Federal Court  Cour fédérale

Date: 20090723

Docket: T-247-08

Citation: 2009 FC 746

Ottawa, Ontario, July 23, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ADVENTURE TOURS INC.

Plaintiff

and

ST. JOHN'S PORT AUTHORITY

Defendant

REASONS FOR ORDER AND ORDER

[1] This is an appeal from an order of Prothonotary Kevin R. Aalto, issued on January 5, 2009, dismissing in part a motion of the defendant to strike virtually all of the Statement of Claim brought by the plaintiff against the defendant. Adventure Tours Inc. (ATI) claims that the St. John's Port Authority (SJPA), by virtue of the conduct of some of its board members, engaged in a series of actions which are alleged to be unlawful, thereby constituting the tort of misfeasance in public office, and to have caused damage to ATI.

[2] Having carefully reviewed the records of both parties, as well as their oral and written submissions, I have come to the conclusion that the Prothonotary's decision should stand, as it has not been demonstrated that his decision was clearly wrong even if the questions raised in the motion are vital to the final issue of the case.

FACTS

[3] The plaintiff is a company that offers sightseeing and boat tours from St. John's harbour. In March 2004, the defendant implemented a new rate schedule which, for the first time, included a per passenger fee for tour boat operators who did not rent a kiosk on the newly developed Pier 7. ATI rented a kiosk during the 2004 season. However, due to a significant reduction in revenue from its tour boat operation and the impossibility of negotiating what it considered to be a more appropriate and reasonable rate, ATI decided not to renew its lease in 2005. As a result, it had to pay a fee of $1.27 per passenger, based upon 70% of total capacity for tour boat operators. On June 3, 2005, ATI filed a complaint with the Canadian Transportation Agency (CTA), alleging that the per passenger fee charged by the SJPA to tour boat operators was unjustly discriminatory and unfair, and infringed subsection 52(1) of the *Canada Marine Act*, S.C. 1998, c. 10.

[4] This complaint was dismissed by the CTA on October 31, 2005, and ATI did not appeal or seek a review of that decision. The panel chair found that the fee tariff is discriminatory, but that it was not unjust as it was based upon a commercially accepted economic strategy that was fundamental to the development of the Pier 7 tourist initiative. Another member of the panel

determined that the passenger fees levied by the SJPA did not constitute discrimination, as tour operators all have a choice between paying a per passenger levy or a kiosk fee.

[5] Subsequently, ATI filed another complaint with the CTA, alleging unjust discrimination and unreasonable action on the part of the SJPA because the latter refused to grant ATI a licence to operate one of its boats from Pier 7 in the St. John's harbour. On April 10, 2008, the CTA dismissed that complaint, finding that it only had authority to investigate complaints related to fees fixed by a port authority. As that complaint related to the inability to obtain a licence to operate in the Port of St. John's, which is a policy or practice as opposed to a fee, the CTA declined jurisdiction.

[6] On February 14, 2008, ATI issued a Statement of Claim bringing an action against the SJPA. ATI alleges that SJPT breached section 50 of the *Canada Marine Act* and that members of the SJPT Board committed the tort of misfeasance in public office. The plaintiff essentially alleges that it incurred losses and damages as a result of being denied the opportunity to berth its boats at Pier 7 in the Port of St. John's. The Statement of Claim provides a detailed history of specific various acts which, according to the plaintiff, constitute a pattern of conduct giving rise to an allegation of public misfeasance.

[7] In the following months, the defendant caused to be served on the plaintiff a demand for particulars, seeking, among other things, the dates when alleged representations by SJPA to ATI were made, by and to whom, and whether these representations were written or verbal. The plaintiff having declined to provide some of the particulars requested, Prothonotary Morneau ordered, upon

motion by the defendant, that further particulars be given with respect to certain paragraphs of the Demand for Particulars. Unsatisfied with the reply of the plaintiff, the defendant filed another Notice of Motion on June 16, 2008, seeking an order that the plaintiff be compelled to comply with the Order of the Prothonotary. Following the Order of the Prothonotary, the plaintiff provided some further particulars. As a result of these proceedings, the plaintiff has now provided the names of two members of the SJPA Board and the Harbour Master as being engaged in conduct which is alleged to be unlawful.

[8] Finally, the defendant brought a motion to strike most of the paragraphs of the Statement of Claim on September 22, 2008. The defendant invoked a number of grounds in support of its motion: 1) the Statement of Claim is an attempt to relitigate prior complaints made by the plaintiff to the CTA, which complaints were dismissed; 2) there is no reasonable cause of action, first because the SJPA is not a public officer within the ambit of the tort of misfeasance in public office, and second because matters of leasing, licensing, and berthing are not matters of a sufficient public character as to come within the ambit of that tort; 3) to the extent that matters of leasing, licensing, and berthing are reviewable as decisions of a federal board, such judicial review is time barred; 4) there is no nominate tort of breach of statutory duty in Canadian law; 5) the CTA has already ruled the actions of the SJPA in amending its port fee structure was lawful; and 6) any cause of action arising from any alleged losses claimed for the years 2004 and 2005 are time barred pursuant to the *Limitations Act*, S.N.L. 1995, c. L-16.1.

THE IMPUGNED DECISION

[9] As already mentioned, Prothonotary Aalto dismissed the motion to strike, except for one of the arguments raised by the defendant. He focussed his reasons on what appears to have been the main argument before him, that is, whether the Statement of Claim or the particulars sufficiently specify the individual persons who are alleged to have engaged in the acts of misfeasance. The gist of his decision in this respect is found in the following two paragraphs of his reasons:

> Like most corporations, the SJPA carries out its mandate based on decisions made by its Board and acted on by individual employees. The Defendant is not privy to the discussion and business carried on at a board meeting or within the confines of the offices of the SJPA. This is information that is primarily within the knowledge of SJPA. Thus, it does not advance the case to simply name either all of the board members or use a shotgun approach to name as many employees who are engaged in the decisions relating to the berthing of tour boats in St. John's Harbour. It is sufficient that in the particulars, the Plaintiff has provided the names of two board members and the Harbour Master as being engaged in conduct which is alleged to be unlawful. It may very well be that during the course of the production and discovery that additional individuals may become known to the Plaintiff who they may then allege are also engaged in the unlawful conduct.
>
> In my view, given the extensive factual matrix in the Statement of Claim combined with the particulars, the elements of the tort of misfeasance in public office are sufficiently pleaded. There is no doubt that SJPA knows the case it has to meet. If during the course of production in discovery, the Plaintiff's ascertain the names of other individuals who have engaged in conduct that is alleged to be unlawful which is occasion [*sic*] damage to the Plaintiff, those parties will be identified and so SJPA is not prejudiced at this juncture of the proceedings by not having the names of potentially all of the individuals who may

> ultimately be alleged to have participated in the unlawful conduct. As noted, two board members are named specifically as is the Harbour Master who carried out many of the actions that are alleged to amount to misfeasance in public office. For purposes of pleading these allegations are sufficient to found the cause of action.

[10] On the other hand, Prothonotary Aalto agreed with the defendant that the plaintiff could not expand the meaning of s. 50(1) of the *Canada Marine Act* to include discrimination of any sort. Although that section of the Act appears to cover any form of discriminatory conduct, it must be read in conjunction with the Act as a whole and, more specifically, in the context of fees because it is found in the part of the Act headed "Fees". Relying on the case law supporting that interpretation, the Prothonotary found that the broader interpretation of the section relied upon by the plaintiff in support of its numerous allegations that various actions by the SJPA amounted to discrimination were bereft of any chance of success. Accordingly, he ordered that references to breaches of s. 50(1) of the Act in the Statement of Claim be struck, even if the factual allegations could be maintained.

ISSUE

[11] The only issue on this appeal is whether the Prothonotary erred in holding that the tort of misfeasance in public office is sufficiently pleaded in the Statement of Claim and that at least two named board members of the defendant are alleged to have engaged in unlawful conduct, or alternatively, that he erred by not ordering further and better particulars of the individuals, officers, or natural persons alleged to have engaged in deliberate and unlawful conduct.

ANALYSIS

[12] Although the *Federal Courts Rules* do not prescribe a standard of review applicable to appeals from the discretionary orders of prothonotaries, the appropriate test was established by the Federal Court of Appeal in *R.* v. *Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, where MacGuigan J.A. stated, at para. 97:

> Following in particular Lord Wright in *Evans* v. *Bartlam*, *supra*, at page 484 (A.C.), and Lacourcière, J.A. in *Stoicevski* v. *Casement*, *supra*, discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless:
>
> (a) they are 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, or
> b) they raise questions vital to the final issue of the case.
>
> When such discretionary orders are clearly wrong in that the prothonotary has fallen into error of law (a concept in which I include a discretion based upon a misapprehension of the facts), or where they raise questions vital to the final issue of the case, a judge ought to exercise his own discretion *de novo*.

[13] This test was later affirmed by the Supreme Court of Canada in *Z.I. Pompey Industrie* v. *ECU-Line N.V.*, [2003] 1 S.C.R. 450, *per* Bastarache J., and subsequently reformulated by the Federal Court of Appeal in *Merck Co.* v. *Apotex Inc.*, 2003 FCA 488, in the following way:

> To avoid the confusion which we have seen from time to time arising from the wording used by MacGuigan J.A., I think it is appropriate to slightly reformulate the test for the standard of review. I will use the occasion to reverse the sequence of the propositions as originally set out, for the practical reason that a judge should logically determine first

> whether the questions are vital to the final issue: it is only when they are not that the judge effectively needs to engage in the process of determining whether the orders are clearly wrong. The test would now read: "Discretionary orders of prothonotaries ought not to be disturbed on appeal to a judge unless: (a) the questions raised in the motion are vital to the final issue of the case, or (b) the orders are 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."

[14] It is true that the test of "vitality" must be a stringent one if we are to give effect to the intention of Parliament as embodied in section 12 of the *Federal Courts Act*, according to which the office of prothonotary is intended to promote "the efficient performance of the work of the Court". To determine whether an issue is vital to the final issue of the case, the emphasis must therefore be put on the subject of the orders, not on their effect (*Merck Co.* v. *Apotex*, *supra*, at para. 18).

[15] It is clear that the defendant's central contention in the motion to strike some paragraphs of the Statement of Claim and in this appeal is that the tort of misfeasance in public office may only be alleged against a natural person. According to the plaintiff, this question is not, *per se*, vital to the final issue of this case as it was open for determination on a basis which involved no finality in the proceeding. Indeed, the defendant itself alleges that the prothonotary erred by not ordering further and better particulars of individuals against whom allegations of deliberate and unlawful conduct might have been made. A question does not become vital to the final issue of the case, argues the plaintiff, simply because an unsuccessful applicant in a motion before a prothonotary asserts that it might have been answered in a manner which might have disposed of the claim.

[16] While ingenuous, this argument of the plaintiff cannot be accepted. It must be remembered that the motion before the Prothonotary was not a motion for particulars, but a motion for an order to strike pleadings. The possibility to order particulars was only raised as an alternative, apparently at the initiative of the plaintiff.

[17] The central argument raised by the defendant in its motion is that, in respect of the tort of misfeasance in public office, the identification of a particular official is a required element of pleading the tort and cannot be left to the discovery process. Whether the defendant is right or wrong, this is clearly an issue that is vital to the final issue of the case. It goes to the very core of the alleged tort upon which damages hinge. Even if looked at before the question is answered by the Prothonotary, it seems to me it clearly qualifies as vital to the determination of the case.

[18] It was open to the Prothonotary to order particulars or permit an amendment to the Statement of Claim in the circumstances. He declined to do so. It follows that if the plaintiff is required to identify an individual natural person, as the defendant submits, to the extent that the pleading failed to do so, they must be struck. As such, I repeat, this is a vital issue. I must therefore exercise my own discretion *de novo*.

[19] The defendant contends that the Prothonotary erred in law and in fact. With respect to the law, counsel for the defendant reiterates the arguments made before the Prothonotary, to the effect that it is essential to pleading the tort of misfeasance in public office, particularly in respect of a corporate entity, that an individual or defined group of individuals be identified in the pleadings.

This is so, in the defendant's view, because the requisite mental elements of the tort (i.e., malice and bad faith) are states of mind which can only be attributed to natural persons.

[20] The Prothonotary pointed out that a motion to strike will not be lightly granted. Rule 221(1) of the *Federal Courts Rules* states that the Court may order that a pleading be struck out, in full or in part, if it discloses no reasonable cause of action (221(1)(a)), or is otherwise an abuse of the process of the Court (221(1)(b)). On that basis, the Prothonotary correctly determined that the defendant has a high burden to discharge, and that the cause of action could only be struck it the pleading and the particulars were bereft of any chance of success.

[21] As the Supreme Court of Canada recognized in *Odhavji Estate* v. *Woodhouse*, 2003 SCC 69, the origins of the tort of misfeasance in a public office can be traced to the English common law. It may arise in one of two ways: it may either involve a conduct that is specifically intended to injure a person or class of persons, or it may involve a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. In both cases, two elements form the tort: first, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer, and second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff (*Odhavji Estate*, *supra*, at paras. 22-23).

[22] The English Court of Appeal decided in *Jones* v. *Swansea City Council*, [1990] 1 W.L.R. 1453 that in certain circumstances, a collective public body such as a council can be liable for the tort. The Ontario Court of Appeal came to a similar conclusion in *O'Dwyer* v. *Ontario (Racing*

Commission), 2008 ONCA 446. Obviously, a corporation can only act through its individual employees or directors. That being said, motive can sometimes be inferred from the evidence. Whether a sufficient number of SJPA's employees or members of its board of directors have been involved in the alleged malicious decisions or courses of action to make the corporation liable *per se* is better left to the trial, once discovery has taken place and the evidence has been laid out.

[23] The Prothonotary was clearly well acquainted with the relevant legal principles and cases, and directed himself accordingly. If there is any uncertainty in the law as to whether and in what circumstances a corporation can be held liable for the tort of misfeasance in a public office, it is better left to the trial judge. At this preliminary stage, I have not been convinced that the Statement of Claim is bereft of any likelihood of success.

[24] In any event, the Prothonotary seems to have grounded his decision not so much on the possibility that the SJPA, as such, could be found liable for the tort of misfeasance in a public office, but on the fact that the SJPA knows the case it has to meet since the names of two board members and the Harbour Master have been provided in the particulars. In light of the detailed nature of the Statement Claim, the SJPA cannot argue that it will be taken by surprise, and the requirement that individuals be named has been fulfilled.

[25] It is no doubt true that the particulars provided with respect to the two board members and Harbour Master are somewhat sketchy, do not provide many details with respect to their involvement in the alleged misfeasance, and relate to only a few of the allegations made in the Statement of Claim. But this only goes to the difficulty faced by litigants to identify the persons

involved in contentions decisions made within the confines of a corporation. That should not prevent the case from moving forward. The plaintiff may well be in a position to identify more individuals, and/or to particularize the role that they have played, either as a result of the discovery process, by the production of witnesses, or by submitting compelling inferences. If, on the other hand, the evidence is not conclusive and does not meet the standard of proof required in those matters, the trial judge will have the authority to dismiss the action.

[26] For all the foregoing reasons, I am of the view that the appeal must be dismissed. The Prothonotary's decision was well-reasoned and certainly not clearly wrong. He correctly applied the law to the facts submitted to him, and properly exercised his discretion not to strike the pleadings as they did not run afoul of the criteria set out in Rule 221(1) of the *Federal Courts Rules*.

ORDER

THIS COURT ORDERS that this appeal from the decision of Prothonotary Aalto dated January 5, 2009, is dismissed with costs.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Douglas Lutz	FOR THE PLAINTIFF
Mr. Jamie Smith, Q.C.	FOR THE DEFENDANT

SOLICITORS OF RECORD:

McInnes, Cooper Barristers and Solicitors Halifax, NS	FOR THE APPLICANTS
Smith Law Offices St. John's, NL	FOR THE DEFENDANT