Federal Court  Cour fédérale

Date: 20210825

Docket: T-1862-15

Citation: 2021 FC 872

Fredericton, New Brunswick, August 25, 2021

PRESENT: Madam Justice McDonald

BETWEEN:

1395804 ONTARIO LTD., OPERATING AS BLACKLOCK'S REPORTER

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

[1] On this Appeal Motion brought pursuant to Rule 51(1) of the *Federal Courts Rules* (Rules), the Plaintiff, 1395804 Ontario Ltd., operating as Blacklock's Reporter (Blacklock) seeks to set aside the April 29, 2021 Order (Order) of Case Management Judge Molgat (CMJ or Prothonotary). Blacklock's primary challenge to the Order is the decision of the CMJ to dispense with the requirement for the Defendant, the Attorney General of Canada (AGC), to obtain leave to file a Counterclaim.

[2] For the reasons that follow, the appeal is dismissed as the Order was an exercise of discretion by the CMJ. In applying the review standard from *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 [*Hospira*] paras 66 to 79, there is no basis for this Court to intervene.

Background

[3] This action against Parks Canada is 1 of 13 actions (related actions) brought by Blacklock against various federal government departments and agencies. Blacklock is an online news agency that offers subscription based news services. Blacklock claims that the various federal government departments and agencies copied, distributed, and accessed their articles contrary to the Copyright Act, RSC, 1985, c C-42 [Act]. The CMJ is case managing the 13 related actions, although at the relevant time, the only action being moved forward by the parties was the Parks Canada action. The other related actions were being held in abeyance pending the outcome of the Parks Canada action.

[4] During a case management conference on Friday, July 3, 2020, Blacklock advised that it intended to discontinue this action against Parks Canada. In this action the AGC's previously filed summary judgment motion was on hold pending the parties reaching an agreement on the appropriate scope.

[5] Two steps led to the issuance of the Order by the CMJ. First, on Sunday July 5, 2020, the AGC served on Blacklock and forwarded to the Court an Amended Statement of Defence and

Counterclaim (Counterclaim). Second, on Monday July 6, 2020, Blacklock filed a Notice of Discontinuance (Discontinuance).

[6] The determination of the sequencing of the filing of Counterclaim and the filing of Discontinuance is significant because it determines whether the AGC's Motion for Summary Judgment can proceed. If the Discontinuance was filed before the Counterclaim was filed, the action would have been concluded and the summary judgment motion could not proceed. Whereas, if the Counterclaim was filed first, the Discontinuance would not apply to the claims advanced in the Counterclaim.

Order Under Appeal

[7] In her Order, the CMJ acknowledges that the Order was necessary because of the procedural issues that arose and because progress toward a resolution was hampered by the entrenched positions of the parties.

[8] The CMJ considered Blacklock's argument that by operation of Rules 143(1) and 71.1(3), the effective date of service of the Counterclaim is deemed to be Monday, July 6, 2020; therefore, it was filed "simultaneously with" the Discontinuance. Further, as the AGC needed leave, pursuant to Rules 172 and 207(1) to file amended pleadings, the Counterclaim was not filed before the Discontinuance.

[9] The AGC's position was that Rule 142 permits service to be effected on a Sunday, and that Blacklock acknowledged having received the Counterclaim prior to serving their

Discontinuance. The AGC argued that the test for leave to file an amended pleading is whether there is prejudice. They argued that there is no prejudice to Blacklock because the claims advanced in the Counterclaim are not new, are not time-barred, and could be advanced in a new action by AGC against Blacklock if necessary.

[10] After considering the positions of the parties, the CMJ makes reference to Rule 3 and the guiding principle that it is in the interests of justice that the action proceed as expeditiously as possible.

[11] The CMJ rejected Blacklock's assertion that the Court must treat the Counterclaim and Discontinuance as having been "submitted and filed simultaneously" at the opening of the Court on Monday, July 6, 2020. She noted that Blacklock had no legal authority to support this position. Further, she noted that Blacklock acknowledged having received the Courterclaim prior to filing its Discontinuance. In the circumstances, the CMJ determined that the Counterclaim was served and filed prior to the action being discontinued.

[12] The CMJ acknowledged that as the pleadings were closed, the AGC would normally be required to seek leave to file the Counterclaim. However, upon being satisfied that there was no prejudice to Blacklock, and that it was in the interests of justice to do so, the CMJ dispensed with the need for AGC to obtain leave to file their Counterclaim and ordered that it be accepted as served and filed before the action was discontinued.

Issues

[13] On this appeal, Blacklock seeks to set aside the April 29, 2021 Order on the grounds that the CMJ erred in law, erred in mixed fact and law and, and erred in misapprehending the facts on the following 3 issues:

A. The jurisdiction of Rule 297.

B. The effect of a discontinuance.

C. Dispensing with the leave requirement.

Standard of Review

[14] The applicable standard of review is that "discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts" (*Hospira* at para 64).

[15] A palpable and overriding error is an error that is both obvious and apparent, "the effect of which is to vitiate the integrity of the reasons" (*Maximova v Canada (Attorney General*), 2017 FCA 230 at para 5).

[16] The correctness standard is a non-deferential standard of review in which the Court can substitute its own opinion, discretion or decision for that of the Prothonotary (*Hospira* at para 68; *Mahjoub v Canada (Citizenship and Immigration*), 2017 FCA 157 at para 58).

Analysis

A. *The Jurisdiction of Rule 297*

[17] Blacklock argues that the CMJ exceeded the jurisdiction of Rule 297 by allowing the AGC Motion for Summary Judgment to proceed because the underlying action is a simplified proceeding. Rule 297 states: "No motion for summary judgment or summary trial may be brought in a simplified action."

[18] Blacklock argues that because some facts are in dispute, the AGC cannot proceed with a summary judgment motion. Blacklock relies upon *D.E. Rodwell Investigative Services Ltd v Enoch Cree Nation Indian Band*, 2003 FCT 509 [*Rodwell*] in support of this proposition. However, the issue in *Rodwell* pertained to the timing of the motion in relation to a pre-trial conference. Further, it is clear in *Rodwell* that the Prothonotary was making a discretionary decision specific to the facts and issues of that particular case. In any event, *Rodwell* does not stand for the proposition that summary judgment can never be brought in a simplified action.

[19] Moreover, the position taken by Blacklock disregards Rule 298(3)(a) which allows a motion to be brought to remove an action from the operation of the simplified action rules.

[20] On this issue, the CMJ concludes as follows at page 12 of the Order:

> Over two years have passed since the parties agreed to a motion for summary judgment by the AGC and to hold the Related Actions in abeyance pending the outcome of that motion. Despite Rule 297, the Court retains the discretion to hear a summary judgment motion (see *Source Enterprise; Lepage v. Canada*, 2017 FC 1136, at paras. 48-52).

[21] Contrary to the submissions of Blacklock, the cases relied upon by the CMJ (*Source Enterprise; Lepage*) demonstrate that in the appropriate circumstances, discretion can be exercised to remove an action from the operation of the simplified action rules. In addition, Rule 385 provides the CMJ with ample authority to take actions that facilitate the "just, most expeditious and least expensive determination of the proceeding on its merits." In her Order, the CMJ specifically noted the potential for the summary judgment motion to dispose of most if not all of the related actions.

[22] While Blacklock takes issue with the CMJ's use of the word "potential" in relation to the summary judgment motion resolving the issues between the parties in the related actions, in my view, that is a discretionary call well within the mandate of the CMJ.

[23] The CMJ considered the positions advanced by the parties as well as the Rules. In her case management role, she is in a unique position to consider the objectives of the Rules, and their potential impact on the issues in the litigation between the parties. The CMJ also has the first-hand knowledge of and experience with the conduct and motivations of the parties. This knowledge and litigation context are key factors in the exercise of discretionary decision-making. Here, the Order demonstrates that the CMJ balanced all of these factors in the exercise of her discretion.

[24] In my view, the CMJ amply justified the reasons for making her Order. The Order demonstrates that the CMJ took all of the factors raised by the parties into consideration. On

appeal, the reviewing court does not ask whether the CMJ made the best decision, but only whether the CMJ properly exercised her discretion.

[25] In my view, the decision of the CMJ on this issue is a clear exercise of her discretion and absent a palpable and overriding error, there is no basis for this Court to intervene.

B. *The Effect of a Discontinuance*

[26] Blacklock argues that the CMJ ignored Rules 143 and 71.1(3) and disregarded her own Direction when she concluded that the Counterclaim was filed prior to the Discontinuance.

[27] Rule 143 states:

> **Effective date - evening or holiday service**
>
> 143 (1) Service of a document, other than an originating document or a warrant, on a holiday or after 5:00 p.m. at the recipient's local time is effective on the next day that is not a holiday.

[28] Rule 71.1(3) states:

> **Submission on holiday**
>
> (3) A document that is submitted for filing on a holiday is deemed to have been submitted for filing on the next day that is not a holiday.

[29] The CMJ acknowledged these Rules, but also acknowledged that she has authority under Rule 385(1)(a) "notwithstanding any period provided for in these Rules…" to dispense with the time periods outlined in the Rules. That is squarely a discretionary decision.

[30] With respect to the Direction, at the case management conference on July 3, 2020, Blacklock advised of its intention to discontinue this action against Parks Canada. This resulted in the Direction issued by the CMJ on July 5, 2020 directing, in part, that "the plaintiff shall serve and file a Notice of Discontinuance by no later than July 6, 2020." The Direction also addressed the timing of the next steps to advance the other proceedings. In compliance with the Direction, Blacklock filed its Discontinuance. However, the CMJ's Direction is silent on the issue of the filing of a Counterclaim by the AGC as presumably that was not discussed at the case management conference.

[31] As the Direction does not deal with the Counterclaim, Blacklock has not established any error on the part of the CMJ as it relates to the Direction.

[32] The AGC's letter to the Court Registry on July 5, 2020, states that the AGC was instructed by its client (Parks Canada) to file the Counterclaim (which is attached to the letter) and advises that the Counterclaim has been served on Blacklock. This letter also states: "I do not anticipate that I will need to seek leave, but I am happy to do so if the Court instructs it."

[33] Blacklock argues that this letter evidences that it was inappropriate for the CMJ to have permitted the filing of the Counterclaim since the AGC acknowledged that leave was required to file the Counterclaim. Blacklock argues that the AGC's letter makes it clear that the Counterclaim was not submitted for "filing" but, rather, was submitted for "consideration". Therefore, their argument goes, it should not have been treated as filed by the CMJ.

[34] The problem with Blacklock's submission on this issue, is that the CMJ considered the timing of the steps taken by the parties over the weekend and considered the potential impact of the wording of the Rules. However, in the circumstances, the CMJ made a decision to exercise the discretion provided to her by the Rules. On this issue, the CMJ found as follows at page 9 of her Order:

> Subject to Rule 190, there is no doubt that once a discontinuance has been filed, the proceeding ends and the Court file is closed (see Olumide v. Canada, (2016) FCA 287 at paras. 27-30). Having reviewed and considered all the circumstances however, I reject the Plaintiff's assertion that the Court must treat the counterclaim and discontinuance as having been "submitted and filed simultaneously" at the opening of the Court on Monday, July 6, 2020. The Plaintiff has also not provided any authority to support its assertion that in the event that a counterclaim and discontinuance are filed "simultaneously", the discontinuance trumps the counterclaim to extinguish the Court file.

[35] Blacklock makes similar arguments that the CMJ did not follow the requirements of Rules 72 and 74. However, at page 10 of the Order she states:

> While the Plaintiff contends that the Counterclaim ought to have been referred to the Court for direction, that is a matter for the Administrator. The language of Rule 72(1)(b) is not mandatory and the Counterclaim was accepted for filing. As for the Plaintiff's submission that the Counterclaim should now be removed from the Court file on the ground that it is not filed in accordance with the Rules, I disagree. Whereas Rule 72 concerns the failure to satisfy conditions precedent for filing a document, Rule 74 addresses whether a document should be removed due to "a fatal substantive defect", which I am satisfied is not the present case (see *Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at para. 7).

[36] Blacklock's position is misguided as it promotes a literal interpretation of the Rules without regard to the substantial discretion afforded to the CMJ in these circumstances.

[37] As well, Blacklock seeks to frame this action against Parks Canada as distinct from the related actions. That, however, is not consistent with the CMJ's view of this action and the related actions, and the potential impact of findings on specific issues across the actions.

[38] The CMJ addressed the timing of the filing of the Counterclaim by making a *nunc pro tunc* Order which had the effect of allowing the Counterclaim to be "filed" as of the date it was submitted. This is a decision within the discretionary mandate of the CMJ.

[39] As the CMJ specifically considered the impact of the Rules, Blacklock's argument that she disregarded the Rules is without merit.

C. *Dispensing with the Leave Requirement*

[40] Blacklock argues that the CMJ erred in law in the exercise of her Rule 385 discretion in failing to consider the prejudice to Blacklock if they have to respond to a summary judgment motion in the action (Parks Canada) that they have discontinued.

[41] However, this issue was considered by the CMJ and is reflected in her conclusion, where she states that the outcome of the summary judgment motion had the potential to "dispose of most if not all of the Related Actions".

[42] Likewise, Blacklock argues that it was inappropriate for the CMJ to apply the discretion afforded by Rule 385 to the related actions because Rule 385 only contemplates the

consideration of expeditious outcomes of "the proceeding" on the merits. In other words, according to Blacklock, the discretion can only be exercised in "one" proceeding.

[43] At page 10 of the Order, the CMJ notes:

> Case management judges are empowered to give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of a proceeding on its merits. Rule 385(1) also "sits alongside" Rule 55 pursuant to which the Court may vary a Rule or may dispense with compliance with a Rule, which powers are to be exercised with procedural fairness in mind (see *Mazhero v. Fox*, 2014 FCA 219 at paras. 2-6; *Canada (National Revenue) v. Mcnally*, 2015 FCA 195 at paras. 8-9).

[44] The argument advanced by Blacklock would suggest that the discretion afforded to the CMJ by the Rules could only be exercised in a particular proceeding (Parks Canada) but not in the other proceedings (related actions). I do not accept this interpretation of the Rules. A plain reading of Rule 385 affords the CMJ broad discretion in relation to the action or the related actions. Further, the related actions have been case managed together and the CMJ was satisfied that the outcome of the summary judgment motion in one action had the potential to resolve the other actions. Therefore, this was the most expeditious way to proceed.

[45] The discretion afforded by Rule 385 is broad and there is no basis for this Court to intervene in the Order of the CMJ.

Conclusion

[46] I would conclude by noting the following from *Hospira*, at para 103:

> …bear in mind that the case managing prothonotary is very familiar with the particular circumstances and issues of a case and that, as a result, intervention should not come lightly. […] deference, absent a reviewable error, is owed, or appropriate, to a case managing prothonotary […].

[47] Blacklock has not demonstrated that the CMJ made a reviewable error.

[48] For the above reasons, I am dismissing the appeal with costs in the all-inclusive amount of $1,000.00 to the AGC.

ORDER IN T-1862-15

THIS COURT ORDERS that this Appeal Motion is dismissed with costs in the all-inclusive amount of $1,000.00 to the Attorney General of Canada.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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