COURT OF APPEAL FOR ONTARIO

CITATION: Mason v. Perras Mongenais, 2018 ONCA 978
DATE: 20181205
DOCKET: C65236

Watt, Miller and Nordheimer JJ.A.

BETWEEN

Michael Mason

Plaintiff (Appellant)

and

Perras Mongenais, Blumberg Segal LLP and Scott D. Chambers

Defendants (Respondent)

Jeffrey Radnoff and Charles Haworth, for the appellant

Michael R. Kestenberg and Aaron Hershtal, for the respondent Perras Mongenais

Susan Sack and Jenny Bogod, for Blumberg Segal LLP and Scott D. Chambers[1]

Heard: November 15, 2018

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated March 6, 2018, with reasons reported at 2018 ONSC 1477.

Nordheimer J.A.:

[1] While counsel for Blumberg Segal LLP and Scott D. Chambers appeared on the appeal, they did not file any material nor did they participate in the hearing.

[1] The plaintiff appeals from the summary judgment granted by the motion judge that dismissed the plaintiff's claim against the defendant law firm, Perras Mongenais, for professional negligence.

Background

[2] The appellant was involved in divorce proceedings with his spouse, Lise Mason. He retained the defendant, Chambers, to act for him. Issues of equalization and spousal support had to be determined. The appellant and his spouse owned a business through a corporation. Each of the spouses owned shares of the corporation. As part of resolving the equalization issue, the appellant was going to buy the shares owned by his spouse.

[3] As the trial approached and settlement discussions occurred, it became apparent to Chambers that the appellant required tax advice with respect to the impact that any terms of a settlement might have on the appellant's tax position. Chambers and his law firm, Blumberg Segal LLP, were not in a position to provide that advice so Chambers advised the appellant to obtain tax advice from another lawyer.

[4] The appellant had previously used the tax and corporate legal services of Pierre Perras of the respondent in connection with the family business. He chose to use the services of Perras for the tax advice he required and so advised Chambers. Chambers got in touch with Perras for that purpose. It was undisputed

that the appellant did not want to be involved in the details of the tax planning. He apparently recognized that he was unsophisticated in such matters and he preferred to leave it to the lawyers to protect him.

[5] At this point, I will recite, in slightly more detail, the key events that occurred and that led to this claim, borrowing extensively from the motion judge's reasons (at paras. 37-51).

[6] At about noon on March 13, 2014, the Thursday before the scheduled commencement of the trial on Monday, March 17, 2014, Chambers sent an email to Perras to introduce himself and to seek Perras' advice. Chambers enclosed two competing offers to settle the matrimonial proceedings. He explained that the settlement being discussed contemplated that the appellant would cause the family corporation to redeem or buy Ms. Mason's shares. Chambers wrote:

> We want to understand the tax implications, consequences and if there are any tax opportunities available to Michael or the corporation in such a transaction.

[7] Perras left a voicemail for Chambers asking for more specific instructions. Chambers responded by email as follows:

> Further to your telephone message this afternoon, we have asked Mike to contact you to provide you with instructions. However, what we are looking for is some tax advice as follows:
>
> 1. How to structure the your [*sic*] proposed offer to buy or redeem Lise's shares in [the corporation] in the most

> effective manner from a tax standpoint for you and the business; and
>
> 2. To understand the tax implications on Lise's offer to you and to the business; and,
>
> 3. Get suggestions on an alternative means to structure an offer to settle that is more tax advantageous than the offers as they stand.

[8] Perras responded by email later that afternoon. He pointed out to Chambers that he had acted for both spouses in the past. He said that he "can offer the following general advice at this time." Perras then gave the following advice:

> Any resolution of the matter which involves a transfer of shares by Lise to Mike and a payment by Mike to Lise will be somewhat inefficient from an income tax point of view as Mike will require after personal tax dollars to make the payments (at Mike's marginal rate, he will need well in excess of $3M pre tax to pay $1.75M).
>
> On the other hand, if, prior to divorce, Lise were to transfer her shares to a holding corporation, and such shares were redeemed by [the corporation], no immediate tax liability would arise. Lise would only be subject to tax as she withdrew the funds (by way of dividends) from the holding corporation. Depending on the rate at which the funds were personally withdrawn by Lise, a low rate of tax (and possibly no, or a negligible amount) would apply.
>
> The preceding are just general observations, based, in part, on CRA Technical Interpretations. The matter would need further review and recommendation.

[9] Two central points emerge from this email. First, Perras told Chambers that, if the appellant agreed to pay Ms. Mason $1.75 million for her shares by way of equalization, he would incur at least another $1.25 million in personal tax

obligations (over $3 million in total outlay) as he drew money from the company to fund the purchase.

[10] Second, Perras advised Chambers that the purchase could be carried out by another route involving redemption of Ms. Mason’s shares with no adverse tax consequence to the appellant and perhaps only minimal tax obligations for Ms. Mason. This second approach has been referred to by the parties as the "redemption approach". There was no tax hit to the appellant from this approach because the corporation would pay Ms. Mason's holding company for her shares. Under the redemption approach, the appellant would not have to personally draw money from the corporation and pay tax on that money to fund the redemption, as he would have to do if he bought the shares personally.

[11] The next Perras heard from Chambers was in an email dated March 17, 2014 at 2:34 p.m. In that email, Chambers forwarded draft minutes of settlement to Perras and asked him to "review these draft minutes of settlement and get back to us as soon as possible."

[12] About 30 minutes later, the appellant called Perras and immediately put Chambers on the phone. Perras told Chambers that, on reviewing the minutes of settlement, he saw that the redemption approach that he had recommended was not being used. Chambers told Perras that Ms. Mason refused to accept the redemption approach. She wanted to receive all cash and did not want the tax

burden to be on her. Instead, Chambers advised that he had negotiated a "tax discount" on the share purchase price to take into account the negative tax outcome caused by the appellant buying the shares personally. The idea of the appellant taking a discount in the purchase price of the shares to reflect his potential tax liability had not been raised with Perras previously. Perras did not make any inquiries about the tax discount.

[13] Chambers next told Perras that he and the appellant were in a settlement conference ready to sign the minutes of settlement but they needed advice on para. 1 (c) of the draft minutes of settlement that provided for a spousal rollover of the family corporation's shares. Para. 1 (c) of the minutes of settlement dealt with the elections available under the *Income Tax Act* when one spouse transfers shares to another. Under the settlement terms proposed, based on the elections agreed upon, the appellant was assuming liability for all taxes on any future disposition of the shares that he would be buying.

[14] By email sent just over one hour after receiving the minutes of settlement, Perras explained that in para. 1 (c) the parties were electing to take a tax free rollover of Ms. Mason's shares on the transfer to the appellant. Perras then explained how the tax attribution rules would apply to the revenue earned on the transferred shares in the appellant's hands. He concluded, "From Mike's perspective, that is fine." The email concluded, "Let me know if you need more from me."

[15] The parties proceeded to settle the equalization issue and entered into minutes of settlement that were incorporated into a court order. At 6:30 that evening, Chambers responded by email, "Thanks Pierre. This information was very helpful."

[16] While equalization was settled, the trial proceeded on the issue of spousal support. The trial judge ultimately ordered the appellant to pay a large amount for spousal support. The appellant was unhappy with that result and retained Mr. Mongenais of the respondent to appeal the support order. Ultimately, because of the issues that arose in this matter, the appellant retained different counsel. He was successful on his appeal, as this court ordered a significant reduction in the amount of spousal support that he was required to pay: *Mason v. Mason*, 2016 ONCA 725, 132 O.R. (3d) 641.

[17] There is no dispute that the appellant settled the equalization issue by agreeing to personally buy Ms. Mason’s shares. He has or will incur tax of approximately $1.3 million as a result. It is the incurrence of this tax liability that led the appellant to sue the respondent, together with the defendants Chambers and Blumberg Segal LLP, for professional negligence.

The decision below

[18] The respondent brought a motion for summary judgment to dismiss the claim against it. On the motion, various affidavits were filed, including affidavits

from the appellant and from Perras. In addition, Chambers was examined pursuant to r. 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as a witness on a pending motion. There was also an affidavit filed by the appellant from a lawyer providing an expert opinion on whether Perras and Chambers met the standard of care in advising the appellant. She concluded that they had not. There was no expert evidence filed by the respondent. Cross-examinations took place on the affidavit of the appellant and the affidavit of Perras, among others.

[19] The motion judge concluded that summary judgment should be granted dismissing the appellant's claim against the respondent. The motion judge began his reasons by reviewing the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, regarding when it is appropriate to grant partial summary judgment.

[20] The motion judge concluded that summary judgment should be granted because he found that Perras had given correct advice to Chambers regarding the potential tax consequence to the appellant, if the payment was made in the way that it ultimately was. The motion judge found that any concern regarding whether the appellant understood the tax advice given by Perras was an issue between the appellant and Chambers since he had directed Chambers to deal with Perras on the issue. While the motion judge said that he was not rejecting the expert evidence that Perras had failed to meet the standard of care of a prudent lawyer, it is clear

that he did, in fact, reject it through his finding that summary judgment should be granted.

Analysis

[21] A motion judge's decision to grant summary judgment is a finding of mixed fact and law, reviewable for palpable and overriding error. However, where the motion judge errs in principle or with regard to an extricable legal question, the decision will be reviewed on a correctness standard: *Hryniak,* at paras. 81-84. Both forms of error are engaged in this case.

[22] In my view, the motion judge erred in principle in granting partial summary judgment, in the context of this litigation as a whole. In doing so, the motion judge failed to heed the advice given by this court in *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450, 120 O.R. (3d) 438, about the risks associated with granting partial summary judgment. Those risks were repeated in this court's decision in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561. As Pepall J.A. said in *Butera*, at para. 34:

> A motion for partial summary judgment should be considered to be a rare procedure that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner.

[23] The potential liability of the respondent to the appellant is not an issue that can be readily bifurcated from the rest of the appellant's claim. The nature of the

appellant's claim is such that it is inextricably linked to the claim against the other defendants, especially Chambers. Indeed the motion judge appears, at one point, to recognize this problem when he says, at para. 99:

> I recognize that nothing is certain and there are risks of both duplication and that a judge could look at the same undisputed facts that I have reviewed and possibly see them differently.

[24] There are serious issues raised in this case about the duties of a lawyer in advising his/her client. Principal among those is whether a lawyer can rely on another lawyer as a conduit for providing advice to a client. One crucial fact in this case is that the respondent's client was the appellant. It was not Chambers.

[25] Perras' professional obligations had two aspects. One was to ensure that his advice was correct. There does not appear to be any dispute that Perras' advice about the tax implications for the appellant personally buying his ex-spouse's shares was correct. The other was to ensure that the advice was communicated to, and properly understood by, his client. At least on the appellant's view of the matter, that did not occur.

[26] There is some authority for this second aspect of a lawyer's professional obligations in a case referred to by the motion judge, namely, *Turi v. Swanick* (2002), 61 O.R. (3d) 368 (S.C.). In that case, Spiegel J. said, at p. 390:

> What I derive from the totality of Mr. Gray's [expert witness] evidence on this issue is that while the best practice is to provide the advice in writing, a failure to do

> so would not constitute a breach of the standard, provided that the solicitor is satisfied on reasonable grounds that the advice had been effectively brought home to the client. [Emphasis added.]

[27] The motion judge avoids this issue by concluding that any concerns about whether the appellant understood the advice is an issue between the appellant and Chambers. It is unclear to me, on this record, that one can safely come to that conclusion. It is an open question, in my view, whether it was sufficient for Perras to simply communicate his advice to Chambers in order to satisfy his professional obligations. It is also an open question, even assuming that Perras could rely on that communication, whether Perras made the necessary inquiries to ensure that his advice had been communicated to, and understood by, the appellant. The state of the appellant's knowledge was especially important after Perras was told by Chambers that the appellant was proceeding in a fashion that was going to incur the very tax liability that Perras had cautioned about.

[28] On this point, the motion judge held, at para. 36:

> Whether or how Mr. Chambers explained the tax advice received from Mr. Perras to Mr. Mason is of no consequence on this motion and is relevant only to the negligence claim as between them.

[29] I do not agree with that blanket statement. There was an obligation on Perras to ensure that his advice was understood by the client. The client was the appellant. There is no evidence that Perras took steps to get that assurance.

[30] In addition, the expert opinion that the motion judge had on the standard of care found that Perras had failed to meet that standard in at least two respects. One was the failure of Perras to reinforce to Chambers, at the time that the settlement was being entered into, of the tax consequences for Mason. The other was the failure of Perras to make any inquiries regarding the tax discount and its implications as they related to his advice. While the expert may have been mistaken about whether Perras repeated his advice to Chambers, she is not mistaken about the lack of inquiries. The record does not reveal any inquiries by Perras of Chambers as to whether the appellant was aware of the tax implications inherent in the proposed settlement and that he understood them.

[31] I note, on this latter point, that there was no challenge to the qualifications of the expert and no apparent challenge to her opinion. Yet the motion judge fails to reconcile his conclusions with the contents of that opinion. In failing to do so, the motion judge made a palpable and overriding error.

[32] It also does not appear that Perras made any inquiries of Chambers regarding the “tax discount” that Chambers said that he had negotiated to offset the tax liability and whether it, in fact, accomplished that objective. Indeed, the motion judge appears to recognize that gap when he says, at para. 55:

> However, there is no indication before me that this deduction was intended to address or redressed at all the taxes that Mr. Perras had identified and warned Mr.

> Chambers would be incurred by Mr. Mason if he bought his spouse's shares personally now.

[33] Yet the motion judge ultimately avoids the impact of that absent inquiry by concluding that the respondent was not retained for that purpose. The motion judge said, at para. 88:

> But nothing in the circumstances of the email and telephone call on March 17, 2014 put that question on Mr. Perras' plate or ought reasonably to have alerted Mr. Perras that anyone was seeking his advice on the nature and quantum of the tax discount. No one was.

[34] It is impossible to reconcile that conclusion with the inquiries that were made of Perras when this matter started. It must be remembered that the sole reason for retaining Perras was because Chambers was not qualified to provide tax advice regarding the proposed settlement. In the initial retainer, Perras was expressly asked to advise on the proposed offers to settle and, in particular, provide "suggestions on an alternative means to structure an offer to settle that is more tax advantageous than the offers as they stand". Perras does so by recommending the redemption approach. Subsequently, Perras is told that the redemption approach is not being utilized but that a tax discount has been negotiated to offset the tax liability that Perras has warned about. Yet, Perras makes no inquiry as to whether that tax discount is more or less advantageous in contrast to the redemption approach that he had recommended. It seems to me to be at least arguable that, in not doing so, Perras has failed to fulfill one of the aspects of his

professional obligations. I note that that conclusion is consistent with the expert opinion that was before the motion judge on this same question.

[35] In response to this point, the respondent contended, during the hearing, that there were two separate and distinct retainers – the first to address the settlement proposals and the second to provide advice on the spousal rollover. There is nothing in the record to substantiate that contention nor does that appear to have been the position taken before the motion judge. Rather, it seems clear that Perras was retained to provide tax advice with respect to the proposed settlement and that is what he did on these two occasions. I would also note that, if there is an issue as to the nature of Perras' retainer, that is an issue that ought not to have been resolved on a summary judgment motion in these circumstances.

[36] The fact remains that there was a tripartite arrangement surrounding the advice to be given to the appellant. How that advice was sought and provided will be the subject of evidence from all three participants. It is inevitable that there will be disagreements as to how that unfolded. The motion judge's finding that "the plaintiff's entire claim against Perras Mongenais is captured in five contemporaneous emails…and one telephone call" (para. 76) does not accord with the factual record.

[37] Further, the result of the motion judge's conclusion is that one side of that tripartite arrangement has been removed from review and consideration at the trial.

That result appears to directly conflict with the “interest of justice” element of the summary judgment approach laid out in *Hryniak*. In particular, I point to the following observation of Karakatsanis J. at para. 60:

> For example, if some of the claims against some of the parties will proceed to trial in any event, it may not be in the interest of justice to use the new fact-finding powers to grant summary judgment against a single defendant. Such partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice.

[38] Those concerns loom large in this case, especially regarding the terms of Perras’ retainer and whether he fulfilled his professional obligations in that regard. The answers to those questions are inextricably connected to the dealings that took place between the appellant, Perras and Chambers. One simply cannot separate those dealings into discrete compartments and pretend that a determination of one does not have any impact on the others.

[39] Further, there does not appear to be any advancement achieved in terms of the action as a whole by rendering partial summary judgment in this case. Indeed, the motion judge acknowledges this when he says, at para. 95:

> There is no doubt that the questions of whether Mr. Chambers acted prudently in dealing with Mr. Mason's tax issues will be one of the important issues in the case. The same facts that I deal with above -- the five emails and the telephone call on March 17, 2014 -- will be put into evidence. Mr. Perras could be called as a witness although his evidence is fixed in emails including his May

> 2, 2014 email that recites his recollection of the telephone call which is not disputed by Mr. Chambers. Granting summary judgment therefore saves little evidence or time at trial. The trial will not be significantly shortened. But the parties will not be the same. Perras Mongenais will not be there as a party. Costs may be reduced as the focus of the claim sharpens on Mr. Chambers and his firm. [Emphasis added.]

[40] The motion judge also appears to recognize that there is a risk of inconsistent findings at trial, including on the issue of Perras' retainer. He notes that "Mr. Chambers will likely be blaming Mr. Perras" (para. 96). However, ultimately, the motion judge dismisses those concerns in favour of "speedier justice" and concludes, at para. 103:

> I am not prepared to accept a bright line rule that consigns to the delays, distress, and inefficient costs of the trial process, every case that might possibly have a risk of duplication or inconsistent verdicts when partial summary judgment is sought.

[41] The motion judge's conclusion, on this point, is inconsistent with this court's decisions in *Baywood* and in *Butera*. I note, with some concern, what appears to be an effort by the motion judge (paras. 23 to 30) to isolate the decision in *Butera* and thus apparently limit its precedential effect. If that was his intention, then it was an inappropriate effort. *Butera* addresses, in a comprehensive fashion, the problems that arise when partial summary judgment is sought. Indeed, the decision here invokes all of the concerns identified in *Butera* in that respect, including delay,

added expense, the unproductive use of scarce judicial resources, and the reality of a limited record.

[42] For all of these reasons, in my view, the determination of whether Perras failed to meet the standard of care as a lawyer, in these circumstances, cannot properly be determined summarily, as the motion judge did. Proceeding summarily also does not achieve the fundamental purposes of the summary judgment process, that is, to provide a "more expeditious and less expensive means to achieve a just result": *Hryniak,* at para. 49.

[43] Before concluding, I would add one further observation. The motion judge spent considerable effort in his reasons describing what he believed to be the "culture shift" mandated by the decision in *Hryniak*. In particular, he appears to adopt the view that, not only are trials not the preferred method for the resolution of claims, they should be viewed as the option of last resort. The motion judge proceeds from this view to his conclusion, at para. 33:

> The shift required is an understanding that judges will be deciding cases summarily as much as possible to avoid the expense and delays of the trial process that put civil justice beyond the reach of most Canadians.

[44] With respect, the culture shift referenced in *Hryniak* is not as dramatic or as radical as the motion judge would have it. The shift recommended by *Hryniak* was away from the very restrictive use of summary judgment, that had developed, to a more expansive application of the summary judgment procedure. However,

nothing in *Hryniak* detracts from the overriding principle that summary judgment is only appropriate where it leads to “a fair process and just adjudication”: *Hryniak* at para. 33. Certainly there is nothing in *Hryniak* that suggests that trials are now to be viewed as the resolution option of last resort. Put simply, summary judgment remains the exception, not the rule.

Conclusion

[45] In light of my conclusion, it is unnecessary to address the appeal of the motion judge’s award of costs, which is set aside with the allowing of the appeal. However, on that point, I should note the fair admission by the respondent that the motion judge erred in not reducing the rates underlying that costs award to properly reflect a partial indemnity scale.

[46] The appeal is allowed and the summary judgment is set aside. The respondent will pay to the appellant the costs of the appeal in the agreed amount of $12,000 inclusive of disbursements and HST. I would reserve the costs of the summary judgment motion for disposition by the trial judge or such other judge who finally disposes of this action.

Released: November 5, 2018 “DW”

“I.V.B. Nordheimer J.A.”
“I agree. David Watt J.A.”
“I agree. B.W. Miller J.A.”