Federal Court of Appeal | Cour d'appel fédérale

Date: 20210921

Docket: A-250-20

Citation: 2021 FCA 187

CORAM: **RENNIE J.A.**
MACTAVISH J.A.
LEBLANC J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

POMEROY ACQUIRECO LTD.

Respondent

Heard by online video conference hosted by the Registry on September 7, 2021.

Judgment delivered at Ottawa, Ontario, on September 21, 2021.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: MACTAVISH J.A.
LEBLANC J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] Her Majesty the Queen appeals a decision of the Tax Court of Canada (2020 TCC 107, *per* Sommerfeldt J.) dismissing a motion seeking leave to file an amended reply pursuant to section 54 of the *Tax Court of Canada Rules (General Procedure)*, S.O.R./90-688a. The respondent, Pomeroy Acquireco Ltd., opposed the motion on the basis that the proposed amendments raised two new arguments: the sham argument and the valuation argument.

[2] The decision whether to allow an amendment to a pleading is discretionary and will not be set aside on appeal absent an error of law or a palpable and overriding error on a question of mixed fact and law (*Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 (*Hospira*); *CBS Canada Holdings Co. v. Canada*, 2017 FCA 65, [2017] D.T.C. 5036 at para. 15). In the decision before us, three errors of law were made that cross that threshold.

[3] The first error arises from the failure of the judge to apply the correct legal test to the question whether an amendment ought to be allowed. The judge relied on *Sanofi-Aventis Canada Inc. v. Teva Canada Limited*, 2014 FCA 65, 238 A.C.W.S. (3d) 846 (*Sanofi-Aventis*) at paragraph 9, to require that the amendments be "vital" to the case in order to be allowed.

[4] An amendment need not be "vital" to a case to be allowed. The controlling principle is that an amendment should be allowed at any stage of an action if it assists in determining the real questions in controversy between the parties, provided it would not result in an injustice not compensable in costs and that it would serve the interests of justice. A court should give significant consideration to amendments which further the ability of the trial court to determine the questions in controversy (*Apotex Inc. v. Bristol-Myers Squibb Company*, 2011 FCA 34, 197 A.C.W.S. (3d) 996 at para. 33; *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3, [1993] 2 C.T.C. 213 at p. 6; *Merck & Co., Inc. v. Apotex Inc.*, 2003 FCA 488, [2004] 2 F.C.R. 459 at paras. 39, 46; *Loewen v. The Queen*, 2007 TCC 703, 187 A.C.W.S. (3d) 388 at paras. 4, 6; *Andersen Consulting v. Canada*, [1998] 1 F.C. 605, 75 A.C.W.S. (3d) 439 at paras. 14-17).

[5] *Sanofi-Aventis* addressed the standard of review to be applied on appeals to the Federal Court from a prothonotary's decision. Decided in 2014 and following the then prevailing jurisprudence, *Sanofi-Aventis* held that a discretionary decision of a prothonotary should not be reversed on appeal unless the question raised in the motion was vital to a party's case. *Sanofi-Aventis* and the requirement of "vitality" was irrelevant to the question whether or not an amendment ought to be made. It was, therefore, an error of law to import a requirement pertaining to appellate review into the jurisprudence governing when an amendment is allowed. I note, parenthetically, that the standard of review expressed in *Sanofi-Aventis* is no longer the standard of review of discretionary decisions of prothonotaries (*Hospira*).

[6] I turn to the second error. During the hearing, the judge indicated that he was satisfied that the facts contained in the existing reply were sufficient to support a sham argument. Relying on this, counsel for the Crown conceded it did not require the sham argument amendments contained in the proposed paragraphs. The Crown conceded that "[i]f the Court is satisfied that in the facts already alleged we have sufficient facts that would support a sham argument should we make that at trial, then we're satisfied" (TCC reasons at para. 39).

[7] In his reasons, the judge conceded that his statements during the hearing may have given rise to a misunderstanding (TCC reasons at para. 29), but nevertheless disposed of the matter against the Crown. The judge concluded that "[…] while the existing Reply does not permit the Crown to raise the doctrine or concept of sham at trial, the existing Reply is sufficient to enable the Crown to challenge the nature of the Subject Transaction and to suggest that the Subject Transaction was falsely or speciously mischaracterized" (TCC reasons at para. 32).

[8] By relying on a concession made by the Crown when it was clear that the concession was the result of a misunderstanding, the judge failed to observe the principles of natural justice (*Kibalian v. Canada*, 2019 FCA 160, 2019 D.T.C. 5079). These principles include the right of a party to be heard and have a reasonable opportunity to present its case. But for this misunderstanding, the Crown would not have made this concession.

[9] There is a third reason why this appeal ought to be allowed.

[10] The judge concluded that allowing the amendments would result in prejudice, non-compensable in costs, to the respondent. The prejudice arose from the fact that Robert Pomeroy had recently passed away and was therefore no longer available to instruct the respondent's counsel with respect to the new arguments raised by the Crown, nor to testify in respect of those arguments.

[11] The judge's finding with respect to prejudice is incompatible with his prior conclusion that the proposed amendments were already engaged by the reply. The judge found that the existing reply already called into question the true nature of the transaction at the heart of the assessment, and permitted the Crown to argue that the transaction was "falsely or speciously mischaracterized" (TTC reasons at para. 32). In the same vein, the judge concluded that the Crown had already plead that the value of the shares in question was nil (TTC reasons at paras. 27, 36). The amendment with respect to valuation was, in the judge's words, simply a "superior framing" of the issue.

[12] The proposed amendments could not be prejudicial to the respondent when the issues were already embedded in the existing reply and before the trial judge for adjudication. As the conclusions are irreconcilable with each other, the judge erred in law.

[13] In assessing prejudice, the judge gave no weight to the over-arching criteria of whether the amendments would further the interests of justice. In this regard, there are two further considerations that weigh in favour of granting the amendments.

[14] Allowing the amendments will ensure clarity and certainty at trial.

[15] There is well-established jurisprudence with respect to what constitutes a sham (*Antle v. Canada*, 2010 FCA 280, [2010] D.T.C. 5172), and denying an amendment to plead sham while at the same time allowing a plea that the transaction was "falsely and speciously mischaracterized" injects uncertainty into the proceedings. This would leave both the parties and the trial judge adrift as to what legal principles govern the presentation and assessment of the evidence. This is not in the interests of justice.

[16] Secondly, as the full transcript of discovery of the late Mr. Pomeroy was admitted as fresh evidence on appeal, this Court had an advantage that the judge did not have in assessing prejudice. It is apparent from that transcript that Mr. Pomeroy had little knowledge of the transactions in issue. Accordingly, there is no evidence that Mr. Pomeroy's inability to testify with respect to the nature of these transactions would result in prejudice to the respondent.

[17] The respondent argues that the appellant should, even if successful, be ordered to pay costs to the respondent on a solicitor client or in the alternative on a party and party basis. The respondent contends that costs ought to be awarded on this basis because the Crown did not draft its reply with the requisite diligence and therefore, by its own conduct, precipitated the motion (*Terasen International Inc. v. The Queen.*, 2012 TCC 408, 225 A.C.W.S. (3d) 263 at para. 68; *Bradley Holdings Ltd. v. The Queen*, 2004 TCC 221, [2004] 3 C.T.C. 2432 at para. 21).

[18] I do not accept that these considerations should guide the disposition of costs. The Crown sought the respondent's consent to the motion, which was refused, and there is nothing in the conduct of the appellant or circumstances of the case that would warrant departing from the ordinary rule that costs are awarded in favour of the successful party. However, as the appellant did not seek costs, I would make no order as to costs.

[19] I would therefore allow the appeal, set aside the decision of the Tax Court and, making the order that the Court should have made, allow the amendments.

"Donald J. Rennie"
J.A.

"I agree.
Anne L. Mactavish J.A."

"I agree.
René LeBlanc J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-250-20
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. POMEROY ACQUIRECO LTD.
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DATE OF HEARING:	SEPTEMBER 7, 2021
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	MACTAVISH J.A. LEBLANC J.A.
DATED:	SEPTEMBER 21, 2021

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