

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160120

Docket: A-254-15

Citation: 2016 FCA 17

**CORAM: TRUDEL J.A.
DE MONTIGNY J.A.
GLEASON J.A.**

BETWEEN:

LBL HOLDINGS LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 20, 2016.
Judgment delivered from the Bench at Ottawa, Ontario, on January 20, 2016.

REASONS FOR JUDGMENT OF THE COURT BY:

TRUDEL J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20160120

Docket: A-254-15

Citation: 2016 FCA 17

**CORAM: TRUDEL J.A.
DE MONTIGNY J.A.
GLEASON J.A.**

BETWEEN:

LBL HOLDINGS LIMITED

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on January 20, 2016).

TRUDEL J.A.

[1] In reasons cited as 2015 TCC 115, Graham J. for the Tax Court of Canada granted in part LBL Holdings Limited (LBL)'s motion to strike portions of the Crown's Fresh Reply to LBL's Amended Notice of Appeal of assessments for the 1999 and 2000 tax years. This arose subsequent to the Tax Court's decision in September, 2014, to strike the Crown's Reply in its

entirety because the Crown improperly relied exclusively on assumptions of fact without pleading any facts in support for reassessing statute-barred years.

[2] LBL would have this Court overturn the Tax Court judge's discretionary decision not to strike these portions of the Fresh Reply, arguing that he erred by failing to consider affidavit evidence LBL sought to present in support of its motion, and that regardless, each challenged portion of the Fresh Reply ought to have been struck.

[3] The test for striking pleadings under Rule 53 of the *Tax Court of Canada Rules (General Procedure)* SOR/90-688a (Rules) is whether the claim has "no reasonable prospect of success" (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45) at paragraph 17. One of the purposes of rules allowing hopeless pleadings to be struck is the promotion of efficiency in the judicial system (*ibidem* at paragraph 20).

[4] Although LBL is correct to note that submission of evidence by affidavit is not prohibited in motions pursuant to paragraphs (1)(a), (b), and (c) of Rule 53, we have reviewed the affidavits in question and find that they do not assist in determining whether the impugned portions of the Fresh Reply should be struck in accordance with this test.

[5] It appears that LBL seeks to essentially argue its case on the merits, and in particular to challenge the Minister's asserted facts by introducing contrary evidence, at this interlocutory stage. We agree with the respondent that a motion to strike is not the appropriate forum. Indeed,

to delay a trial with repeated challenges to pleadings would seem to frustrate the purpose of promoting judicial efficiency. As Bowman, C.J. wrote for the Tax Court:

If the respondent wishes to challenge the facts alleged, a section 53 motion is not the place in which to do so. It is at trial where a judge hearing the evidence can determine the correctness, relevancy and weight to be assigned to the evidence adduced in support of the allegations. (*Sentinel Hill Productions (1999) Corporation v. The Queen*, 2007 TCC 742, [2008] 5 C.T.C. 2690) at paragraph 6.

[6] The Tax Court judge conducted a careful examination of the portions of the Fresh Reply challenged by LBL. He found that paragraphs 12(d), 12(j), and 12(y) constituted assertions of fact and not, as LBL argued, conclusions of mixed fact and law that would be impermissible in pleadings as material facts.

[7] He found, further, that paragraphs 18, 19, 23, and 24, all under the heading of “Statutory Provisions, Grounds Relied on, and Relief Sought”, were sufficiently supported by the facts the Crown pleads that a judge may reach the conclusions set out in those paragraphs. In other words, none of the portions of the Fresh Reply that were not struck manifest the kind of radical deficiency that would justify striking pleadings at this early stage.

[8] We have not been persuaded that this Court should interfere with any of these conclusions or that the Tax Court judge made any error in his analysis. As a result, the appeal will be dismissed with costs.

"Johanne Trudel"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-254-15
STYLE OF CAUSE: LBL HOLDINGS LIMITED v. HER MAJESTY THE QUEEN
PLACE OF HEARING: Ottawa, Ontario
DATE OF HEARING: JANUARY 20, 2016
REASONS FOR JUDGMENT OF THE COURT BY: TRUDEL J.A.
DE MONTIGNY J.A.
GLEASON J.A.
DELIVERED FROM THE BENCH BY: TRUDEL J.A.

APPEARANCES:

David D. Robertson
Allison Blackler
FOR THE APPELLANT
LBL HOLDINGS LIMITED
André LeBlanc
Craig Maw
FOR THE RESPONDENT
HER MAJESTY THE QUEEN

SOLICITORS OF RECORD:

Couzin Taylor LLP
Calgary, Alberta
FOR THE APPELLANT
LBL HOLDINGS LIMITED
William F. Pentney
Deputy Attorney General of Canada
Ottawa, Ontario
FOR THE RESPONDENT
HER MAJESTY THE QUEEN