Federal Court of Appeal | Cour d'appel fédérale

Date: 20201215

Docket: A-421-19

Citation: 2020 FCA 216

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

BETWEEN:

JOHN CHRISTOPHER BEWSHER

Appellant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, GILLES CHIASSON AND DR. DONALD CAMPBELL

Respondents

Heard by online video conference hosted by the Registry on December 14, 2020.

Judgment delivered at Ottawa, Ontario, on December 15, 2020.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] This is an appeal of a decision by the Federal Court (2019 FC 1350 *per* Justice Barnes) dated October 28, 2019, dismissing the appeal of a Prothonotary's decision by which the appellant's motion to strike portions of the respondents' Statement of Defence was denied.

[2] The appellant, a former member of the Royal Canadian Mounted Police (RCMP) who was medically discharged in 2018 after being diagnosed with Post-Traumatic Stress Disorder (PTSD), claims losses from the respondents' alleged breaches of their fiduciary duties and of his fundamental rights. More particularly, the appellant claims that the respondents owed him a duty of care, that they breached their respective fiduciary duties by sending him to a high risk isolated post, despite psychological test results showing that he was not suited for such a dangerous assignment, and that his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 have also been breached.

[3] After the respondents had filed their Statement of Defence, the appellant brought a written motion to strike portions of that pleading pursuant to Rule 221(1)(*a*) and (*c*) of the *Federal Courts Rules*, S.O.R. 98/106, on the basis that no reasonable defence was disclosed or that the defence was scandalous, frivolous or vexatious. In essence, the appellant sought to deny the respondents the opportunity to argue that they owed no fiduciary duty to him. He also requested the striking of the pleadings whereby the respondents denied any causation between a breach of fiduciary duty and the damages claimed, as well as the respondents' mitigation argument. Finally, the appellant also argued that the statutory limitation pleaded by the respondents, based on section 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the *Crown Liability and Proceedings Act*), section 111 of the *Pension Act*, R.S.C. 1985, c. P-6 (the *Pension Act*), and Part III of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the *Royal Canadian Mounted Police Act*), stood no chance of success and ought to be struck.

[4] Prothonotary Steele dismissed the motion for the most part, finding that it would be premature to resolve these matters at the pleadings stage and that it was not plain and obvious that the respondents' arguments stood no chance of success.

[5] On appeal, the Federal Court confirmed the decision of the Prothonotary, stating that the opportunity to raise causation and mitigation defences is a matter appropriately left to trial. The same was said of the pleaded statutory liability limitation, the applicability of which raises matters of evidence best left to trial.

[6] Before us, as was the case before the Federal Court, the appellant does not argue that the Prothonotary erred in selecting the wrong legal test to be applied on a motion to strike. Indeed, the test on a motion to strike under Rule 221(1)(*a*) is well settled and was set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 979-980. Under that test, the Prothonotary's task was to determine whether it was plain and obvious, assuming the facts pleaded to be true, that the impugned defences had no reasonable prospect of success (see also *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17).

[7] Despite some attempts to find extricable errors of law, it is clear that the appellant's disagreement is with the Prothonotary's and the Federal Court's application of the test to the facts of this case. This is clearly a question of mixed fact and law, attracting review on the standard of palpable and overriding error: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at paras. 66-79; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 36. As explained by this Court on numerous

occasions, this is a highly deferential standard of review: *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46; *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, [2016] 1 F.C.R. 246 at para. 40; *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 62.

[8] The appellant has not convinced me that the Federal Court erred in upholding the Prothonotary's finding that it is not plain and obvious that the mitigation defence is bound to fail. The Prothonotary accepted that the argument may appear weak at first sight, but nevertheless properly concluded that this was clearly not sufficient to strike out the defence. As noted by the Federal Court, whether mitigation can be a defence to a breach of fiduciary duty claim has not been unequivocally ruled out by the Supreme Court in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, 131 N.R. 321 [*Canson*]. Moreover, it cannot be categorically excluded that the appellant could have taken certain steps and sought assistance to alleviate his alleged losses if the facts pleaded in the Statement of Defence are accepted, as they must be for the purposes of a motion to strike. Accordingly, the motion judge did not make a palpable and overriding error in concluding that the matter is best left to the trial judge for determination.

[9] The same is true with respect to causation. The appellant submits that on a "common sense view of causation", the respondents' breaches of their fiduciary duty in approving his posting led to his inability to complete his career. In his view, there are no facts pled by the respondents that could either contradict that factual link or support an alternative link between the breach and the loss. He also seems to suggest that a loss does not have to be proven once a breach of fiduciary duty has been established, since the breach is a wrong in and of itself.

[10] In my view, that position is untenable. Causation is a key component in most civil actions, and its assessment depends entirely on the evidence presented by the parties. Here, not only have neither the breach nor the injury been established, but the link between the two is certainly a matter for the trial judge to determine. Even in the context of a claim in equity for a fiduciary breach, where the objective is not only to put the beneficiary in as good a position as he or she would have been had there been no breach, but also to deter wrongdoing by fiduciaries, the losses must still flow from the breach. As the Supreme Court stated in *Canson* at 551, "equitable compensation must be limited to loss flowing from the [fiduciary's] acts in relation to the interest he undertook to protect": see also *Southwind v. Canada*, 2019 FCA 171 at paras. 58, 60.

[11] Therefore, the Prothonotary and the Federal Court did not err in finding that causation is a matter best left to the trial judge. It may be, as the Prothonotary observed, that causation will be easily established once a breach is proved, but it is no reason to conclude that causation is plain and obvious and to preclude the trial judge from making a determination in that respect based on all the evidence that will be presented by the parties.

[12] The appellant also challenges the decision of the Prothonotary, affirmed by the Federal Court, to refuse to strike the statutory limitation pleaded by the respondents in their Statement of Defence. Pursuant to section 9 of the *Crown Liability and Proceedings Act*, individuals are prohibited from suing the Crown for injuries in respect of which a pension has been paid or is payable under the *Pension Act*. According to the Statement of Defence, the appellant is receiving a disability pension for PTSD, the very condition underlying his claim for damages. The purpose

of section 9 is to prevent double recovery for the same claim, and has been interpreted as barring all claims against the Crown where a pension was paid on the same factual basis underlying the claim: *Sarvanis v. Canada*, 2002 SCC 28, [2002] 1 S.C.R. 921 at para. 28.

[13] The appellant contends that the factual basis for his pension is not the same as the factual basis of his claim for damages, because the facts do not overlap in time and also because the purpose of the pension is different than the purpose for compensation underlying his claim. The appellant submits that the claim for breach of fiduciary duty is based on events that occurred before he was posted to a high risk isolated post where he was exposed to traumatic events, whereas the basis for his pension is the 2016 PTSD diagnosis resulting from the psychological injuries that he sustained after being exposed to these traumatic events.

[14] As creative as he has been in characterizing his action, the appellant cannot escape, at least at this preliminary stage of the proceedings, the reach of section 9 of the *Crown Liability and Proceedings Act* by way of careful crafting. The jurisprudence quoted by the Federal Court (at paragraph 13 of its reasons) makes it clear that a claimant cannot obtain damages for a breach of duty when the facts underlying that claim are the same as those underpinning his disability pension.

[15] The applicability of the section 9 litigation bar is best left to the determination of the trial judge, with the benefit of a full evidentiary record. It would be premature to preclude the respondents from raising that statutory defence, and the Federal Court certainly made no palpable and overriding error in so finding.

[16] Finally, I am unable to find that the Federal Court erred in refusing to strike the respondents' pleading that the appellant failed to exhaust his rights under the grievance and appeal processes set out in the *Royal Canadian Mounted Police Act*. Having been granted permission by the Prothonotary to amend their Statement of Defence in order to plead the necessary material facts in support of that defence, the respondents did advance some new facts. In light of previous cases where such a defence was accepted (see, for example, *Canada v. Prentice*, 2005 FCA 395, [2006] 3 F.C.R. 135; *Villeneuve v. Canada*, 2006 FC 456, 303 F.T.R. 1), it is far from "plain and obvious" that it is doomed to fail in the case at bar. Accordingly, the Federal Court did not err in finding that it is an evidenced-based question better left for trial.

[17] For all of the foregoing reasons, I would dismiss this appeal, with costs.

"Yves de Montigny"
J.A.

"I agree
Donald J. Rennie J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-421-19
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CONCURRED IN BY:	RENNIE J.A. GLEASON J.A.
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APPEARANCES:

Julien Matte	FOR THE APPELLANT
Sarah Drodge	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

North End Law Halifax, Nova Scotia	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENTS