IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Boutcher v. Clearwater Seafoods Ltd. Partnership, 2005 NSSC 252

Date: 20050622
Docket: SH 244471
Registry: Halifax

Between:

Cecil Boutcher and Clyde Knickle

Plaintiffs

v.

Clearwater Seafoods Limited Partnership

Defendant

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood
Heard:	June 15, 2005, Special Chambers, in Halifax, Nova Scotia
Written Decision:	September 12 , 2005
Counsel:	**G. Grant Machum** for the Plaintiffs **Eric Durnford**, Q.C. for the Defendant

By the Court:

[1] This is the reserved decision in the matter of *Boutcher and Knickle v. Clearwater Seafoods Limited Partnership*. An application was brought by Mr. Durnford for severance of the statement of claim filed by Boutcher and Knickle together.

[2] I will give you the result before we begin: the application brought by Mr. Durnford is dismissed.

[3] The facts are set out in the affidavits filed by each plaintiff which are also referred to in the statement of claim. There is also an affidavit from a representative of the defendants, Mr. Pittman, the Vice-president of Fleet Operations. In brief, two fishing boat captains were employed by Clearwater. Pittman says that it was since 1986. Knickle and Boutcher say they worked for the defendant and its predecessors for over 30 years. Both received a letter from the defendant dated December 4, 1996 saying their employment would be terminated April 30, 1998 and that was confirmed in the letter from the defendant on April 28, 1998.

[4] Thereafter, each signed a series of single trip employment agreements. Both were told on January 17, 2005 by a letter from the defendant that there would be no further single trips. Captain Boutcher was offered a position for part of each year on a vessel used for R & D and surveys. Captain Knickle was made no similar offer. Captain Boutcher declined the offer. These documents and letters I have referred to you are exhibits to the affidavits. Both jointly sued Clearwater for **negligent misrepresentation**: that they would continue to have employment with Clearwater; for **wrongful dismissal**: to declare the Single Trip Employment Agreements unconscionable; and for **bad faith** in the manner of their dismissals.

[5] The defendant Clearwater brings this application for misjoinder. It says *Civil Procedure Rule 5.02 (1)(b)* and *Rule 5.03 (1)* have not been met. The first issue raised is who has the onus. Does the applicant have to show misjoinder or must the respondent show joinder is appropriate? The applicant says there is no onus on it and that all of this is irrelevant. The respondent says there is an onus and it is on the applicant. In *Power v. Podlecki*, [1996] A.J. No. 881 which was provided to me by the respondent, Justice Veit said in para. 11:

> 11 The onus is on the applicant for severance to establish that the actions cannot be conveniently tried together: ...

[6] In my view, in an application like this, the applicant has the onus of showing there has been misjoinder. I do not agree, as Ms. Gallivan said, that the plaintiffs should choose how to proceed, if she means by that that the defendant has no say. Mr. Durnford for the defendant strenuously objected to the idea of the plaintiffs having control of the proceedings. Their control only extends so far as to require the defendant to be the one to satisfy the court that misjoinder has occurred. I can see no reason why the onus should be different in this sort of application than in any other and no authority was cited to me to the contrary. The applicant has the onus.

[7] Clearwater admits that there may be common questions of law arising if there were two proceedings but points out that *(a) and (b) of 5.02(1*) are conjunctive. Clearwater says the rights to relief claimed do not arise out of the same transaction or series of transactions and that is the issue for me.

[8] Only one Nova Scotia case was cited to me: *Lockhart v. New Minas (Village)*, [2005] N.S.J. No. 164, 2005 NSSC 93. In that case, there was one plaintiff and one defendant but two separate causes of action - one being defended by the defendant itself and one by its insurer. However, that application was brought only under *Rule 5.03(1)* and I will deal with that *Rule* hereafter.

[9] Some of the cases cited by both counsel are very old: one from 1917 and two related ones from 1919. Two others are from the same master in Alberta with two different results. In several cases, the courts refused joinder where the causes of action were essentially debt actions arising from contracts of employment.

[10] In *Bourner v. Pauling*, [1917] 2 W.W.R. 1129, 24 B.C.R. 222, 35 D.L.R. 465, the British Columbia Court of Appeal refused joinder. In that case, Justice McPhillips said in para. 7 of the decision:

> 7 ... The contracts sued upon are identical in form, but no question of fraud or misrepresentation is alleged, nothing which can be said to enclose the causes of action into the ambit of one enquiry, either in whole or in part. The causes of action are simply for moneys due and owing in respect of contracts for work and labour performed in pursuance of the terms of separate and distinct contracts, although it is true the contracts are alike in terms, yet the breaches of contract may differ and no common question is to be determined relevant to all the contracts;

> nor can it be all successfully contended, as in *Drincqbier v. Wood*, [1899] 1 Ch. 393; 68 L.J. Ch. 181, that the several causes of action are the same and arise out of the same transaction. Nor can it be said to be a series of transactions.

[11] In the *Drincqbier* decision to which Justice McPhillips referred, Justice Byrne concluded that the causes of action arose from the same transaction which was the issuance of a prospectus containing false statements.

[12] In *Risler v. Alberta Newspapers Ltd.*, [1919] 1 W.W.R. 740, 1919 CarswellAlta 92, the Alberta Supreme Court concluded that there had been a misjoinder of parties. Justice Stuart said in that case in para. 3.

> 3 The claim alleges in par.*(sic)* 1 that the plaintiffs were between certain dates in the employ of the defendant company as labourers, clerks, servants and apprentices and that during such period they performed services for the said company in their respective capacities for which there became due and was still owing and unpaid to the plaintiffs respectively the amounts set opposite their respective names as follows: ...

He went on to be specific about the claims of the various individuals, and then in para. 12 he said:

> 12 It seems to me that it is difficult to say that the separate claims of a number of workmen arise out of even the same series of transactions.... The fact is that I cannot discover the existence of "the same transaction" or the "same series of transactions" which is essential. What is a "transaction" or "occurrence: within the meaning of the Rule? Surely not the mere common activity in conducting or aiding in carrying on the employer's business. I think "transaction" or "occurrence" means some business negotiation or dealing or series of such with which several persons, though in different rights, may have been connected.

[13] However, in *Risler v. McTeer*, 1919 A.J. No. 15, [1919] 1 W.W.R. 746, joinder was permitted when the same employee sought redress from the directors of the company and this decision was rendered by the same judge. In that case he said in paras. 2 and 3:

> 2 But while I ventured in that judgement to express a fairly firm opinion that the plaintiffs there were improperly joined it does not necessarily follow that they are improperly jointed in this case. This is a different kind of action from the other one. In *Risler v. Alberta Newspapers Ltd., supra*, the employees were simply

> suing for wages and were suing their employer . Here they are having recourse to the statutory liability of directors for the wages of workmen. It seems to me that the fact that it is by a statute, by the Companies Ordinance, C.O., 1915, ch. 61, that the directors are made liable is sufficient to give to the case the aspect set forth in Rule 15, viz., that of "the same series of transactions."
>
> 3 The line between this case and the former one is perhaps narrow but my opinion is that in the present case the plaintiffs are entitled to the benefit of the Rule. The directors are responsible for the conduct of the business of the company and in consequence the Legislature has seen fit to make them personally liable for wages to workmen.

[14] In *Agnew* v. *Sault Ste. Marie Board of Education*, [1976] O.J. No. 1425 (S.C.), 365 plaintiffs sued the Board of Education for amounts owed to them individually pursuant to contracts in writing. They also sought declaratory relief in a permanent injunction and made claims for general and punitive damages.

[15] The defendant/applicant in that case claimed that since the cause of action for each plaintiff arose from personal and separate contracts and it therefore gave rise to separate and individual claims and they should be severed. Severance was not granted. The *Rule,* however in that case, only required either that they arose out of the same transaction or occurrence or there were common questions of law or fact.

[16] The situation was somewhat different in *Hale* v. *Cdn. Amreican Financial Corp. (Can.) Ltd.*, 1987 CarswellAlta 549; 86 A.R. 244, [1987] A.W.L.D. 167 where Master Funduk in Alberta struck claims of three plaintiffs who allege misrepresentations by the defendant induced them to become employees. At p.3 of 5 of that decision, from the **Carswell** version the Master said:

> If the Plaintiffs are advancing claims based on misrepresentations Balroop's uncontradicted evidence makes it clear that any possible misrepresentations were not one set of misrepresentations made to all Plaintiffs. Each Plaintiff was interviewed separately by Balroop. What transpired at each interview is a question of fact, and is to be decided without reference to what transpired at the other interviews.
>
> I do not agree that this is a situation involving the same series of transactions or occurrences.

[17] Clearwater relies heavily upon this case on the basis that there are also allegations of negligent misrepresentations made to the two plaintiffs here.

[18] However Master Funduk reversed himself in *Lutz v. Alberta (Treasury Branches)*, [1989] A.J. No. 1286 which was cited by the respondent/plaintiffs and he followed an Alberta decision which he said was binding upon him. He said in para 21:

> 21 ... Until the pleadings are closed it is not logical to conclude that there are not common questions of fact or law. It is not logical to conclude that the claims do not arise out of the same transaction or series of transactions until all the pleadings are in. Such a finding before the pleadings are closed is premature.

[19] I note that, of course, a decision of a Master in Alberta is not binding upon me. I also conclude that in this case I can determine now whether joinder is an appropriate. I have the plaintiff's pleadings and their affidavits and I have the affidavit of Pittman for the defendant. Based upon the information before me, including the exhibits to the three affidavits, I can determine whether the actions arise from the same transactions or series of transactions. I therefore conclude the application is not premature.

[20] The applicant also relies upon *1279022 Ontario Ltd. v. Posen* (2003) MBQB 262, 2003 CarswellMan 465, 38 C.P.C. (5th) 85, 179 Man. R. (2d) 108 (Man. Q.B.). However, in that case there were 35 franchises suing franchisors in two provinces, which had the same individual as president. Although the defendant *Alberta Co.*, entered into agreements with the Alberta plaintiffs, the defendant *Manitoba Co.*, had franchise agreements with franchisees in Manitoba, Ontario, Saskatchewan and British Columbia. Furthermore the case was decided upon the issue of commonality of questions of law and fact. The court also said in para. 3:

> 3 In addition to claiming breach of contract, the statement of claim also asserts causes of action on behalf of each plaintiff for misrepresentation and false representations; in reality there is not much commonality in the causes of action collectively beyond the form of franchise agreement and the fact that all plaintiffs sue the same defendants.

[21] The Manitoba Court of Appeal, as a result, allowed the appeal from the Queens Bench decision. It found that there was not much commonality in the causes of action. The Queens Bench decision quoted the relevant *Rule 5.02(1)* in Manitoba. Only one of three things must be established in Manitoba. The *Rule* provides:

> 5.02(1) Two or more persons who are represented by the same lawyer of record may join as plaintiffs or applicants in the same proceeding where,
>
> (a) they assert, whether jointly, severally or in the alternative, any claims to relief arising out of the same transaction or occurrence, or series of transactions or occurrences;
>
> (b) a common question of law or fact may arise in the proceeding; or
>
> (c) it appears that their joining in the same proceeding may promote the convenient administration of justice.

[22] In any event, the Court of Appeal was satisfied there was not much commonality in the causes of action which comment appears to me to relate to the part of Manitoba's rule which is similar to ours, that is with respect to the transaction or occurrence or a series of transactions or occurrences.

[23] In this case, I find as a fact that the rights to relief claimed by Knickle and Boutcher arise from the same transaction or series of transactions. The rights to relief arise from:

1) their employment with the same employer or its predecessor for similar lengths of time in the same capacity and under the same supervision;

2) the individual letters each received in December 1996 and April 1998;
3) the individual contracts they entered into for single trips;
4) the letters each received in January of this year which were identical except that Boutcher was offered further part-time employment and Knickle was not.

[24] Although the contracts with each were separate, I conclude that the series of transactions from which the claims for relief arise are of the same series, that is, the change in the nature of the employment of each in 1998, their working under individual single trip contracts thereafter and their terminations in January 2005. The differences between the two claims are, in my view, minimal and can easily be dealt with at trial. The same witnesses will testify with respect to both claims. It will not be problematic to keep separate any differing testimony with respect to each plaintiff. On the issue of mitigation, the refusal of Boutcher to accept the alternate employment offered can, in my view, be kept separate from the evidence,

if any, with respect to mitigation issues concerning Knickle. The same can be said of the appropriate period of notice for each, should they be successful. This is not a foreign exercise for the courts which, as an example, must often determine what are proper damages for each of two or more plaintiffs in a personal injury claim and whether each has properly mitigated.

[25] Although I do not conclude that the application is premature, I acknowledge that *Rule 5.03(1)* may come into play later in these proceedings. I was referred to only two reported cases in Nova Scotia on that *Rule*. In *Shah v. Jesudason* (1999), 177 N.S.R. (2d), Justice MacAdam had ordered severance of two claims: one against the defendant for debt and another against the defendant and his wife with respect to a property conveyance. The Nova Scotia Court of Appeal upheld Justice MacAdam's decision to sever the debt action on the basis that Nova Scotia was not the *forum conveniens* to hear that claim. The Court of Appeal said at para. 22:

> 22 The Chambers Judge had a wide discretion under Civil Procedure Rule 5 to order severance.

[26] The other Nova Scotia case is *Lockhart* to which I referred briefly before. In that case, an employee who was dismissed sued both for wrongful dismissal and for defamation. There was only one defendant but it had two counsel: one for the insurer on the defamation claim and one for the municipality itself on the wrongful dismissal claim. Counsel for the insurer sought severance. In that case, the defendant insurer said: there would be no delay from the severance; the jury which is required in defamation cases would be confused by the two issues; the defendant had two different counsel and, in its submission, there was not sufficient overlap in the legal issues to merit both actions being tried together.

[27] Justice Warner said in paragraph 29:

> [29] The defendant does not discuss such other factors as the potential lengthening of the proceeding (in terms of the plaintiff) and the issue of the cost to the plaintiff, and the savings to the defendant(s), if severance is granted. The defendant further does not deal with the issue of whether the plaintiff, who is unemployed, would ever be able to pursue both causes of action, which is, in effect, a policy issue about the access by poor or middle class individuals to the civil justice system, especially when in contest with corporate defendants.

[28] He concluded the delay issue, properly characterized, favoured the plaintiff, that is, against severance. He was not satisfied there would be any difficulty with the jury instruction or the jury understanding the two different claims, nor did he consider there being two counsel for the defendants as militating against a joint trial. He considered the overlap of evidence and issues to be the most significant. He said in para. 39 with respect to the shifting onus:

> [39] On the facts of this case, as pleaded, it appears that the only significant shift in onus is that if the plaintiff can show that the alleged statements were made on January 13, 2003, and the defendant cannot show that the occasion was one of qualified privilege, then the defendant has the onus of proving that the statements were substantially true.

He also said in para. 40:

> [40] The court notes that the legal basis for damages differs between the two causes of action. This does not mean that they are somehow in conflict as to be unintelligible to a jury that is given proper instruction on the law of damages.

[29] He discussed the issue of fairness in paras. 44 and 45 where he said:

> [44] In her circumstances, financing a single lawsuit against such powerful defendants will be difficult; financing two lawsuits, could be devastating.
>
> [45] A fairness concern is the inability of the average Canadian to access the civil justice system because of it's complexities, delays and costs. The facts of this case appear to fit squarely within those that are put forward by opponents of change to our civil justice system. Ordinary persons have a right to have legitimate legal claims determined by an objective third party in an efficient and cost effective way. This fairness issue weighs heavily for the plaintiff and against the defendant for whom (backed by an insurer) cost is not a barrier, and complexity and delay can be a tactical tool.

He then concluded in paras. 48 to 50:

> [48] To the extent that there maybe some areas, particularly as to damages, that are more relevant to the defamation insurer than to the wrongful dismissal claim, there maybe some increased costs to the defendant(s). This possible minor increase in costs does not come close to balancing the significant cost, even in terms of disbursements and delay to the plaintiff in restarting and pursuing two separate sets of litigation.

> [49] The greatest concern to this Court in terms of the arguments of the defendant was whether a reasonable jury could be properly instructed with respect to both claims. The Court accepts after reviewing in detail the defendant's lists of factual and legal issues in both the wrongful dismissal and the defamation action, and its review of the onuses that apply in the respective actions, that while this is a matter of some concern, it is not of such great concern as to trump the obvious delay and increase costs to an impecunious plaintiff.
>
> [50] In summary, while a single action may embarrass (complicate) the trial somewhat, two actions dealing with the same evidence and with substantially overlapping issues will delay significantly the resolution of all the issues and will otherwise inconvenience the plaintiff to the point that the claims may not be determined on their merits.

[30] I am not satisfied that in this case there is any evidence before me at present that the joinder of these two plaintiffs will embarrass or delay the trial or is otherwise inconvenient as is required by the *Rule*. The action is just recently underway, the statement of claim having been filed only in early April 2005, just over two months ago. There is no evidence of possible delay which will be caused. **The Oxford English Dictionary** gives us a definition of embarrass "to hinder or hamper". Likewise, I have no evidence of how joinder will hinder or hamper the trial, nor do I have evidence of any inconvenience to the defendant. In fact, it seems to me that joinder of these plaintiffs will be consistent with the *Judicature Act* provision discouraging multiplicity of proceedings which is as much in the defendant's interests as that of the plaintiffs. As well, joinder in my view will serve the object of the *Rules* as set out in *Rule 1.03* which provides:

> 1.03 The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding.

[31] No prejudice to the defendant has been demonstrated by joinder. Furthermore ,fairness to the plaintiffs who have lost their jobs outweighs any speculation that the factors set out in *Rule 5.03(1)* now affect the defendant. The *Rules* in the *Judicature Act* encourage one trial in circumstances where similar sets of facts and questions of law arise from the same series of transactions. The application is, therefore, dismissed.

COSTS

[32] In my view, this is an application where the respondent has been successful and, although the issue of joinder may arise again, it seems to me that the appropriate ruling with respect to costs at this time is to give the successful respondent its costs. They are only seeking $500.00 for a contested chambers application lasting almost half a day. In any event, I will award costs in the amount of $500.00 in favour of the successful respondent, payable forthwith.

Hood, J.