Federal Court  Cour fédérale

Date: 20191028

Docket: T-717-18

Citation: 2019 FC 1350

Ottawa, Ontario, October 28, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

JOHN CHRISTOPHER BEWSHER

Plaintiff/Moving Party

and

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

Defendants/Respondents

ORDER AND REASONS

[1] This is an appeal by the Plaintiff of a Prothonotary's decision dated June 21, 2019, by which the Plaintiff's motion to strike certain passages from the Defendants' Statement of Defence was denied.

[2] The Plaintiff concedes that the Prothonotary correctly identified the legal test to be applied on a motion to strike, that being the "plain and obvious" standard described in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at pp 979-980, [1990] 1 WDCP (2d) 523].

[3] The test that applies to this appeal is, of course, whether the Court is satisfied that the Prothonotary's decision contains a palpable and over-riding error applying the law to the facts: see *South Yukon Forest Corp v The Queen*, 2012 FCA 165, [2012] FCJ No 669.

[4] The Plaintiff argues that it is plain and obvious that the Defendants' pleading of a failure to mitigate, an absence of causation, and the applicability of the liability limitations set out in s 9 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50 and in s 111(2) of the *Pension Act*, RSC, 1985, c P-6, have no reasonable prospect of success. In the result, the Prothonotary is said to have made a palpable and over-riding error by declining to strike those defences.

[5] The obvious place to begin is with the Prothonotary's decision. She dealt with the Defendants' causation and mitigation allegations in the following way:

> [17] The Plaintiff argues that causation is not an issue as either the Defendants are found to have done nothing wrong and therefore the action is dismissed, or if a breach is found to have occurred, the Defendants have admitted that he was discharged in large part due to his postings in isolated and sometimes high risk posts.
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> [18] The Defendants submit causation should not be determined at the pleadings stage as it is a fact and evidence driven conclusion. The Defendants further disagree with the Plaintiff's assessment of what is the relevant breach that would have caused the resulting injury.

[19] I agree with the Defendants. This case turns on whether (i) the Defendants owed a fiduciary duty to the Plaintiff, (ii) whether this duty was breached, (iii) whether this breach in turn caused damage to the Plaintiff and the nature of such damage, and (iv) the quantum of damages to be awarded to the Plaintiff, as the case may be. It is premature for me to rule that causation has been established as this would require foregone conclusions as to the existence and nature of the fiduciary relationship and any ensuing breach, both of which are in dispute. In any event, even if the Court were to accept the existence of the fiduciary relationship and a breach of the Defendants' duty to the Plaintiff, it is not for me at the pleadings stage to preclude the trial judge from making a determination as to whether such breach caused injury to the Plaintiff.

[20] It may very well be that causation is established with relative ease if a breach is proved, but it is not "plain and obvious" that causation is established on the face of the pleadings and that the defence of the absence of causation has no reasonable prospect of success.

[21] The Plaintiff additionally claims that the second sentence of paragraph 26 should be struck given that when equitable breaches are claimed, the traditional concept of mitigation does not generally apply. The Plaintiff also contends that it is untenable to impose a duty to mitigate given the fact pattern in this case, in particular in view of the time elapsed between when the alleged breach would have occurred and the manifestation of loss.

[22] The Defendants argue that mitigation is live issue. They submit that the pleadings support the argument that it would have been open to the Plaintiff to take certain steps to alleviate his alleged losses and that consequently, the mitigation argument is not doomed to failure.

[23] While the mitigation argument may appear weak at first blush, I cannot conclude that the Defendants' mitigation argument is bound to fail given the facts pleaded in the Statement of Defence. The facts, taken as true, tend to show that notwithstanding his exposure to traumatic events, he did not seek assistance during that period. Could the Plaintiff have done something at the time as the Defendants suggest, or is it untenable to suggest that he mitigate loss during a period when no loss had yet occurred, as the Plaintiff suggests? Given that the parties draw different conclusions from the same set of facts, I cannot conclude that it is "plain and obvious" that the mitigation defence is bound to fail.

[6] The Prothonotary's analysis of the viability of the Defendants' statutory defences was the following:

> [29] The Plaintiff seeks to strike paragraph 28 and portions of paragraph 30 to remove references to section 9 of the *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50) [the *Crown Liability Act*] and the *Pension Act* (RSC 1985, c P-6) [the *Pension Act*].
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> [30] With respect to section 9 of the *Crown Liability Act*, the Plaintiff argues that the Defendants have failed to allege the material facts and basis for the pension received by the Plaintiff, and that even if such facts had been plead, section 9 does not apply. The Plaintiff submits that this is a loss of opportunity case and therefore, there can be no overlap between the claimed amount and the disability pension the Plaintiff is receiving.
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> [31] The Defendants respond that the Plaintiff has framed his claim to avoid the application of section 9 of the *Crown Liability Act*. They assert that the Plaintiff is, for all intents and purposes, seeking further and better compensation to what he is already receiving under the *Pension Act* and that the same factual basis underlies the Plaintiff's pension and his claim for damages in the present case.
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> [32] In his reply submissions, the Plaintiff suggests that the post-traumatic stress disorder diagnosis is irrelevant as the Plaintiff's claim for lost opportunity arises out of facts that occurred solely prior to the postings for which he is receiving compensation following his medical discharge from the RCMP.
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> [33] The parties have expended much effort trying to convince the Court whether and why the section 9 defence does, or does not, apply. Taking the facts alleged as true, I cannot find that it is "plain and obvious" that the post-traumatic stress disorder diagnosis is altogether immaterial to the limitations defence that the Defendants have raised based on the *Crown Liability Act* and the *Pension Act*. Again, whether these defences apply or not will depend on the trial judge's assessment of liability. It would be premature for me to make such a finding at the pleadings stage.
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> [34] For these reasons, the Plaintiff's request to strike paragraphs 28 and part of 30 is refused.

[7] The Plaintiff contends that the Defendants are not entitled to assert defences that do not address his claims. That however is an oversimplification of the problem. It is not open to a plaintiff to unilaterally characterize relevant factual events in a way that suits his theory of the case to the detriment of a defendant who wishes to characterize those events in a legally different way. This point was addressed in *Canada v Prentice*, 2005 FCA 395 at paras 69-70, [2006] 3 FCR 135 [*Prentice*]:

> [69] The remedy sought here, compensatory, moral and exemplary damages, is typical of liability actions in common law and confirms the real nature of the action brought by the respondent. When stripped of the artifices that litter the statement of claim once it was amended in response to the decision in *Dumont-Drolet* - undoubtedly to avoid the Crown immunity against civil liability actions recognized by the Court - the applicant's action is in reality an action by an employee against his employer seeking damages for harm allegedly suffered in the course of his employment (see *Vaughan*, at paragraph 11).
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> [70] Given that this action is a disguised action in civil liability against the Crown, it is prohibited by sections 8 and 9 of the *Crown Liability and Proceedings Act*.

[8] The Plaintiff has framed his cause of action as a breach of fiduciary duty and seeks compensation for his “lost opportunity” to finish out his career in the Royal Canadian Mounted Police [RCMP]. Presumably, that lost opportunity is to be measured by his forgone wages after the termination of his employment.

[9] The Plaintiff’s argument that causation and mitigation defences are effectively unavailable to the Defendants rests heavily on the decision in *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129. The Plaintiff, however, reads far more into that decision than it will bear. That case dealt with a clear breach of a fiduciary duty, and

stands for the proposition that any resulting claim to compensation is not to be limited by the absence of foreseeability. The decision does not support an argument that, where a fiduciary duty has been breached, issues of causation and mitigation are similarly removed from consideration. Indeed, there are numerous references in the Court's two opinions to the opposite effect.

[10] Justice Beverley McLachlin (as she then was) stated that the duty to mitigate remains in cases of fiduciary breach where a plaintiff's loss results from his "own unreasonable actions" (see p 553). In such circumstances "it is no longer sensible to say that the losses which followed were caused by the fiduciary's breach" (see p 554. According to Justice McLachlin, in situations of a lost opportunity, the "question is whether, applying a common sense view of causation, the losses sustained…can be said to have resulted or flowed from the breach of fiduciary duty" (see p 556).

[11] The opinion given by Justice La Forest is similarly circumspect, as can be seen from the following passages:

> The rubric "breach of fiduciary duty" has come to encompass so many different types of liability that it is not now possible to determine the appropriate remedy by defining the wrong simply as a "breach of fiduciary duty". It is necessary, instead, to look through the categorization of the wrong as a "breach of fiduciary duty" to the true nature of the wrong, and to move from there to the determination of the remedy. The nature of the wrong and the nature of the loss, not the nature of the cause of action, will dictate the scope of the remedy. [p 563]
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> …
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> In *Cory*, and for that matter in *Laskin*, the court was also willing to apply the concept of mitigation of damages. Mitigation in equity was also found to be appropriate in *LeMesurier v. Andrus* (1986), 54

> O.R. (2d) 1 (C.A.), and it seems to be implicit in this Court's decision in *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at pp. 667-68. This is consistent with the fact that equity acted on the basis of fairness and justice. The truth is that barring different policy considerations underlying one action or the other, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress. [p 581]
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> …
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> But, as these cases underline, equity cannot be rigidly applied. Its doctrines must be attuned to different circumstances. Quite obviously not all fiduciary obligations are the same. It would be wholly inappropriate to interpret equitable doctrines so technically as to displace common law rules that achieve substantial justice in areas of common concern, thereby leading to harsh and inequitable results. I wholeheartedly reject the notion advanced by the appellants that the Court of Appeal fell "into error because of a misplaced concern with concepts of common sense and reasonableness". I would have thought these concerns were central to both common law and equity. [pp 588-589]
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> In my view a court of equity, applying principles of fairness, would and should draw the line at calling upon the fiduciary to compensate for losses arising as a result of the unanticipated neglect of the engineers and pile driving contractor. The fiduciary had nothing to do with their selection, their control, their contractual or bonding obligations. It follows that I agree with the trial judge and the British Columbia Court of Appeal that these losses are too remote, not in the sense of failing the "but for" test, but in being so unrelated and independent that they should not, in fairness, be attributed to the defendant's breach of duty. [p 563]

[12] In the face of the above statements, the argument that the Plaintiff can, by artful pleading, deny the Defendants the opportunity to raise causation and mitigation defences is, as the Prothonotary held, a matter appropriately left to trial.

[13] The same problems arise in respect of the Defendants' reliance on the pleaded statutory liability limitations. There are any number of authorities that have applied those provisions in similar cases, notwithstanding attempts to escape their reach: see *Prentice*, above; *Lebrasseur v Canada*, 2007 FCA 330, [2007] FCJ No 1365 (QL); *Sherbanowski v Canada*, 2011 ONSC 177, [2011] OJ No 55; *O'Farrell et al v Attorney General of Canada et al*, 2017 ONSC 931, 276 ACWS (3d) 263; *Kift v Canada*, [2002] OJ No 5448,2003 CanLII 11719 (ONSC); and *Barry v AG of Canada*, 2017 NBQB 121, 280 ACWS (3d) 865 [*Barry*]. In *Barry*, the Court addressed the applicability of s 9 of the *Crown Liability and Proceedings Act* in similar circumstances. It held that the purpose of that provision is to avoid double recovery for the same factual situation, and that how the action is legally framed is irrelevant (see para 25).

[14] Although the Plaintiff asserts that there is a temporal issue in his case that distinguishes these authorities, that is a matter of evidence to be determined at trial.

[15] I also reject the Plaintiff's argument that the Prothonotary erred by extending leave to amend paragraph 29 of the Statement of Defence, or, alternatively, for this Court to strike the amended paragraph. It is presumptuous to assert that there could never be a set of material facts that might save the defence of alternative remedy. This is an evidence-based question that cannot and should not be resolved on a motion such as this. It, too, is a matter for trial.

[16] For the foregoing reasons and for the reasons given by the Prothonotary, which I adopt, this appeal is dismissed with costs in the amount of $750.00 payable to the Defendants.

ORDER IN T-717-18

THIS COURT ORDERS that this motion is dismissed with costs payable to the Defendants in the amount of $750.00.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-717-18
STYLE OF CAUSE:	JOHN CHRISTOPHER BEWSHER v HER MAJESTY THE QUEEN IN RIGHT OF CANADA, GILLES CHIASSON AND DR. DONALD CAMPBELL
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ORDER AND REASONS:	BARNES J.
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