

SUPREME COURT OF NOVA SCOTIA

Citation: Canada Life Assurance Company v. Saywood, 2010 NSSC 87

Date: 20100305

Docket: Hfx No. 174073

Registry: Halifax

Between:

The Canada Life Assurance Company

Plaintiff

and

Robin Saywood, Shirley Saywood and
The Robin Cleaning Centre Limited

Defendants

and

Constitution Insurance Company of Canada

Third Party

Judge: The Honourable Justice Glen G. McDougall

Heard: February 23, 2010 in Halifax, Nova Scotia

Written Decision: March 5, 2010

Counsel: Alan V. Parish, Q.C. and Brian Awad, Esq., on behalf of the
applicant/defendants
Peter Rogers, Q.C. and Jennifer Biernaskie, Esq., on behalf of the
respondent/plaintiff

By the Court:

[1] The defendants, Robin Saywood, Shirley Saywood, and The Robin Cleaning Centre Limited (henceforth the “defendants”) advance this motion for:

- an order pursuant to Rule 83.02 to allow the Defendants to amend their Notice of Defence.

[2] The motion also sought an order to require a non-party witness to submit to a discovery. This issue was agreed to by counsel in advance of the hearing and an order will be filed to reflect the agreement and compliance with the rules of procedure including the undertakings required of **Rule 18.05(2)**.

RELEVANT RULES:

[3] I will begin by looking at the relevant rules of procedure that govern this motion:

83.02 - Amendment of notice in an action

(1) A party to an action may amend the notice by which the action is started, a notice of defence, counterclaim, or crossclaim, or a third party notice.

(2) The amendment must be made no later than ten days after the day pleadings close, unless the other parties agree or a judge permits otherwise.

2.03 - General judicial discretions

(1) A judge has the discretions, which are limited by these Rules only as provided in Rules 2.03(2) and (3), to do any of the following:

....

(c) excuse compliance with a Rule, including to shorten or lengthen a period provided in a Rule and to dispense with notice to a party.

38.02 - General principles of pleading

(1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.

(2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:

(a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;

(b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.

(3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

(4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.

38.05 - Further rules for pleading a defence

The following further rules of pleading apply to a statement of defence:

....

(c) it must specifically plead any material fact or points of law on which the party intends to rely at trial and that, if not specifically pleaded, would take the other party by surprise or raise an issue not clearly raised by the statement of claim and the party's denials and version of the material facts.

PROPOSED AMENDMENT:

[4] The defendants seek to amend their defence to add a further pleading based on a legal doctrine recognized in three mid-1970's decisions from the Supreme Court of Canada known as "The Trilogy". The three cases making up "the Trilogy" are:

- (i) **Agnew-Surpass Shoe Stores Ltd. v. Cummer - Young Investments Ltd.**, [1976] 2 S.C.R. 221;

(ii) **Ross Southward Tire Limited et al. v. Pyrotech Products Limited et al.**, [1976] 2 S.C.R. 35;

(iii) **T. Eaton Company Limited et al. v. Smith et al.**, [1978] 2 S.C.R. 749

[5] The Trilogy stands for the legal principle that was perhaps summarized best by Carthy, J.A., in **Madison Developments Limited et al. v. Plan Electric Co. et al.** (1997), 36 O.R. (3d) 80 (Ont. C.A.) when he wrote:

....A contractual undertaking by the one party to secure property insurance operates in effect as an assumption by that party of the risk of loss or damage caused by the peril to be insured against. This is so notwithstanding a covenant by the tenant to repair which, without the landlord's covenant to insure, would obligate the tenant to indemnify for such a loss. This is a matter of contractual law, not insurance law,....The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence:....

[6] In **1044589 Ontario Inc. v. A.B. Autorama Ltd.**, 2009 ONCA 654, a more recent case from the Ontario Court of Appeal, Laskin, J.A., after referring to The Trilogy, stated the rationale for the holding in **Ross**, *supra*, as follows:

14 The rationale for the holding in *Ross* is simply that because the lessee paid for insurance, it gets the benefit of insurance coverage. To permit the Landlord or the Landlord's insurer to then sue the lessee for fire loss caused by its negligence would deprive the lessee of that benefit.

LAW RESPECTING AMENDMENTS TO PLEADINGS:

[7] Apparently there are no written decisions regarding the new **Rule 83.02**. There are, however, a number of cases pertaining to the predecessor **Rule 15 (1972 Rules)**. In the case of **Global Petroleum Corp v. Point Tupper Terminals Co.** (1998), 170 N.S.R. (2d) 367, Bateman, J.A., at para. 15, stated:

[15] 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 et al. v. Williams et al.** (1977), 22 N.S.R. (2d) 564; 31 A.P.R. 564 (C.A.)).

[8] This same statement of the law was cited by the Honourable Justice Arthur J. LeBlanc in the case of **Shea v. Whalen** (2008), 250 N.S.R. (2d) 65 at para. 6.

[9] In the case of **Garth v. Halifax (Regional Municipality)** (2006), 245 N.S.R. (2d) 108 Cromwell, J.A. (as he was then) stated the following at para 30:

[30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs:

[10] While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes.

[11] The new rule does change the time to amend the pleadings, as of right, from 20 days after the close of pleadings to 10 days.

[12] There have also been changes which would limit the ability to add a third party after expiry of a relevant limitation period (**Rule 83.04**) or to make material changes to a cause of action but the general discretion to allow an amendment to the pleadings still rests with the court.

PLAINTIFF'S ARGUMENTS OPPOSING THE MOTION:

[13] The plaintiff is opposed to the motion arguing that:

- (i) the proposed amendment would be prejudicial to its position and could not be redressed through costs; and
- (ii) a defence based upon the Trilogy of cases from the Supreme Court of Canada fails to raise a triable issue and therefore have no application in this particular case;

[14] While advancing cogent arguments to deny the motion, the plaintiff invites the Court “to embark upon an assessment of the merits of the issue.” (In **Lamey v. Wentworth Valley Developments Ltd.** (1999), 175 N.S.R. (2d) 356 (N.S.C.A.), Glube, C.J.N.S. (as she was then) stated at para. 16:

[16] It seems clear that Justice Wright embarked upon an exercise that is not contemplated by Civil Procedure Rule 15.01. He engaged in an extensive examination of the merits of the proposed amendment by examining the differing case law. The Chambers judge was presented with arguable and interesting interpretations of case law and statutes which should have been left to a trial judge to reach a decision based on the full merits and argument of the case. There were clearly arguments for and against the proposed claim. This should have resulted in a bare finding, which is all that is necessary, that the proposed amendment raised a justiciable issue.

[15] In allowing the appeal, Glube, C.J., considered the meaning of ‘justiciable’ found in The Dictionary of Canadian Law, (1991) and in Black’s Law Dictionary, (6th Ed. 1991). The definition of ‘justiciable’ in The Dictionary of Canadian Law, (3rd ed, 2004) remains unchanged.

[16] In Black’s Law Dictionary, (8th Ed. 2004) the definition is stated, perhaps more succinctly, to read:

(of a case or dispute) properly brought before a court of justice; capable of being disposed of judicially.

[17] When one applies the meaning of the word ‘justiciable’ in the context of this case it is clear that the defendants’ proposed amendment raises a justiciable issue. The viability of the defence is not for this Court to decide on a motion made pursuant to **Rule 83.02**. After further discoveries are conducted and perhaps further evidence is uncovered it might then be open to the plaintiff to bring a motion to determine a question of law under **Rule 12** or a motion pursuant to **Rule 13** for summary judgment on pleadings that are clearly unsustainable or on evidence establishing that there is no genuine issue for trial.

[18] At this juncture, however, it is inappropriate to deny the defendants’ motion on the basis that it fails to disclose a triable issue.

[19] The other argument advanced by the plaintiff to deny the motion is that it would suffer prejudice that could not be compensated by costs.

[20] Although this action was first commenced in 2001 it is far from ready for trial. Further discoveries have to be conducted. Some witnesses are to be re-discovered and some discovered for the first time.

[21] While there might be some trouble tracking down some of the four representatives from the insurance industry who were previously discovered in 2005 and 2007 there is no evidence to establish they are no longer available. Indeed there might have to be entirely new and independent witnesses found to testify about standard practices relating to property insurance coverage in instances such as the one that is presently before the Court.

[22] I am not convinced that the proposed amendment to the statement of defence would cause prejudice to the plaintiff that could not be compensated for by costs.

[23] Plaintiff's counsel have suggested that if the proposed amendment is allowed, the plaintiff should be awarded costs including the costs of this motion and the cost for re-examination of the insurance witnesses (or examination of alternate witnesses to make up for those of the previous witnesses who may not be readily found) such costs to include travel costs and legal fees on an actual solicitor-client basis.

DECISION:

[24] I will grant the defendants' motion to allow the amendment to be made to the statement of defence in accordance with the draft attached to the notice of motion and marked 'Schedule "A".'

[25] The proposed amendment should be further amended to ensure all material facts are pleaded as required by **Rule 38.02** and in particular **Rule 38.02(2)(a)** and **(b)** and **Rule 38.02(3)** and **(4)**.

[26] The defendants' motion given orally at the hearing of this matter to:

- (i) plead that the Landlord billed the Tenant for a proportionate share of the insurance costs which the Tenant paid; and
- (ii) plead that the Landlord failed to act reasonably in placing insurance as contemplated in the lease or agreement to lease.

is also granted.

[27] I am not prepared to order the defendants to, in effect, completely underwrite the costs which the plaintiff might incur as a result of these amendments. I am

prepared, however, to award costs to the plaintiff for the motion, based on Tariff C. The range for a hearing of more than one hour but less than one-half day is \$750.00 - \$1,000.00.

[28] The plaintiff is awarded costs of \$900.00 payable by the defendants in any event of the cause.

McDougall, J.