

COURT OF APPEAL FOR ONTARIO

CITATION: Murray v. 8165246 Canada Inc., 2020 ONCA 832

DATE: 20201217

DOCKET: M52000
(C66936 & C67356)

Brown J.A. (Motion Judge)

BETWEEN

Emily Murray and 2327342 Ontario Inc.

Plaintiffs (Respondents in C66936/
Appellants in C67356/
Moving Parties)

and

8165246 Canada Inc., David Star and Pier 21 Asset Management Inc.

Defendants (Appellants in C66936/
Respondents in C67356/
Responding Parties)

Cynthia L. Spry and Michael Bookman, for the moving parties

Igor Ellyn and Kathryn J. Manning, for the responding parties

Heard: December 9, 2020 by video conference

REASONS FOR DECISION

[1] These appeals will be heard together. For ease of reference, I will refer to Emily Murray and 2327342 Ontario Inc. as the “Plaintiffs” and 8165246 Canada Inc., David Star, and Pier 21 Asset Management Inc. as the “Defendants”.

[2] The Defendants filed their notice of appeal in C66936 on May 15, 2019; the Plaintiffs filed theirs in C67356 on August 28, 2019. The appeals are not yet perfected.

[3] The Plaintiffs move for directions regarding motions for leave to file fresh evidence that have been filed by both sides.

[4] The Defendants have filed a fresh evidence motion seeking leave to adduce billing information from the Plaintiff's valuation expert, John Temple, about the work he performed for the trial. If leave is granted, the Defendants intend to rely on the fresh evidence to argue that Mr. Temple was not an independent expert, with the result that the trial judge should have rejected his valuation opinion. The trial judge refused to entertain a motion by the Defendants to reopen the trial on that basis; the documents constituting the Defendants' fresh evidence were filed on that motion: *Murray v. Pier 21* (10 July 2020), Toronto, CV-15-10906-CL (Ont. S.C.).

[5] The Plaintiffs have filed their own fresh evidence motion that seeks: (i) a ruling that the Defendants' fresh evidence is cloaked with litigation privilege or, (ii) in the alternative, leave to file their own fresh evidence consisting of correspondence between Plaintiff's counsel and Mr. Temple. That correspondence has been filed with this court on a sealed basis. I have not been able to review it, either in the present motion materials or in the appeal case file.

[6] In the motion before me, the Plaintiffs request a “protocol”, or sequencing order, that would first require a panel to determine whether the Defendants’ fresh evidence is privileged. If it is not, then the Plaintiffs would seek from the panel hearing the appeal leave to adduce the Plaintiffs’ fresh evidence. However, under the proposed protocol, the Plaintiffs’ redacted fresh evidence would not be disclosed to the Defendants until after the first panel determines that the Defendants’ fresh evidence is not privileged.

[7] The Defendants submit that no protocol is required.

[8] I think some directions are appropriate in the circumstances. As set out in section 7.2.6 of the “Practice Direction Concerning Civil Appeals at the Court of Appeal for Ontario”, (March 1, 2017), a motion for fresh evidence is considered by the panel hearing the appeal. I see no reason to depart from that practice.

[9] However, the assertions of privilege in respect of both sets of fresh evidence, coupled with the Plaintiffs’ concern about being taken to waive privilege in respect of the evidence (which it is not) by making submissions on it, potentially complicate how the panel would structure its treatment of the fresh evidence motions. In those circumstances, the parties should proceed in the following manner:

- (i) The parties must perfect their appeals;

- (ii) Once they do, the parties must then secure a hearing date for the appeals from the Appeal Scheduling Unit;
- (iii) As soon as they obtain a hearing date for the appeals, the parties should contact me immediately to set up an appeal management conference. They can make the appropriate arrangements through Ms. Lily Miranda, Appeal Scheduling Unit: lily.miranda@ontario.ca;
- (iv) At the appeal management conference, we will review the status of the fresh evidence motions and what, if anything, remains to be done with them. I will then contact the President of the panel scheduled to hear the appeals to apprise the President of the fresh evidence motions and seek the panel's guidance as to how it wishes to handle the fresh evidence applications.

[10] Through the process set out above, the parties will be informed of the procedure that the panel intends to follow.

[11] Finally, the Plaintiffs served a 54-page factum in C67356 without first securing an order from this court permitting them to do so. In any event, the Defendants have filed their factum in response. The Plaintiffs now seek an order allowing them to file the 54-page factum. Although the Plaintiffs have put the cart before the horse, I will not order them to file a shortened factum. That would only increase overall costs. Instead, I authorize the filing of the Plaintiffs' 54-page

factum in C67356 but order the Plaintiffs to pay the Defendants the costs of this motion fixed at \$2,000 payable by December 31, 2020.

“David Brown J.A.”