Date: 20080305

Docket: T-1049-95

Citation: 2008 FC 306

Ottawa, Ontario, March 5, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

TREVOR NICHOLAS CONSTRUCTION COMPANY LIMITED

Applicant

and

HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER OF PUBLIC WORKS CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an appeal from two orders of a prothonotary acting as a case manager, dismissing, for the most part, the plaintiff's motion to compel answers to alleged undertakings and refusals arising from the cross-examination of Joseph Grossi. Mr. Grossi had sworn an affidavit in support of the defendant's pending motion for summary judgment.

[2] For the reasons that follow, I am not persuaded that the prothonotary erred as alleged by the plaintiff. As a consequence, the appeal will be dismissed.

The Sequence of Events Surrounding the Motion

[3] This motion unfolded in a somewhat unusual way. The plaintiff filed its motion materials, which were subsequently responded to by the defendant. The prothonotary understood this to be a motion brought pursuant to Rule 369, and initially dealt with the motion on the basis of the parties' written submissions.

[4] The prothonotary allowed the plaintiff's motion in part, ordering the production of certain documents pursuant to undertakings given at the cross-examination. The balance of the relief sought by the motion was refused.

[5] After the release of the prothonotary's decision, the plaintiff contacted the Court, explaining that it had been expecting an oral hearing in relation to the motion.

[6] The prothonotary then issued directions indicating that the Registry should file a supplementary affidavit provided by the plaintiff, which had been sworn after the defendant had filed its responding materials. The Plaintiff had previously attempted to file the affidavit without leave of the Court.

[7] The prothonotary further granted leave to the plaintiff to file further written representations in reply to the defendant's motion record.

[8] Finally, the prothonotary stated that the earlier order would be reconsidered "if the plaintiff can establish that a matter has been overlooked which would have a determining influence on the order in question".

[9] After consideration of the plaintiff's additional submissions, the prothonotary declined to vary the earlier order.

[10] Both of the prothonotary's orders form the subject matter of this appeal.

The Contents of the Record

[11] The plaintiff's representative objects to the inclusion of copies of the memoranda of fact and law filed by the parties before the prothonotary as part of the record in this appeal, citing the decision of the Federal Court of Appeal in *Flamborough v. Canada (National Energy Board)*, 55 N.R. 95, at ¶44 in support of the objection.

[12] In *Flamborough*, the Federal Court of Appeal held that "such documents do not fall within the contemplation of the Rules as "papers relevant to the matter" required by Rule 1305 to be included in the appeal case". According to the Federal Court of Appeal, "[a]rgument, as distinct from admissions, made before a tribunal is no proper part of the case on appeal whether made verbally or in writing".

[13] However, it is clear from subsequent cases of the Federal Court of Appeal that written submissions provided during the hearing of first instance may form part of the appeal record, if they would assist the Court in understanding what issues were before the Court below: see *Deigan v. Canada (Attorney General)*, [2000] F.C.J. No. 134, at ¶5.

[14] In this case, the plaintiff argues that the prothonotary exhibited bias by finding that the plaintiff's reply submissions contained arguments that could - or should - have been advanced in the plaintiff's original submissions. This argument cannot be addressed, except by reference to those submissions.

[15] As a consequence, I am prepared to consider the defendant's supplementary motion materials in relation to this appeal.

Standard of Review

[16] Before turning to consider the classes of questions in dispute in this matter, it is necessary to first address the level of deference to be accorded to decisions such as this made by prothonotaries, when acting as case managers.

[17] Amongst other things, the plaintiff alleges that the prothonotary was biased. An allegation of bias raises a question of procedural fairness. The issue of the standard of review does not arise in relation to such questions – it is for the Court to determine whether the individual received a fair

hearing or not, having regard to all of the relevant circumstances: *Sketchley v. Canada (Attorney General)*, [2005] F.C.J. No. 2056, 2005 FCA 404, at ¶ 52-53.

[18] Insofar as the standard of review with respect to the merits of the prothonotary's decision is concerned, where a discretionary order of a prothonotary is vital to the final issue in a case, the decision should be reviewed on a *de novo* basis: see *Merck & Co. Inc. v. Apotex*, [2003] F.C.J. No. 1925, 2003 FCA 488 at ¶18-19.

[19] However, where the decision under review is not vital to the final issue in the case, it ought not to be disturbed on appeal unless the order is clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Merck*, at ¶19.

[20] As to what sort of questions will be viewed as vital to the final issues in a case, *Merck* teaches that the test is a stringent one. Examples of vital issues were cited by Justice Reed in *James River Corp. of Virginia v. Hallmark Cards, Inc.*, (1997), 72 C.P.R. (3d) 157 (F.C.T.D.) where she stated that:

> Questions that are vital to the final issues of a case are, for example, the entering of default judgment, a decision not to allow an amendment to pleadings, a decision to add additional defendants and thereby potentially reduce the liability of the existing defendant, or a decision on a motion for dismissal for want of prosecution. [at page 160, footnotes omitted]

[21] The questions at issue in this motion are not vital to the final issues in this case. As a consequence, the decision of the prothonotary is to be accorded substantial deference.

[22] Moreover, it should be noted that this lawsuit was commenced in 1995. The prothonotary has been managing this proceeding since 2001. The case has been the subject of numerous procedural motional and appeals. The orders in issue on this appeal are discretionary. As the Federal Court of Appeal noted in *Sawridge Band v. Canada*, [2002] 2 F.C. 346, at ¶11, case management judges must be afforded some "elbow room" to manage cases, and the Court should only interfere with orders made in the case management in the clearest case of a misuse of judicial discretion.

Bias

[23] The plaintiff's representative alleges that the plaintiff did not receive a fair hearing on the refusal motion as the prothonotary was biased. As I understand the plaintiff's argument, the prothonotary displayed conduct giving rise to a reasonable apprehension of bias by finding that the plaintiff's reply submissions contained new arguments that could - or should - have been advanced in the plaintiff's original submissions.

[24] The plaintiff further alleges that the bias of the prothonotary is demonstrated by the fact that the prothonotary had issued a decision in a different matter, which decision, the plaintiff asserts, conflicts with his reasoning in this case.

[25] The test for determining whether either actual bias or a reasonable apprehension of bias exists in relation to a particular decision-maker is well known: the question for the Court is what an informed person, viewing the matter realistically and practically - and having thought the matter through – would conclude.

[26] That is, would the reasonable person think it more likely than not that the decision-maker, either consciously or unconsciously, would not decide fairly: see *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, at p. 394.

[27] The fact that the prothonotary may have issued a decision leading to a different result in a different, unrelated matter, based on different facts does not give rise to a reasonable apprehension of bias.

[28] Similarly, while the plaintiff may not agree with the finding of the prothonotary that its reply submissions contained new arguments that could or should have been advanced in the plaintiff's original submissions, such a finding does not establish bias on the part of the prothonotary.

[29] In any event, it is clear from a review of the written submissions filed before the prothonotary that the arguments should indeed have been advanced by the plaintiff in its original motion material, and did not amount to proper reply material.

The Disputed Questions

[30] Turning now to the disputed questions, the first group of questions in issue in this appeal are questions 322-327. These questions relate to Mr. Grossi's alleged refusal to explain what he meant by "very low", when he was referring to his assessment of the plaintiff's production capacity.

[31] The prothonotary found that the question was improper, in that it was hypothetical, and that, in any event, the witness had answered the question to the best of his ability. Having reviewed the relevant portions of the transcript, I can see no error in the prothonotary's conclusions in this regard.

[32] Questions 378-382 relate to a series of calculations made by the plaintiff's representative in relation to a survey of the "Belle River" project. The prothonotary found that the plaintiff had not established the relevance of questions relating to a project that was not the subject matter of this litigation, and that, in any event, the questions went well beyond the matters raised in Mr. Grossi's affidavit.

[33] A cross-examination on an affidavit is not an examination for discovery. As the Court noted in *Ward v. Samson Cree Nation*, [2001] F.C.J. No. 1383, at ¶3, there is no obligation on the part of the witness to inform himself prior to the cross-examination, and thus no requirement that the witness further inform himself. If a witness cannot elucidate upon any of the facts referred to in his affidavit, it may go to his credibility, but that is all.

[34] In this case, Mr. Grossi was not aware of the basis for the calculations presented by the plaintiff's representative, and was thus unable to confirm their accuracy. Thus the prothonotary did not err in refusing to compel the witness to answer the questions in issue.

[35] Questions 718 to 753 relate to the plaintiff's request for accounting information with respect to payments made by the defendant to the plaintiff in connection with an earlier project known as the "Treasure Island" project.

[36] The plaintiff's involvement in the Treasure Island project evidently resulted in another lawsuit being brought by the plaintiff against the defendant. This action culminated in a financial settlement being paid to the plaintiff.

[37] As I understand the plaintiff's submissions, the defendant justifies its refusal to award the contracts in issue to the plaintiff, in part, because of concerns as to the plaintiff's dredging capacity. The plaintiff is of the view that the defendant's evidence as to the plaintiff's dredging capacity could be discredited, if the plaintiff were able to obtain the defendant's financial records demonstrating how the settlement funds were calculated and allocated.

[38] The prothonotary refused to order the questions to be answered on the basis that the relevance of the questions had not been established. The prothonotary further found that it was abusive for the plaintiff to pursue this line of questioning in light of previous rulings by this Court to the effect that the information sought was protected by settlement privilege.

[39] I agree with the prothonotary that the information sought by the plaintiff in this regard is governed by settlement privilege, and need not be disclosed.

[40] The plaintiff further argues that the defendant was bound to answer the questions posed by virtue of an earlier undertaking given to provide this information. According to the plaintiff, it was not open to the defendant to resile from its earlier undertaking without first proving to the satisfaction of the Court that it had satisfied the tripartite test set out in *Premakumaran v. Canada*, [2005] F.C.J. No. 632.

[41] That is, the plaintiff submits that in order to be relieved of an undertaking, the defendant must establish that the undertaking was given inadvertently, that it should not have been given, and that the other side has not been prejudiced or that the prejudice will be repaired by the party seeking relief.

[42] A review of the record discloses that that undertaking to provide the information in issue was given in the context of an earlier examination for discovery, and not at the cross-examination of Mr. Grossi. The undertakings given at that examination for discovery were not the subject of the motion before the prothonotary that is in issue on this appeal.

[43] Moreover, after that session of the examination for discovery had taken place, Prothonotary Milczynski issued an order declaring the plaintiff's examination for discovery at an end. The reason given by the prothonotary for making such an order was that the last session of the examination had

been taken up with questions relating to the Treasure Island project, a subject which the prothonotary found to be irrelevant to this action.

[44] According to Prothonotary Milczynski, "[t]he matter of the plaintiff asking questions and seeking answers about the settlement of this previous litigation has arisen time and time again, and the plaintiff has been repeatedly directed not to pursue that line of questioning". As information relating to the settlement of the Treasure Island litigation appeared to be the only remaining area of interest to the plaintiff, the plaintiff's discovery was declared to be at an end.

[45] It is in this context that the plaintiff's representative once again asked for financial records relating to the Treasure Island project during the cross-examination on Mr. Grossi's affidavit. The defendant refused to provide answers, both on the basis of relevance, and because access to the information sought had been foreclosed by the ruling of Prothonotary Milczynski.

[46] In such circumstances, it was entirely open to the prothonotary in this case to conclude that the information sought need not be provided on the basis that it was protected by settlement privilege.

[47] On this appeal, the plaintiff also seeks leave to ask additional questions in relation to what were described as "add-ons" - or follow-up questions - arising from answers previously provided by the defendant. This issue was not before the prothonotary in the first instance, and thus does not fall within the scope of this appeal.

[48] Similarly, the answer given to question 302 does not appear to have been in issue in the motion before the prothonotary. In any event, the defendant is evidently seeking to provide the plaintiff with the clarification that it seeks.

Conclusion

[49] For these reasons, I am not persuaded that the orders of the prothonotary appealed from were clearly wrong, or that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts. Nor am I persuaded that the prothonotary was biased, or that a reasonable apprehension of bias exists in relation to the prothonotary.

[50] As a consequence, the appeal is dismissed, with costs to the defendant, fixed in the amount of $500.

ORDER

THIS COURT ORDERS AND ADJUDGES that:

1. This appeal is dismissed, with costs to the defendant, fixed in the amount of $500.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1049-95
STYLE OF CAUSE:	TREVOR NICHOLAS CONSTRUCTION CO LTD. v. HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTER OF PUBLIC WORKS CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 25, 2008
REASONS FOR ORDER AND ORDER:	MACTAVISH, J.
DATED:	March 5, 2008

APPEARANCES:

Mr. John Susin	FOR THE PLAINTIFF
Mr. Derek C. Allen	FOR THE DEFENDANT

SOLICITORS OF RECORD:

JOHN SUSIN, DIRECTOR Trevor Nicholas Construction Company Limited Niagara Falls, Ontario	FOR THE PLAINTIFF
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT