, is not a *res judicata* if the same interlocutory issue is raised again". He continued:

> 8 . . . the *raison d'être* of the principle of *res judicata* or issue estoppel lies in what is just and reasonable. Applying that notion to an assertion that a ruling on an interlocutory application is a *res judicata* when the same issue is raised in a subsequent interlocutory application in the same action, it will not be unjust or unreasonable to allow the second application to be heard, for what is involved is not re-litigation of an identical substantive issue of law or fact:
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> > (a) if the ruling on the first application was not based on the merits of the issue but on a technical objection: Dombey & Son v. Playfair Brothers, [1897] 1 Q.B. 368 (C.A.) cited in Doty v. Marks, 57 O.L.R. 623, at p. 625, [1925] 4 D.L.R. 740 (C.A.);
> >
> > (b) if upon the first application the applicant had failed to prove essential facts from mistake or inadvertence: Doty v. Marks, supra;
> >
> > (c) if there is new evidence that seriously justifies re-consideration of the issue;
> >
> > (d) if there is a material change of circumstances of a non-evidentiary nature.

The way to achieve justice and reason and to indicate the court's disapproval of the second application if none of those considerations is present is by an award of fully compensatory costs.

On appeal ((1995) 123 D.L.R. (4th) 141), the Alberta Court of Appeal endorsed and clarified the remarks of MacDonald, J.:

6 On October 1993, PFI again sought an order requiring production of the 105 documents in respect of which McDonald J. had earlier refused to order production. That decision had been appealed and upheld by the Court of Appeal. The Crown objected on the grounds that the matter was *res judicata* and should not be reconsidered by the Court. McDonald J. [25 C.P.C. (3d) 292] found that the matter was not *res judicata* and indicated that he would entertain the application. The Crown appeals from this order.

7 McDonald J. relied on the decision of this Court in **Talbot v. Pan Ocean Oil Corp**. (1977), 4 C.P.C. 107 [3 Alta. L.R. (2d) 354] (Alta. C.A.), in concluding that the principles of *res judicata* and issue estoppel do not apply to interlocutory procedural motions. The Crown seeks to distinguish the **Talbot** decision on the basis that **Talbot** applies only to cases of insufficiency or imperfection in the material relied on for the earlier application and does not apply to matters decided on the merits of the application before the court. We agree with McDonald J. that the judgment of this Court in **Talbot** decides the issue. *Res judicata* and issue estoppel do not apply to procedural interlocutory motions. While in the judgment of Clement J.A. in **Talbot**, there is considerable discussion of the position where a decision is made on the adequacy of the material rather than on the merits of the application, when read as a whole the decision supports the position taken by McDonald J. in this case.

. . .

9 We accept this statement of principles governing the discretion of the chambers judge to entertain a second application on a procedural matter. However, we emphasize that the object of the exercise is to avoid re-argument and re-litigation of issues already dealt with by the Court and in respect of which an order has been taken out. Such re-litigation is unfair to the other party and wastes the valuable and scarce resources of the Court. We add that, to prevent “judge-shopping”, the second application should be made before the same judge, if possible.

10 While we agree with his statement of the principles, we have some concerns about the manner in which McDonald J. applied the criteria. McDonald J. first found that he could reconsider the matter because of the passage of time and because of an intervening election and the retirement of the former Premier and Finance Minister. The passage of time and a change in the government are matters which may be relevant to the question of public interest immunity. (See: **Carey v. Ontario**, [1986] 2 S.C.R. 637.) Counsel for the Crown argues that the changes are insufficient to justify rehearing. This is a discretionary matter to be determined by the chambers judge. In the absence of palpable and overriding error, we will not interfere with his decision.

. . . Where the second application seeks only to re-argue the first application, or to make arguments which were available at the time of the first, it should be dismissed as an abuse of the court process, or as frivolous and vexatious.

(Emphasis added)

Global, in making a further application to amend, risked dismissal of the application and an order for costs should the Chambers judge find that the application was frivolous, an abuse of the court's process or simply an attempt to re-litigate an issue already decided on the same facts. Justice Hamilton was satisfied, however, that there had been a material change in circumstances since the first application. She concluded that on a reasonable interpretation of Justice Nunn's decision, the conflict of interest issue was material to his dismissal of the application to amend. Such a finding is within the discretion of the Chambers judge. That issue having been resolved, it was appropriate to entertain the further application.

(ii) Triable issue:

On this issue Justice Hamilton wrote:

> 11 Having found I should reconsider the application on its merits, I considered whether there was any evidence of Global acting in bad faith or Point Tupper Terminals Company being prejudiced in such a way that it could not be compensated in costs. I also considered Point Tupper Terminals Company's argument that there is no triable issue disclosed in the proposed amendment because of the different corporate entities involved as owner of the terminal facility and as a customer of the terminal.
>
> 12 I am not satisfied that there is no triable issue. I accept Global's argument there may be a connection between one company in a corporate group becoming an owner of a facility and another company in that corporate group becoming a customer of the facility. I am not prepared to consider the merits beyond that as that is properly left to the trial judge who will have the evidence and the law before him or her.

Justice Hamilton's approach to this issue accords with the law as stated by Chief Justice Clarke in **Consolidated Foods v. Stacey** (1986) 137 C.P.C. (2d) 13 (N.S.C.A.) where, speaking for the Court, he said at p.138:

In considering this application the chambers judge entered upon an examination of the merits of the proposed amendment. In our opinion, that ought to have been left for the trial judge to determine on the evidence and the law.

(iii) Bad Faith:

Justice Hamilton said:

13 I am not satisfied that Global was acting in bad faith. I accept Global's argument that it feels it needs this defence added to completely deal with the substantial counterclaim against it, which I believe is in the amount of approximately eight million dollars. The withdrawal of the objection on conflict by Synfuels and the bringing of this application without also bringing an application for consolidation do not amount to bad faith.

The question of bad faith is within the discretion of the Chambers judge.

(iv) Compensation in Costs:

Justice Hamilton said:

14 I am also not satisfied that Point Tupper Terminals Company will suffer any prejudice that cannot be compensated for by costs. The prejudice Point Tupper Terminals Company argues it will suffer is delay in the first action coming to trial, prejudice to its position on a subsequent application for consolidation and a longer trial than would occur on the first action without this amendment.

15 Given the agreement between counsel that discoveries will relate to both actions and will be held at the same time, I am not convinced this amendment will result in delay in bringing this action to trial and if the other matters that Point Tupper Terminals Corporation suggests are prejudicial to it, they can be compensated for in costs.

16 **Civil Procedure Rule 15.10** provides that costs occasioned by an amendment shall be borne by the party making the amendment, unless otherwise ordered. I don't feel it is appropriate for me to make an order on that now. This is a matter that should be dealt with by the trial judge who can consider whether there has been prejudice as a result of the late amendment and any costs associated with it.

17 Therefore, I grant the application and order costs in the cause.

In so deciding Justice Hamilton did not apply any wrong principle of law nor will a patent injustice result.

Disposition:

Accordingly, I would dismiss the appeal with costs to Global Petroleum Corporation in the amount of $1,000.00, plus disbursements.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Hallett, J.A.