

Federal Court



Cour fédérale

Date: 20120717

Docket: T-1495-07

Citation: 2012 FC 898

Ottawa, Ontario, July 17, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

ADMIRALTY ACTION *IN REM* AND *IN PERSONAM*

BETWEEN:

NAVAMAR LTD.

Plaintiff

and

RODEL ENTERPRISES INC.

and

THE SHIP FEDON

and

**THE OWNERS AND ALL THOSE
INTERESTED IN THE SHIP FEDON**

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an appeal of a discretionary decision dated January 13, 2012 [the Order] of Prothonotary Morneau, acting as case management judge, who decided to strike from the Court record an expert report on the basis that this report was not “in strict rebuttal” as called for by an Order dated July 7, 2011 [the Case Management Order].

[2] Both parties had initially filed their respective expert reports. At a pre-trial conference held on July 6, 2011, the plaintiff Navamar Ltd. [Navamar] requested leave to file a further report in sur-rebuttal of the Rodel Enterprises Inc. [Rodel] expert report (without any written motion or notice and after having had possession of Rodel's expert report for over one year). Notwithstanding Rodel's objections, the case management prothonotary granted the request to file a report "in strict rebuttal" of Rodel's expert report. The trial is scheduled to be heard over a period of ten days in February of 2013.

[3] After the expert report was filed, Rodel filed a motion objecting to the report on the grounds that it constituted an attempt by Navamar to split its evidence.

[4] The prothonotary heard counsel for the parties and in a nine page Order, explained that the last expert report had to be "in strict rebuttal" of Rodel's expert report. Through specific references to Rodel's motion to object and to Rodel's written submissions, which included a detailed table of references, the case management prothonotary came to the conclusion that the expert report was not "in strict rebuttal" and that Navamar was in effect attempting to split its evidence. He therefore struck out the report and awarded costs against Navamar.

[5] Navamar considers the Order of the prothonotary to be a careful description of the facts, including a faithful reproduction of Rodel's arguments. Having said that, Navamar then complains that the Order does not describe or refer to the two expert reports and that the prothonotary has not stated that he had read them. In addition, it mentions that the Order does not comment on how the Navamar Expert Report responds to Rodel's expert report and whether or not it is "in strict rebuttal." For the plaintiff Navamar, the Order should have provided any alternative basis for striking the report and that it "[...] rather simply endorses Rodel's view that [...] 'the report' [...]"

constitutes case-splitting and comments that admitting it could lead to an endless series of expert reports.”

[6] In its motion on appeal, Navamar did not file or submit that the striking of the report created a prejudice that could seriously impact the finality of the procedures.

[7] The parties agree that the Order of the case management prothonotary is discretionary. It is also interlocutory in nature and such a decision can only be overturned when it is shown that the Order was clearly wrong and that the exercise of the discretion was based on a wrong principle or upon a misapprehension of the facts (see *Orient Overseas Container Line Ltd v Sogelco International*, 2011 FC 1466 at para 16).

[8] Case management of files is an ongoing demanding task. It requires knowledge of the file, a mastering of our *Federal Courts Rules*, SOR/98-106 and experience in understanding the intricacies of litigation and the role that each party must play with the assistance of counsel. When decisions are made, they are the result of current knowledge of the facts and the legal issues at play. In such circumstances, a very high burden must be met in order for an appellate court to intervene to set aside the findings made by the case management judge or prothonotary (see *j2 Global Communications, Inc v Protus IP Solutions Inc*, 2009 FCA 41 at paras 5 and 16 and also *Apotex Inc v Lundbeck Canada Inc*, 2008 FCA 265 at paras 5 and 6).

[9] In essence, Navamar argues that the Order of the prothonotary lacks adequate reasons to support its conclusion. That said, case management decisions are numerous and cannot be expected to be detailed, full of references or lengthy as this would not reflect the task and purpose of case management. As long as such decisions are generally understandable, informative, and answer the

requests being made, they are to be read in light of the full context of the information presented and the submissions made by the parties (see *Savanna Energy Services Corp v Technicoil Corp*, 2005 FC 842, at para 19 and *Novopharm Ltd v Nycomed Canada Inc*, 2011 FC 109 at paras 23 and 24).

[10] Navamar is of the view the Case Management Order of July 2011 is contradicted by the Order of January 2012. First, at the pretrial conference, Navamar requested orally for an opportunity to file a report “in strict rebuttal.” Since it was made orally, nothing permits this Court to know why at the time Navamar felt that such a request had to be made. The case management prothonotary granted the request under the condition it be made “in strict rebuttal.” In its motion to object to the expert report, Rodel submitted that the report was in fact not “in strict rebuttal” and that as a result, it was in essence an attempt to split its evidence.

[11] A simple reading of the Order of January 2012 makes clear that the prothonotary agreed with Rodel’s submissions (which included a detailed table of references) that the report was not “in strict rebuttal” and that its effect was an attempt on the part of Navamar to split its evidence. It is true that by relying on Rodel’s submissions, the case management prothonotary was not writing his own reasons, but no error was committed here. As long as specific references are clearly announced, as was done in this case, a judge can rely on the submissions made by one of the parties (see *Es-Sayyid v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59, at paras 51 to 63). Depending on the facts and legal issues at play and the context in which the decision is made, this may not be the proper way to proceed in all cases. It was an appropriate way to proceed in this case however and I see no reason to allow the appeal.

[12] I am of the view the reasons given to justify the Order were sufficient and the reliance on the submissions of Rodel was proper and informative in the circumstances. While Navamar would naturally have preferred a different outcome or at least different reasons detailing why their expert report was found not to be “in strict rebuttal” and why alternatives to the striking of the report were not taken, this was not the approach followed by the prothonotary as his discretion led him to conclude differently.

[13] The general approach followed by the prothonotary in his Order was to favour the basic principle by which a plaintiff must make its case in chief and that the defendant makes its case through its own rebuttal evidence. It is only exceptionally that sur-rebuttal will be allowed. That opportunity was given to Navamar, but it was shown that the expert report filed was not “in strict rebuttal” as required by the Case Management Order of the prothonotary and that it was instead an attempt for Navamar to split its case. The January Order of the prothonotary was not based on an incorrect principle.

[14] Navamar also attempted to submit that the Order was based on a misapprehension of the facts which resulted in a misuse of the exercised discretion. A review of the written submissions made by Navamar at paragraphs 39 and 40 shows that this is an attempt to invite this Court to reweigh the evidence. My reading of the facts and issues permits me to decline such an invitation for the reasons mentioned above.

[15] Rodel did not ask for costs in its written submissions nor at the hearing of this appeal and so no costs shall be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal of the Order of Prothonotary Morneau dated January 13, 2012 is dismissed. No costs are allowed.

“Simon Noël”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1495-07

STYLE OF CAUSE: NAVAMAR LTD. v RODEL ENTERPRISES INC. ET AL

PLACE OF HEARING: Montreal, Quebec

DATE OF HEARING: July 9, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** NOËL S. J.

DATED: July 17, 2012

APPEARANCES:

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