In the Court of Appeal of Alberta

Citation: 422252 Alberta Ltd. v. Messenger, 2015 ABCA 47

Date: 20150203
Docket: 1403-0267-AC
Registry: Edmonton

Between:

422252 Alberta Ltd. and Robert F. MacRae

Applicants

- and -

**Robert Messenger, Real Pro Consultants Ltd.,
Farris Vaughan Wills & Murphy (a firm) and Felesky Flynn (a firm)
formerly known as Bell Felesky Flynn**

Respondents

**Reasons for Decision of
The Honourable Mr. Justice Ronald Berger**

Application to Restore Appeal

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

[1] This is an application to permit the Applicants, 422252 Alberta Ltd. and Robert F. MacRae, to restore their appeal filed on October 20, 2014, which was struck by the Registrar on November 24, 2014 because the Applicants had failed to file the appeal record in accordance with the applicable deadline.

[2] The appeal had been filed initially as a standard appeal, but its status was changed by the Registrar to a fast track appeal. The Applicants' counsel was so notified in writing by facsimile dated October 21, 2014. Counsel for the Applicants assert that it was not until November 24, 2014, that they appreciated that the appeal designation had been changed when they received notification that the appeal had been struck.

[3] The underlying litigation began in the year 2000 and relates to events that occurred in 1990. The subject of the extant appeal pertains to an application brought by the Applicants on January 3, 2013 to amend their statement of claim. Both the Master and the Queen's Bench chambers judge were of the view that the proposed contested amendments (others were not in dispute) must be rejected.

[4] This Court has repeatedly made clear that the decision on whether to restore an appeal involves an exercise of discretion. Several factors must be taken into account. All must be weighed to determine whether the interests of justice warrant that the appeal proceed:

- The reason why the appeal was struck.
- The length of the delay in bringing the application to restore.
- The overall conduct of the litigation.
- Prejudice to the Respondent.
- The merits of the appeal.

See ***Morbank Financial Inc. v. Field***, 2014 ABCA 3, ***Can-Cell Industries Inc. v. Lippa***, 2010 ABCA 409, ***Ruskin Estate v. Chutskoff Estate***, 2013 ABCA 276.

[5] The question of whether to allow amendments to a statement of claim is within the discretion of the judge. Such discretionary decisions are reviewable on the standard of reasonableness. This Court may interfere if no weight or insufficient weight was given to relevant considerations, or if the judge erred in law: ***Peterson v. Highwood Distillers Ltd***, 2005 ABCA 248 at para. 16. In ***Hill v. Hill***, 2007 ABCA 293 at para. 8, this Court put the matter as follows:

> "Whether the amendments were properly allowed is a question of mixed fact and law, involving an exercise of discretion. In order to succeed, the appellants must show that the case management judge erred on an extricable question of law or made an overriding and palpable error in her fact findings or factual inferences, or otherwise exercised her discretion unreasonably in light of all the relevant considerations: *Re Indian Residential Schools* (*sub nom*. *Doe v*. *Canada*), 2001 ABCA 216, 286 A.R. 307 at paras. 17-23; *Decock v*. *Alberta*, 2000 ABCA 122, 225 A.R. 234, 186 D.L.R. (4th) 265."

[6] The chambers judge found that the proposed contested amendments would cause serious prejudice not compensable in costs. He reasoned as follows:

> "Prejudice arising from the passage of time does not stop accruing just because the parties agree to do nothing with respect to advancing the claim. Memories still fade, documents may go missing, witnesses may relocate and their presence become unknown, or one might even die.
> ...
>
> It falls to the respondents to point to evidence to make out serious prejudice. Neither Felesky Flynn nor Farris Vaughan filed affidavits, but the evidence in this hearing makes out serious prejudice not compensable by costs for both.
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> The passage of time must be given much weight. Nearly 23 years passed from the sale of the shares in July 1990 until the applicants applied to amend, more than 12 years passed after the filing of the statement of claim in 2000 before the appellants filed, and almost 11 years passed after Farris Vaughan filed the affidavit of records referencing the Hatton note. That affidavit provided the appellants with notice and an opportunity to obtain a copy of the note and other documents. They did not do so.
>
> Memories have faded as indicated in the questioning of Mr. Hatton and Mr. Kirkby. Just as telling, if not more so, Macrae deposed in October 2013 that he cannot remember receiving the affidavit of records served on him in June of 2001. It seems odd then that he would ask the respondents to defend new allegations relating to matters 11 years prior to the service he cannot recall.
>
> I agree with the Master, the evidence from the questioning shows Felesky Flynn and Farris Vaughan essentially defenceless against these new claims. The result is serious prejudice to both.
>
> The nature of the new allegations also add to the prejudice caused by the passage of time. With respect to both respondents, the allegations are more serious. Those

> against Felesky Flynn allege a complete failure with respect to advising on alternative investments, not just poor advice, on the tax risks regarding the sale at hand. For Farris Vaughan, the allegation consists of egregious and high-handed conduct giving rise to a claim for increased damages, even punitive damages.
>
> A final but important consideration is that the application comes well beyond all limitation periods. Accordingly the Court should be very reluctant to exercise its discretion in favour of the application. As the Master pointed out, such restraint is required if we are to give any credence to the rationale for a limitations system and so acknowledge the logic supporting the ultimate period even when the ultimate period is sterilized by Section 6(2) of our *Act*.
>
> Accordingly to allow the amendments would cause serious prejudice to the defendants Felesky Flynn and Farris Vaughan, the respondents in this hearing. No costs could compensate them if placed in a situation where they find themselves defenceless against the new allegations." (Proceedings, p. 11/18-12/26)

[7] In the course of oral submissions, counsel for the Applicants acknowledged that on the face of the record it is apparent that there have been "horrible delays". He maintains, however, that these are not attributable to his clients and there has been no resulting prejudice to the Respondents. At the heart of his submission is the proposition that the Respondent law firms knew or ought to have known, as early as 1994, that there was an ongoing tax investigation which, in the event of an adverse ruling, might give rise to litigation which, indeed, occurred in the year 2000. It is apparent that thereafter negotiations with the taxing authority went on for some considerable period of time, culminating in a settlement agreement of June 25, 2008. In the light of the foregoing, the argument is that the Respondents were throughout well aware of the key chronology of events (inclusive of limitation periods) and that, consequently, the delays from 1990 to and including, at the very least, 2008, cannot be attributable to them.

[8] In my view, those submissions beg the question. Under the rubric of the merits of the underlying appeal is the pivotal issue of whether given the passage of time, regardless how blame is assigned, the disputed amendments in the light of the temporal hiati, materially alter the gist and thrust of the litigation with resulting prejudice to the Respondents.

[9] With the foregoing in mind, I have concluded that the discretionary decisions in the Court below survive when reviewed on a standard of reasonableness. In my opinion, this Court is not likely on appeal to interfere on the basis of any error of law or principle or on the basis that insufficient weight was given to the relevant considerations in rejecting the application to amend.

[10] I would add only that the argument advanced for the first time at the outset of oral submissions, in reliance upon Rule 14.14(3) is, in my opinion, without merit. This Court has always considered an application for leave to appeal a rejected application for leave to amend a

pleading as an intended fast track appeal. It follows that the contention that the Registrar erred in so characterizing the appeal, must be rejected.

[11] For the reasons set out above, the application for leave to restore the appeal is dismissed.

Application heard on January 27, 2015

Reasons filed at Edmonton, Alberta
this 3rd day of February, 2015

Berger J.A.

Appearances:

R.G. McLennan, Q.C. and C.S. Ballesteros
for the Applicants

P.A.L. Smith, Q.C.
for the Respondents Robert Messenger, Real Pro Consultants Ltd., and Farris Vaughan Wills & Murphy

J.M. Hope, Q.C.
for the Respondent Felesky Flynn