

Court of King's Bench of Alberta

Citation: Dragon HCPS Inc v Turcan & Associates Ltd, 2023 ABKB 367

Date: 20230621
Docket: 2201 11715
Registry: Calgary

Between:

Dragon HCPS Inc.

Appellant
(Defendant/Applicant)

- and -

Turcan & Associates Ltd., Robert Turcan

Respondents
(Plaintiffs/Respondents)

Reasons for Judgment of the Honourable Justice N.E. Devlin

Overview

[1] Robert Turcan and his company sued the appellant, Dragon HCPS Inc. (“Dragon”), for wrongful dismissal in the Alberta Court of Justice, Civil Division. Shortly before trial, Dragon produced a draft Statement of Claim in this Court, alleging multiple heads of negligence against Turcan during his time as its contractor or employee. Dragon then moved to adjourn the Court of Justice trial and have it transferred to King’s Bench to join with its nascent negligence claim, pursuant to section 56 of the *Provincial Court Act*, RSA 2000, c P-31 (as it then was).

[2] Justice Burt refused the motion and directed the trial to proceed as scheduled. Dragon appeals that decision.

Key facts

[3] Turcan filed a Civil Claim in the Court of Justice on May 11, 2021, claiming he had been wrongfully terminated on March 22, 2021. He claimed just over \$70,000 in damages but expressly abandoned the portion which exceeded the then \$50,000 jurisdictional limit of the Court of Justice.

[4] Dragon defended the claim. In a Dispute Note, filed on May 31, 2021, it pled that Turcan had been negligent in his provision of services, including bookkeeping problems and taxation-related errors. Importantly, no counterclaim was filed in the Court of Justice proceedings.

[5] Pleadings closed on July 12, 2021, pursuant to the Court of Justice's procedural regulations. The matter proceeded through an unsuccessful mediation and onward to a pretrial conference on June 20, 2022. On that date, Justice Shannon made a procedural order that both parties exchange their documents no later than July 15, 2022.

[6] I am advised that Dragon's production did not include any material relating to its negligence claims.

[7] On August 4, 2022, Dragon filed an Application to: (i) adjourn the trial; (ii) transfer Turcan's claim to the Court of King's Bench; and (iii) be permitted to file its draft counterclaim in this Court.

[8] The draft counterclaim sought general damages in the amount of \$50,000, special damages in the amount of \$50,000 as well as pre-and post-judgement interest. However, it particularized Dragon's crystallized loss as consisting of: (i) a penalty assessed by the Worker's Compensation Board of approximately \$20,000; (ii) a GST penalty in the amount of \$3,022.91; and (iii) an estimated penalty for further GST filing errors in the amount of \$5,000. These amounts total well under \$50,000. The counterclaim also asserted unspecified losses incurred to correct the allegedly negligent work, as well as interest charges and lost interest on inaccurate invoices and payments.

[9] In support of its adjournment and transfer application, Dragon filed the affidavit of John O'Rourke as its corporate representative. He deposed that Dragon had conducted a full internal investigation relating to Turcan's alleged negligence, stating that this was completed and reviewed with Dragon's counsel "on or about July 2022".

[10] Evidence supporting the particularized losses pled in the counterclaim were attached as exhibits to that affidavit. An affidavit from Turcan was also before Justice Burt, in which he addressed the potential losses suffered by Dragon, seeking to show they could not exceed \$50,000.

The decision under appeal

[11] Justice Burt dismissed the application providing brief oral reasons. She began by noting that the mandate of the Court of Justice Civil Division is to provide "the efficient, fair disposition of relatively small matters." She noted the obvious tension between that objective and the last-minute alteration and complexification sought by Dragon. Noting that Dragon's application was

being heard one month prior to trial, in the absence of any previous assertion of a counterclaim at any point, she concluded that it would be unfair to the litigants and to the court system to add the counterclaim at that late stage.

[12] Justice Burt further noted that Dragon was free to file its claim in the Court of King's Bench if it wished to do so, but directed that Turcan's original claim proceed to trial as previously ordered. She also dismissed a cross-application by Turcan relating to a disputed settlement agreement. That latter issue forms no part of this appeal.

[13] Dragon appealed Justice Burt's decision, resulting in an automatic stay of proceedings. The Court of Justice trial thus did not proceed last fall.

Standard of Review

[14] There is no dispute that the applicable standard of review is reasonableness. Justice Burt's decision was one of discretionary case management and the reviewing court will only interfere where the judge in this role has clearly misdirected herself on the facts or the law, proceeded arbitrarily, or made a decision so clearly wrong as to amount to an injustice: *Broda v. Broda*, 2004 ABCA 73 at para 8; *Balogun v. Pandher*, 2010 ABCA 40 at para 7.

Grounds of appeal

[15] Dragon complains that Justice Burt failed to appreciate that the claim and counterclaim were intricately connected. It argues that her consequent refusal to transfer and consolidate the matters in King's Bench was unreasonable because it would create a duplication of trials.

[16] Dragon further contends that Justice Burt failed to provide sufficient reasons for denying the application and, in particular, did not provide any reasons with respect to whether the proposed counterclaim fell within the jurisdiction of the Court of Justice.

Analysis

[17] The essence of Dragon's argument on appeal was that Justice Burt's decision was unreasonable because transfer is effectively mandatory under s. 56 where one of the claims before the Court of Justice exceeds its jurisdiction. This position relies on the law as summarized by Jones J. in *Atrium Square Investments Ltd v. John Barlot Architect Ltd*, 2014 ABQB 327 at para 18 [*Atrium Square*], where he stated that:

The use of the words, "may order" [in s. 56], suggests that the decision to transfer a matter is discretionary, however, this has been interpreted differently in the case law. If the Provincial Court Judge is satisfied on a balance of probabilities that a matter is *not within* the jurisdiction of the Provincial Court, it *must* transfer the matter: *527375 Alberta Ltd v EPCOR Energy Services (Alberta) Inc*, 2003 ABQB 997 at para 32 [*Epcor*]. As Belzil J states in *Epcor*, "[j]urisdiction is an absolute concept. It either exists or it does not exist": at para 19.

[18] This is consistent with the application of s. 56 described by Dea J. in *Qualico Developments Ltd v. Doherty*, 1985 CanLII 1264 (AB KB) at paras 9–10 [*Qualico*], where he summarized the decision process in that scenario as follows:

If a claim is within his jurisdiction and a counterclaim is filed by the defendant which exceeds Provincial Court jurisdiction and does not appear to have any bearing on the claim but merely raises an independent action against the defendant, the Provincial Court judge would properly exercise his discretion by transferring the counterclaim to Queen’s Bench and by proceeding to hear and determine the claim. To do otherwise, would be to deny to a claimant the benefit of a swift and inexpensive trial at Provincial Court merely because a counterclaim in excess of Provincial Court jurisdiction has been filed.

But where the counterclaim raises issues which are connected with the claim and which the Provincial Court judge is advised will be raised in defence of the claim, then a different situation prevails. In that scenario, if both claim and counterclaim were not transferred, the Provincial Court judge in hearing the claim and a Queen’s Bench judge in hearing the counterclaim would in fact be hearing the same testimony and deciding the same issues in different trials. Where such appears to be the case, the Provincial Court judge properly exercises his discretion by transferring both claim and counterclaim to Queen’s Bench in order to avoid a duplication of trials. [emphasis added]

[19] Dragon argued that this language makes the transfer mandatory in the present scenario, with discretion applying only to the Justice’s assessment of the true nature of the claims in issue: *Atrium Square* at para 21. As their argument runs, this makes the lower Court’s failure to turn its mind to the quantum of the counterclaim fatal to the exercise of its discretion under s. 56.

[20] With respect, I disagree. Justice Burt faced a third scenario, different to that described at paras 9-10 in *Qualico*. In this case, Dragon pled Turcan’s negligence as a defence to his claim but did not advance any counterclaim for damages in the Court of Justice proceeding. Turcan waived the portion of his claim in excess of \$50,000. Therefore, the Court of Justice unquestionably had jurisdiction to hear this entire dispute as framed by the pleadings — pleadings which had been closed for over a year before the disputed application came before Justice Burt.

[21] What Dragon sought in the contested application was to have Turcan’s in-jurisdiction Civil Claim transferred to King’s Bench so that Dragon could then file its proposed over-value counterclaim there. It is important to note that Dragon was out of time to file any counterclaim in the Court of Justice Proceeding and did not ask for permission to file a late pleading in that action.

[22] Dragon had no rights exceeding the Court of Justice’s jurisdiction at stake in the proceeding before that Court. Rather, it was asking the Court of Justice to cede its jurisdiction over Turcan’s claim to King’s Bench to fix its lateness problem and spare it, and the courts, the expense of trying the negligence allegations twice.

[23] This scenario created a true discretionary decision. The Court was tasked with balancing the inefficiency and risk of potentially divergent outcomes involved in trying Dragon’s negligence claims once as a defence in the Court of Justice action and again as a positive claim

in the Court of King’s Bench, versus the procedural and substantive prejudice to Turcan of depriving him of the efficiency of the Civil Division’s streamlined processes — a tactical impact which could well obviate the value of a small claim.

[24] The value of Dragon’s counterclaim was largely irrelevant to this question since, as Justice Burt noted, Dragon was precluded from advancing any counterclaim in the Court of Justice action, but fully entitled to pursue its claim to any value it desired in the Court of King’s Bench. Simply put, there was no risk of the Court of Justice exceeding its jurisdiction in the trial it was set to hear. The case law suggesting a very limited discretion to continue with Court of Justice Trial’s where its jurisdictional limits may be exceeded apply to cases where that is a possibility on the pleadings. It has comparatively little bearing here.

[25] It bears noting that, Ms. Grantham’s very able advocacy notwithstanding, the record simply does not support that Dragon’s putative damages in negligence exceeded \$50,000. While she argued that the general damages associated with identifying and remedying Turcan’s alleged mistakes should be presumed to easily bring the claim above the Court of Justice’s threshold, the record does not rise to her aid. Mr. O’Rourke’s affidavit, both alone and when read in conjunction with Turcan’s affidavit deconstructing the amounts particularized in the draft counterclaim, do not logically or obviously support Dragon’s potential damages obviously exceeding \$50,000. The bare amounts pled on the draft Counterclaim looked very much like the sort of “plugged number” cautioned against in *Hnidan v Shpeley*, 2012 ABQB 686 at paras 20, 23–24.

[26] In applying s. 56 to this situation, the motions Justice was entitled, and indeed obligated, to consider the procedural stage and history of the matter, together with any other factors shown to bear on the proper administration of justice. She did so reasonably. Granting Dragon relief would have adjourned Turcan’s simple small-scale claim on the eve of trial, eighteen months after his termination, and potentially render it uneconomical to pursue under King Bench procedural rules. It would also squander the trial time reserved to his matter and the judicial resources invested in it.

[27] Dragon was effectively asking to remedy its failure to advance a counterclaim in the Court of Justice action, and potentially to produce the documents supporting it, while dealing Turcan a major tactical blow. This ask was to be weighed in light of Dragon’s own conduct. The materials before Justice Burt demonstrated that it was dilatory in pursuing concerns about Turcan’s performance which had been identified in its May 2021 Dispute Note. The statutory close of pleadings in July 2021 set a hard deadline for advancement of a counterclaim within the Court of Justice action. Yet, Dragon provided no account for why the ostensibly simple errors it pled in the proposed King’s Bench action were detected in actionable form only at some unspecified point in July 2022.

Conclusion

[28] Justice Burt’s decision that, under these circumstances, placing the Court’s hand so strongly on the tactical scale in Dragon’s favour would be unfair and contrary to the proper administration of justice was eminently reasonable. She was clearly aware of the related nature of the claim but chose to balance the relative prejudices in Turcan’s favour. That decision made sense in the circumstances, irrespective of the quantum of Dragon’s purported counterclaim,

which it could not advance in the Court of Justice proceeding in any event given the late stage of the proceedings.

[29] For these reasons the appeal is dismissed, with Schedule “C” costs payable to the Respondents.

Heard on the 2nd day of June 2023.

Dated at the City of Calgary, Alberta this 20th day of June 2023.

N.E. Devlin
J.C.K.B.A.

Appearances:

Taylor Grantham
for the Appellant Dragon HPCS Inc.

Sarah Miller
for the Respondents Turcan & Associates Ltd. and Robert Turcan