



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Tobin v. Jon E. Williams Surveying Limited*, 2023 NLSC 14

Date: February 6, 2023

Docket: 201201G5764

BETWEEN:

GERARD TOBIN

PLAINTIFF

AND:

**JON E. WILLIAMS SURVEYING
LIMITED**

FIRST DEFENDANT

AND:

JON E. WILLIAMS

SECOND DEFENDANT

Before: Justice Stacy Ryan

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

November 9, 2022

Appearances:

Michael Hrabowsky Appearing on behalf of the Plaintiff

F. Richard Gosse Appearing on behalf of the Defendants

Authorities Cited:

CASES CONSIDERED: *Tobin v. Jon E. Williams Surveying Limited*, 2018 NLSC 137; *Miawpukek Band v. Ind-Rec Highway Services Ltd.* (1999), 172 Nfld. & P.E.I.R. 245, 528 A.P.R. 245 (Nfld. C.A.); *Bank of Montreal v. Mercer* (1998), 163 Nfld. & P.E.I.R. 119, 503 A.P.R. 119 (Nfld. C.A.); *Tuck v. Supreme Holdings Ltd.*, 2016 NLCA 40; *Mutual Life Assurance Co. of Canada v. Porter* (1996), 66 A.C.W.S. (3d) 1149, [1996] N.J. No. 283 (Nfld. S.C.(T.D.))

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

RYAN, J.:

INTRODUCTION

[1] The Applicants in this matter are the first and second Defendants in a Statement of Claim issued in 2012. The Respondent in this matter is the Plaintiff in the Statement of Claim. For ease of reference, I will refer to them as the Plaintiff and Defendants.

[2] The Defendants have applied for a determination of a question of fact, pursuant to Rule 38 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986 c. 42, Sch. D (the “*Rules*”) specifically, a determination of the evidence of damages led by the Plaintiff and a declaration that damages pleaded are not appropriately claimed against them.

[3] The Defendants further seek a dismissal of the action if I find damages are not appropriately pleaded.

[4] The Statement of Claim filed November 9, 2012, alleges breach of contract and/or negligence and seeks damages in respect of economic loss arising from professional negligence.

[5] On February 12, 2018, an Interlocutory Application was made by the Plaintiff seeking the addition of his company as a party to the proceeding. This Application was denied (see *Tobin v. Jon E. Williams Surveying Ltd.*, 2018 NLSC 137).

[6] The Defendants base this application on affidavits filed by the Plaintiff in the 2018 Interlocutory Application, specifically, an affidavit sworn on May 4, 2018, and another affidavit sworn on May 22, 2018.

[7] The Defendants submit that evidence led in relation to the 2018 application amounts to an admission that losses suffered by the Plaintiff were losses of the company and not him personally.

[8] The Plaintiff submits the evidence led in the 2018 application does not amount to an admission that losses suffered by him were losses of the company and not him personally. The Plaintiff further submits that the 2018 decision (see *Tobin*), lends credence to his position that he incurred personal losses.

ISSUES

[9] Is this an appropriate case to invoke the use of Rule 38?

[10] If this is an appropriate case to invoke the use of Rule 38, has there been an admission that losses claimed were not incurred personally by the Plaintiff?

[11] Is trial of this matter appropriate?

THE LAW

[12] Rule 38 states:

38.01. (1) The Court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,

- (a) determine any relevant question or issue of law or fact, or both;
 - (b) determine any question as to the admissibility of any evidence;
 - (c) order discovery or inspection to be delayed until the determination of any question or issue;
 - (d) give directions as to the procedure to govern the future course of any proceeding, which directions shall govern the proceeding notwithstanding the provision of any rule to the contrary;
 - (e) where the pleadings do not sufficiently define the issues of fact, direct the parties to define the issues or itself settle the issues to be tried, and give directions for the trial or hearing thereof; or
 - (f) order different questions or issues to be tried by different modes and at different places or times.
- (2) Where in the opinion of the Court, the determination of any question or issue under rule 38.01(1) substantially disposes of the whole proceeding, or any cause of action, ground of defence, or counterclaim, the Court may thereupon order the entry of such judgment or make such order, as is just.
- (3) Unless the Court otherwise orders, a trial or hearing shall not be stayed pending an appeal from an order under Rule 38.

[13] The leading case dealing with the use of Rule 38 is *Miawpukek Band v. Ind-Rec Highway Services Ltd.*, 172 Nfld & P.E.I.R. 245.

[14] The decision to deal with an issue under Rule 38 is discretionary. The general principle is that all issues relating to a particular proceeding should be disposed of

at one time (*Miawpukek* quoting *Bank of Montreal v. Mercer*, 163 Nfld. & P.E.I.R. 119 at para. 12):

12 It follows that before a judge proceeds to deal with a matter as a preliminary question of law or fact, he or she must ask and answer certain threshold questions. Those questions are: Whether it is appropriate, in the circumstances, that the issue be determined in that way and, if so, what directions ought to be given and procedures adopted to ensure that the matter can be properly dealt with? If it is determined that the use of *Rule 38* is not appropriate, or suitable procedures cannot be adopted for properly dealing with the issue separately, it is the judge's duty to refuse the application.

[15] In deciding the appropriateness of invoking Rule 38, our Court of Appeal has outlined seven general principles for consideration:

1. There should be some advantage to proceeding in this way rather than dealing with the issues as part of an overall trial or hearing.
2. The Court must be satisfied this is a suitable vehicle to determine the questions that have been posed. An important consideration is whether a sufficient evidentiary record can be provided.
3. Where the issue for determination is a point of law, the discretion to determine the issue, as a preliminary matter, should generally be exercised only if the evidentiary background can be established by an Agreed Statement of Facts or if the facts underlying the resolution of the legal issues are a matter of public record.
4. As an exception to the third principle, the court may receive evidence that may be necessary to provide a background for the resolution of the legal issue, but this is only appropriate where the issues are not complex and intermingled, or the facts are not in dispute and resolution does not depend on determination of credibility of witnesses.
5. If resolution of this issue has the potential of disposing of the case, or simplifying the trial, it may be justification for invoking the rule.
6. Even if appropriate, the court should consider giving directions.

7. If it involves the status of a party, the court should determine if it is more appropriate proceed under Rule 7.04.

[16] The Defendants have the burden of establishing that the Court's discretion ought to be exercised in favor of a Rule 38 hearing (see *Tuck v. Supreme Holdings Ltd.*, 2016 NLCA 40 at para. 10).

APPLYING THE PRINCIPLES IN MIAWUKPEK TO THIS CASE

Is there a discernible advantage in proceeding this way?

[17] The Applicant submits the discernible advantage of determining the issue would be the substantial disposition of the action.

[18] The Plaintiff agrees that Rule 38 is the appropriate rule to determine a question of law and or fact for the purposes of the relief sought but does not agree with the Defendant's submissions that the action ought to be dismissed.

[19] If I find the Plaintiff admitted all losses were incurred by his company and not him personally, this would dispose of the matter; the matter in its entirety would be dismissed. If I find the Plaintiff did not admit that all losses were incurred by his company and not him personally, a trial would be required.

[20] There is potential for the substantial disposition of the matter.

Is Rule 38 a suitable vehicle to determine the questions that have been posed?

[21] There must be a consideration of whether there is a sufficient evidentiary record to determine whether the Plaintiff has admitted that he has suffered no personal losses and that the losses are attributed to the company.

[22] The Defendants rely on the affidavits previously submitted by the Plaintiff in the 2018 application to add the Plaintiff's company as a Party and suggests nothing more is required

[23] The Plaintiff and Defendants agree there is a sufficient evidentiary record upon which to base a decision.

[24] I find there is a sufficient evidentiary record to determine the matter.

Is there an agreed statement of fact or are the facts underlying the resolution of the legal issue a matter of public record?

[25] There is no agreed statement of facts. The Defendants submit the only evidence relevant to a determination of the Plaintiff's loss is the Plaintiff's own evidence. In that respect, there are affidavits of the Plaintiff sworn on two different occasions. These affidavits are a matter of public record and have been filed in support of this application.

[26] As outlined in *Miawpukek* at paragraph 16, my discretion to determine the issue as a preliminary matter should generally be exercised only if the evidentiary background can be established by an agreed statement of facts or if the facts underlying the resolution of the legal issue are a matter of public record.

[27] The Defendants submit the affidavits are sufficient to determine the matter as the primary thrust of each affidavit is that it was the company and not the Plaintiff who suffered the loss.

[28] The Plaintiff suggests the affidavits filed refer primarily to losses in profitability (not damages) of the company. This evidence is reliable and can be led in furtherance of the broader action. This can be done by the Plaintiff without contradicting his own evidence.

[29] I agree with submissions from both counsel; the affidavits upon which the Defendants are relying, are sufficient to determine the issue. These affidavits are a matter of public record having been filed with the court on the earlier application and filed with the court on this application.

Is it necessary to receive further evidence to provide a background for the resolution of the issue?

[30] Counsel for the Defendants suggest it is not necessary to receive further evidence. Counsel for the Plaintiff does not take a position. I agree; it is not necessary to receive further evidence.

Would the result simply be a trial in another form where there would be no jurisdiction for doing?

[31] Paragraph 18 in *Miawpukek* states:

18 Fifthly, although *Rule 38.01(1)(a)* (as well as *Rule 40.04*) also contemplates the possibility of preliminary determination of questions of fact as opposed to questions of law, as a practical matter if the result would simply be a trial in another form there would generally be no justification for doing so. If, on the other hand, the determination of one contentious issue has the reasonable prospect of leading to a resolution of other issues thereby obviating the need for a further trial, or has the potential, if decided in a particular way, of disposing of the whole case or substantially simplifying the trial on remaining

issues, there might well be justification for invoking the rule. (See, e.g. *Mutual Life Assurance Co. of Canada v. Porter* (November 7, 1996), Doc. St. J. 2136/94 (Nfld. T.D.).

[32] This case has the potential, if decided in a particular way, of disposing of the whole of the case.

[33] The sixth principle does not apply.

[34] The seventh principle does not apply to this case.

Is this an appropriate case to invoke the use of Rule 38?

[35] Both counsel agree this is an appropriate issue to invoke the use of Rule 38. I agree, having referenced the above principles set out in *Miawpukek*.

Has there been an admission that losses claimed were not incurred personally by the Plaintiff?

[36] The Defendants suggest that the affidavits filed by the Plaintiff in support of his application in 2018, to add his company to the proceeding, amount to an admission that it was the company, and not him personally, that suffered loss.

[37] The Plaintiff submits that the affidavits filed do not amount to an admission that he did not suffer losses personally.

[38] The Plaintiff further submits the decision (*Tobin v. Jon E. Williams Surveying Limited*, 2018 NLSC 137) is persuasive on the issue of damages. The decision deals with whether or not to add the Plaintiff's company as an additional Plaintiff to the action. This application was denied, however in denying the application, the court considered the issue of damages.

[39] I agree with the Plaintiff.

[40] Khaladkar J. at paragraph 23 states:

23... If an agreement between Mr. Tobin and the Respondents was breached then the Respondents, or either one of them, will be responsible in damages. If there was professional negligence giving rise to damages, the Respondents will be liable. In either event, if liability is ascertained, damages will accrue to the Applicant because he was the contracting party, he was the owner of the property when the negligence occurred and he was the person who suffered loss. Effectual adjudication can occur without the addition of the proposed corporate plaintiff.

[41] Khaladkar J. also previously states in paragraph 17 and 18:

[17] In the present case I do not sense any such clear intention from the outset to have a representational plaintiff bringing an action on an agency basis for a corporate principal. Mr. Gerard Tobin, the Applicant, contracted with the Second Respondent to prepare a survey of property owned by him, personally, for \$22,575.00 plus HST. He told the First Respondent to send the bills to him, personally. He paid all of the bills so sent personally – save for one in the amount of \$649.75 that was paid for by the proposed corporate plaintiff.

[18] The Applicant owned the land to be surveyed at all material times when the survey was completed and, as well, when it was discovered that a mistake had allegedly been made. The Statement of Claim is dated November 7th, 2012. The property was transferred to the proposed corporate plaintiff on or about December 13th, 2012.

[42] Kaladkhar J. was in receipt of the same affidavit evidence that I have before me. I agree with the Plaintiff that his judicial consideration on the issue of damages is persuasive and does add credence to the Plaintiff's submissions with respect to the apportionment of liability and damages.

[43] In an affidavit dated May 22, 2018, at paragraph 36, the Plaintiff states:

36. The result of all of the above is that I have experienced losses that are a blend of my own personal losses and losses to the company...

[44] Further, at paragraph 42, the Plaintiff stated if the company was not added as a party, there is a risk that some damages may not be recovered. This is an acknowledgement that some, but not all damages, have been incurred by the company.

[45] It cannot be said that the Plaintiff admitted to suffering no losses personally.

[46] Consequently, I find the damages are appropriately claimed against the Defendants. The application is dismissed with costs.

Is trial of this matter appropriate?

[47] Based on my findings in question number two, a trial of this matter is appropriate.

STACY RYAN
Justice