SUPREME COURT OF NOVA SCOTIA

Citation: *MacGregor's Custom Machining Limited v. Sanikiluaq Development Corporation*, 2021 NSSC 159

Date: 20210512
Docket: Pic. No. 464402
Registry: Pictou

Between:

MACGREGOR'S CUSTOM MACHINING LIMITED, a body corporate, operating as MACGREGOR'S INDUSTRIAL GROUP

Plaintiff

v.

SANIKILUAQ DEVELOPMENT CORPORATION, a body corporate, and DARYL DIBBLEE

Defendants

DECISION ON PLAINTIFF'S MOTION FOR LEAVE TO FILE MOTION TO AMEND

Judge:	The Honourable Justice Scott C. Norton
Heard by Correspondence:	May 11, 2021, in Pictou, Nova Scotia
Decision:	May 12, 2021
Counsel:	Donn Fraser, for the Plaintiff Applicant Jason Cooke and David Lasaga, for the Defendants Respondents

By the Court:

Introduction

[1] By Decision dated April 22, 2021 (reported 2021 NSSC 139) ("Decision"), the Court granted the motion by the Defendant Daryl Dibblee ("Dibblee") for summary judgment on the pleadings and an order dismissing all claims against him personally pursuant to *Nova Scotia Civil Procedure Rule* 13.03.

[2] By correspondence dated May 3, the Plaintiff requested that, before the order arising from the Decision was issued, the Court permit the Plaintiff to file a motion to amend its Statement of Claim pursuant to 13.03(4). The Defendants responded by correspondence dated May 4, 2021opposing the Plaintiff's request.

[3] The Court convened a telephone conference with counsel on May 11, 2021. Counsel agreed that the Court should deal with the Plaintiff's request as a motion by correspondence. Counsel further agreed that their written submissions to the Court were complete and declined the opportunity to make further submissions in writing.

Civil Procedure Rules

[4] Rule 13.04(3) says:

> (4) A judge who hears a motion for summary judgment on pleadings may adjourn the motion until after the judge hears a motion for an amendment to the pleadings.

[5] Rule 83.11(1) says:

> (1) A judge may give permission to amend a court document at any time.

Law

[6] Both parties agree that the authorities clearly state that the Court continues to have jurisdiction to consider the Plaintiff's request and is not *functus*.

[7] In *Burke v Sitser*, 2002 NSCA 115, Justice Oland, writing for the Nova Scotia Court of Appeal, stated the law as follows:

> [7] In our respectful opinion, the chambers judge erred in determining that he was *functus.* Until the order issued, he had the discretion to withdraw, modify, or even reverse his decision. In *Lunenburg v. Bridgewater Public Service Commission* (1983), 59 N.S.R. (2d) 23 (N.S.S.C.A.D.), where the issue was whether the judge erred in reversing his oral decision, Cooper, J.A. reviewed the case authority pertaining to *functus officio* at ¶ 8 and ¶ 9. He stated at ¶ 10:
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> > . . . in my view Judge Clements was here not *functus*. He could only be so if an order giving effect as a judgment to his oral decision had been entered. I quite recognize the word of caution entered by Bridges, J., in the *Fruehauf Trailer Co.* case, supra, to the effect that the right to modify or vary a decision in circumstances such as we have here is one which "a court should be most reluctant to exercise and should only do so in an exceptional case", but in my opinion this is such a case. Judge Clements frankly said that he had not clearly dealt with the main argument of the Commission and, that being so, it seems to me highly desirable that he exercise his right to vary his oral decision.
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> [8] We would also refer to *Temple v. Riley*, [2001] N.S.J. No. 66 (QL) wherein Saunders, J.A. stated at ¶ 60:
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> > The general rule is that a trial judge may change or amend his/her judgment at any time before issue and entry thereof, but that after the judgment has been issued and entered, he/she is *functus officio* and relinquishes any power to do so, subject of course to the provisions of the Rules. See, for example, *The Law of Civil Procedure*, W.B. Williston and R.J. Rolls, Vol. 2, Butterworths (Toronto: 1970), p. 1059.
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> This court also reviewed the legal principles relating to the reopening of a proceeding after the judge has made a decision and issued reasons but before the formal judgment has issued in *Griffin v. Corcoran*, [2001] N.S.J. No. 158.
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> [9] We think it clear that the chambers judge here had a discretion to reopen the matter prior to the issuance of the formal order. While this power is, as noted, discretionary, so that the judge was not obliged to reopen the matter, he had the authority to do so and erred in finding otherwise. Given that the absence of the now located records formed an apparently significant part of the basis of his decision to dismiss the action, we cannot say that the judge's error of law was immaterial to the result which he reached.

[8] In *Griffin v Corcoran*, 2001 NSCA 73, the Nova Scotia Court of Appeal considered the principles relating to reopening a proceeding after the judge had made a decision and issued reasons. In that context the Court provided the following guidance:

> [62] The principles which guide the exercise of this discretion attempt to balance the requirements that parties bring forward their whole case and that there

> must be finality in litigation with the need to reach a result that is just in substance. In other words, the judge must take account of the, at times, competing goals of employing fair procedure and achieving right results.

[9] In *Innocente v Canada (Attorney General)*, 2012 NSCA 36, the Court of Appeal determined that the Chambers Judge erred when he refused the Plaintiff's request to amend his pleadings made during the motion for summary judgment on pleadings. Justice Fichaud, writing for the Court, stated at para 45:

> [45] Rules 83(11)(1) and 13.03(4) give the judge a discretion to amend or adjourn and hear a motion for an amendment. No specific amendment was proposed to Justice Coady. Neither was there a request for an adjournment so that a specific amendment could be proposed. In those circumstances, Justice Coady did not err in law by failing to order that Mr. Innocente was entitled to another amendment.
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> …
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> [48] As I discussed earlier, a discretionary ruling under the *Civil Procedure Rules*, including one that terminates a proceeding, is reviewable if it results in a patent injustice, even without an associated error of law. Would the chambers judge's denial of Mr. Innocente's request to further amend his claim result in a patent injustice?
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> [49] My view is Yes.
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> [50] "Injustice" has a flexible meaning for which guidance may be deduced from the Rules. Rule 1.01 describes the "Object of these Rules" as:
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> > These Rules are for the just, speedy, and inexpensive determination of every proceeding.
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> [51] The Rules offer litigants the opportunity to shepherd a claim, that is sustainable on its face, toward a proper resolution by settlement or trial. That is a "just determination". The denial of the amendment withdrew that opportunity from Mr. Innocente.
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> [52] Rule 1.01 directs that the determination also be "speedy, and inexpensive". The Attorney General points out that Justice LeBlanc already gave Mr. Innocente one opportunity to amend, Mr. Innocente was represented by counsel for a period thereafter, and he filed an amendment. Enough is enough, says the Attorney General. Pleading by drawing lines in the sand is neither speedy nor inexpensive.
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> [53] Rule 1.01 cites "just, speedy, and inexpensive" as guiding principles. When the quest for immaculate justice adds inordinately to the litigation's time and expense, the Rule expects the three factors to be balanced proportionately. A proportionate balance employs a less intrusive judicial tool, like costs, before the ultimate remedy of dismissing the claim. Unless there is bad faith or irreparable

> prejudice, judicial discretion over amendments should prefer the sting of costs to the guillotine of dismissal.
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> [54] In *Stacey v. Electrolux Canada* (1986), 76 N.S.R. (2d) 182, (C.A.), Chief Justice Clarke endorsed that approach:
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> > [5] A review of the case law leads us to conclude that the amendment should have been granted unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated in costs.
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> Similar principles apply to amendments on appeal: *Scott Maritimes Pulp Limited v. B. F. Goodrich Canada Limited and Day & Ross Limited* (1977), 19 N.S.R. (2d) 181 (C.A.), paras 39-40; *Jeffrey v. Naugler*, 2006 NSCA 117, paras 12-16.
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> [Emphasis added]

Analysis

[10] The Court cannot distinguish the present facts from those dealt with by Justice Fichaud in *Innocente*. In each case, the Plaintiff did not propose amendment and did not seek an adjournment of the hearing to bring a motion to amend. There is no suggestion that the Plaintiff is acting in bad faith or, that by allowing the motion to amend, irreparable prejudice would be caused to the Defendants. The Court of Appeal has instructed that in such circumstances the Court should permit the amendment and use "a less intrusive judicial tool, like costs, before the ultimate remedy of dismissing the claim." (*Innocente*, paragraph 53)

[11] Absent this appellate direction, the Court would have been inclined to accept the argument of the Defendants that the Plaintiff knew or should have known the

deficiencies in its pleading from the Defendants' motion materials; that the time to seek an adjournment was before the hearing of the Defendants' motion; and that the Plaintiff, having taken the position that its pleadings were not deficient, should not have a second chance for relief not already sought.

[12] Accordingly, the Court will permit the Plaintiff to move to amend the Statement of Claim.

[13] The Court finds that the Plaintiff's failure to seek an adjournment to allow amendment before the hearing of the motion for summary judgment on pleadings resulted in a substantial waste of court resources and unnecessary expense to the Defendants. Accordingly, the Court will award costs to the Defendants for the motion for summary judgment on pleadings, this motion by correspondence and the motion to amend. The Court finds that it is appropriate for the quantum of costs to include a substantial indemnity of the expense to the Defendants for the hearing of the motion which could have been avoided by a timely motion to amend. The Court fixes the quantum of those costs at $3,500 inclusive of disbursements and orders that they be paid forthwith.

[14] The Plaintiff shall provide the Defendants with a copy of the proposed amendments attached to a draft order for consent as to form within 7 calendar days

of the date of this decision. If the Defendants do not consent to the order, counsel are to contact the Court to schedule a hearing on the motion to amend.

[15] In light of these reasons, there will be no order for dismissal issued resulting from the Decision. I will now consider the companion motion for summary judgment on evidence heard with the motion for summary judgment on pleadings and render my decision on that motion.

Norton, J.