Canadian Triton International, Ltd. (Assignees of) v. National Iranian Oil Co.

Between
Crown Resources Corporation S.A. and Ata Olfati, as
Assignees of the Estate of Canadian Triton
International, Ltd., plaintiffs/respondents, and
National Iranian Oil Company, defendant/moving party

[2005] O.J. No. 949
Court File No. 03-CL-4904
Divisional Court File Nos. 58/05 and 60/05

Ontario Superior Court of Justice
Divisional Court
G.D. Lane J.

Heard: March 14, 2005
Judgment: March 15, 2005.
(17 paras.)

Civil procedure — Applications and motions — Evidence — Appeals — Leave to appeal.

Motion by the defendant, National Iranian Oil, for leave to appeal an order dismissing its application to strike out an affidavit submitted by the plaintiff, Canadian Triton International. The affidavit was submitted by Canadian on a motion by National to stay the action on the grounds that Canada was not a convenient forum. The action arose out of contracts to drill for oil in Iran. National had moved on the grounds that the affidavit was inappropriate sur-reply which set out legal opinion already contained in a previous affidavit by Canadian; the motions judge found that rule did not apply to motions, but only to evidence at trial.

HELD: Motion dismissed. There were no conflicting authorities, so that leave to appeal would not be granted on that ground. Further, there was no reason to doubt the correctness of the decision; evidence rules were different for motions, and the judge had exercised her discretion to allow the affidavit.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 39.02(1), 39.02(2), 62.02(4)(a), 62.02(4)(b).

Counsel:

Markus Koehnen and Karen S. Kuzmowich, for the defendant, moving party.

Stephen M. Turk and Keith Landy, for the plaintiffs, responding.

¶ 1 **G.D. LANE J.** (endorsement):— The defendant moves for leave to appeal to the Divisional Court from the decision of Hoy J. dated January 20, 2005, refusing to strike out an affidavit submitted by the plaintiffs. The defendant had moved against the affidavit as improper sur-reply, but the learned motion judge held that the rules as to reply evidence applicable to trials did not apply to motions and found that, in any event, it was a proper case in which to exercise her discretion and admit the affidavit.

¶ 2 The actions (there are two proceeding together) arise from alleged contracts to drill for oil in Iran, allegations as to seizure of property by Iranian government officials and the sale of goods located in Iran. The defendant has brought motions to stay the actions on jurisdictional and forum non conveniens grounds, asserting that the contract provides for the exclusive jurisdiction of the Iranian courts. The plaintiffs submit that Ontario is the proper jurisdiction because, inter alia, they cannot obtain a fair trial in Iran.

¶ 3 It is conceded, at least for the purpose of these motions, that the proffered affidavit is relevant to the fair trial issue. It attaches three extracts from websites maintained, respectively, by Amnesty International, the International Commission of Jurists and the U. S. State Department.

¶ 4 The objection to the affidavit is one of timing. In support of its motion to stay the actions, the defendant filed an affidavit from an Iranian legal expert in September 2003. The plaintiffs responded with an affidavit in January 2004 from their expert. The defendant replied with a further affidavit in April 2004. Cross-examinations were then scheduled for October 5, 2004, in London, England. On Saturday, October 2, 2004, the proffered affidavit was faxed to the offices in Toronto of counsel for the defendant, who was actually in Iran. He saw the affidavit on arrival in London, placed an objection to it on the record and permitted the cross-examination of the defendant's expert to proceed.

¶ 5 The defendant submitted that such an affidavit was not permissible because the law of evidence required the orderly submission of evidence and, in particular, evidence in reply which was not responsive to the opponent's evidence but was merely confirmatory of the party's prior evidence was not permitted. In the alternative, the tendering of the affidavit was proscribed as 'case-splitting'. The defendant also submitted that Hoy J. exercised her discretion to admit the affidavit upon erroneous principles, including the absence of a proper evidentiary record and ignoring the possible prejudice inherent in permitting additional evidence which could lead to an additional affidavit from the defendant's expert upon which he could then be cross-examined a second time.

¶ 6 Leave to appeal is governed by Rule 62.02(4)(a) and (b). Sub-rule (a) requires a showing of a conflicting decision and that it is desirable that leave should be granted. Sub-rule (b) requires that there be good reason to doubt the correctness of the order and that it involves matters of such importance that leave should be granted.

The First Branch

¶ 7 Before Hoy J., counsel for the defendant conceded that there were no conflicting decisions. Before me, he contended that the Federal Court decision in Business Depot [See Note 1 below] was an authority for the proposition that the rules as to calling witnesses at trial applied to the tendering of affidavits in the preparation of a motion. In that case, the judge referred to the law as to calling reply evidence at trial, as set out in Sopinka and Lederman: The Law of Evidence in Canada (Toronto, Butterworths, 1999) at pages 958, 959. There the authors discuss the limitations on the right of a party to call reply evidence at trial. Counsel relied in particular on the prohibition against case-splitting, stressing that it was settled law that a defendant had the right to know the plaintiff's full case against him before he presented his own case. Counsel said the present situation was analogous and that there must be an orderly presentation of evidence to preserve his client's rights. Therefore the rules against case-splitting must be enforced in respect of motions as well as trials.

Note 1: Business Depot Ltd. v. Canadian Office Depot Inc. [1999] F.C.J. No. 2027 (Trial Div.).

¶ 8 At first glance, Business Depot appears to be similar to the case at bar, but there is actually a significant difference. In that case, the court had already made an order allowing the filing of a reply affidavit and the issue was whether the contents of the affidavit filed pursuant to this permission were proper reply. The court turned to "Sopinka" to determine what was appropriate reply, and decided that the contents were merely confirmatory of previous evidence. The offending parts were struck out. In the present case, the issue is not the contents of the affidavit, but the right to deliver it at all. Business Depot is not an instance of the court refusing to allow the delivery of an affidavit based on applying the rules applicable to calling witnesses at a trial.

¶ 9 In my view, the application for leave cannot succeed on the first branch of Rule 62.02 as there are no conflicting authorities.

The Second Branch

¶ 10 Nor can it succeed on the second branch. I do not find that there is good reason to doubt the correctness of the decision. Hoy J. expressed in her reasons her doubts about counsel's submission:

> I do not think that it is appropriate for me to extend that principle to the context of motions where a different dynamic is at play than in the case of a trial with viva voce evidence. This is particularly so having regard to the provisions of Rule 39.02(2).

¶ 11 In my view Hoy J. was correct in this statement. It is not appropriate to import the rules governing the conduct of a trial into the context, not of the actual argument of this motion, but to the period in which the parties are accumulating the evidence on which they will ultimately argue it. However orderly it might be to restrict the delivery of affidavits in this fashion, the real world of motion preparation is not orderly. Matters arise and must be dealt with; new information comes to hand; new arguments and lines of inquiry appear and need to be followed. The authors of Holmested and Watson: Ontario Civil Procedure (Carswell, Toronto), recognize the differences between the practice at trial and that on motions at pages 39-29 to 39-31, where they note that parties at trial are not required to call all their evidence before cross-examining the other party's witnesses and observe:

> However, this matter must be viewed in context. Different evidence taking rules are* followed on applications and motions than at trial, e.g. there is a prima facie requirement that evidence be given by affidavit, not orally [citations omitted] and sound policies underlie this approach; ...
>
> * emphasis in the original

¶ 12 They also observe that an important difference is that affidavits on applications not only serve as evidence, but also as documents defining the issues. Hence the requirement for filing of affidavits before cross-examining is justified. While the authors suggest that the aim of Rules 39.02(1) and (2) is a tidy approach, they do not suggest that this is to be achieved by applying trial procedure to motions.

¶ 13 The Rule which governs this preparatory stage is Rule 39.02 and it imposes one restriction: one cannot cross-examine the deponent of the adversary until one has filed all affidavits on which one intends to rely; further affidavits may be filed only with leave. The proffered affidavit was proffered before the cross-examination of the expert of the defendant and the Rule was therefore not offended.

¶ 14 Finally, the applicant submits that the alternative basis on which Hoy J. supported her decision was flawed. In exercising her discretion, she failed to consider the prejudice involved in exposing the defendant's witness to a second cross-examination. Although there would have been cost and inconvenience involved, any such prejudice could have been avoided by postponing the London cross-examination until the issue of this affidavit was resolved. It was the decision not to do so, no doubt for good reasons, which rendered any such possible prejudice unavoidable if the proffered affidavit was admitted. That is not a prejudice caused by the proffering of the affidavit.

¶ 15 It was further submitted that there was not a proper evidentiary base for the exercise of the discretion because the explanation for the lateness of the affidavit was unsatisfactory. But that presupposes that an explanation is necessary. If the plaintiff was re-opening a closed case at a trial, as the passages from Sopinka relied on indicate, there would be a need for an explanation. That however is not what happened here. The case of the plaintiff was not closed; there is no such provision in the Rules for a motion apart from Rule 39.

¶ 16 Nothing in these reasons, nor in those of the motion judge, inhibits judges from making orders restraining the delivery of further affidavits in situations where the conduct of a party amounts to a deliberate abuse of the process, but that is not this case.

¶ 17 In short, the entire case for leave depends upon the flawed analogy to the evidentiary rules applicable to the actual conduct of a trial. There is no good reason to doubt the correctness of the decision of the motion judge. Leave to appeal is refused with costs to the respondents. For a hearing of a little more than three hours and the associated preparation, I would think that $3500 payable forthwith would be appropriate. If either party is dissatisfied, I will receive submissions in writing within fifteen days.

G.D. LANE J.

QL UPDATE: 20050322
cp/e/qlamb