COURT OF APPEAL FOR ONTARIO

CITATION: National Industries Inc. v. Kirkwood, 2023 ONCA 63
DATE: 20230127
DOCKET: C70432

Paciocco, Harvison Young and Thorburn JJ.A.

BETWEEN

National Industries Inc. and National Steel Car Limited

Appellants

and

Peter Kirkwood and Marsh Canada Limited

Respondents

Jerome R. Morse, David Trafford and Earl A. Cherniak, for the appellants

Robert W. Traves and Natalie D. Kolos, for the respondents

Heard: December 5, 2022

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated February 9, 2022, with reasons reported at 2022 ONSC 937.

Paciocco J.A.:

OVERVIEW

[1] A Case Management Master ("Master") denied the appellants' pleadings motion to amend a statement of claim on the basis that the proposed amendments alleging negligence from 2008 and 2009 were not amendments to existing claims but rather new causes of action. That decision was upheld on appeal. Subsequently, the appellants filed a Response to a Request for Particulars ("Response"), and a Reply, that include allegations of negligence from 2008 and 2009. The respondents brought a successful motion to strike the Response and relevant passages from the Reply on the basis of *res judicata*, issue estoppel and abuse of process ("re-litigation doctrines") arising from the Master's decision. For the reasons that follow, I would deny the appellants' appeal of the motion judge's decision to strike these pleadings.

MATERIAL FACTS

[2] In 2007, the appellant National Industries Inc. ("NII"), and its steel rail car manufacturing subsidiary, the appellant National Steel Car Limited, decided to build a new plant in Alabama. This project was operated through another subsidiary corporation of NII, National Alabama Corporation ("NAC").

[3] In 2013, Gregory Aziz, the appellants' principal, who was also CEO of NAC, was indicted on securities fraud offences in Alabama in connection with the

operation of the project. In 2014, those charges were settled by the payment of USD $22 million, which the appellants funded.

[4] The appellants sought indemnification for the settlement payment pursuant to Directors and Officers liability ("D&O") insurance policies that the appellants had arranged through their long-standing insurance broker, the respondent Peter Kirkwood, an employee of the respondent firm, Marsh Canada Limited. Approximately USD $17 million of the appellants' claims were denied by the insurance carriers because of non-disclosure by the appellants of material risks. This non-disclosure occurred in application documentation prepared for a 2010 renewal of their USD $10 million D&O coverage, and in waiver forms signed by the appellants to obtain a 2011 increase in their D&O insurance coverage to USD $70 million.

[5] In April 2016, the appellants issued a notice of action, followed by a statement of claim, against the respondents alleging that the non-disclosure occurred because of the respondents' negligence and the breach of their fiduciary duty.

[6] In 2017, the appellants brought a motion to amend that statement of claim before a Master pursuant to r. 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "pleadings motion"). The pleadings motion was denied because the Master found that proposed amendments constituted new causes of action in

negligence outside of the applicable limitation period (2017 ONSC 4196), that were not pleaded in the statement of claim.

[7] It is unnecessary to provide a detailed description of the pleadings and the holdings of the Master. Suffice it to say that the Master found that the "negligence alleged [in the statement of claim] against the [respondents] concerns the placing of the D&O insurance policies in 2010 and 2011" and "contains no reference to the action or inaction of the [respondents] in 2008 or 2009", whereas the proposed amendments consisted of new claims of negligence against the respondents relating to their failure to obtain increased D&O coverage in 2008 and 2009.

[8] Based on the decision of the Master, a formal order was issued that "the plaintiffs' motion for leave to amend the Statement of Claim is dismissed".

[9] The appellants appealed the decision of the Master to the Divisional Court. The appeal was denied on March 6, 2018 (2018 ONSC 1490), after the appeal justice applied the correctness standard. The appeal justice framed the issue before him by asking, "[D]id the original statement of claim complain about the defendant's allegedly negligent conduct in 2008 and 2009 or was the complaint restricted to the defendant's allegedly negligent conduct in 2010 and 2011?" He answered that question after taking a deep dive into the facts and the pleadings: "The Master read the original statement of claim as alleging negligent conduct in 2010 and 2011. I agree with that reading."

[10] On July 6, 2018, this court denied leave to appeal from the Divisional Court decision.

[11] The appellants subsequently obtained the consent of the respondents to make other amendments to their statement of claim. When the appellants' amended statement of claim was filed, it did not include one of the amendments that the respondent had agreed to and which would have made clear that the time frame of the claim was limited to 2010 and 2011. This caused the respondents to apprehend that the appellants intended to advance claims during the trial related to 2008 and 2009, despite these previous rulings. The respondents delivered a Demand for Particulars seeking the time period for allegations of negligence pleaded in designated paragraphs of the statement of claim. On October 6, 2022, they received a Response from the appellants identifying the time period of 2007 through to 2011. In an amended statement of defence, the respondents pleaded *res judicata* and abuse of process relating to allegations of wrongs between 2007 and 2009. The appellants delivered a Reply in which they respond, in paras. 3 to 7, to these defences.

[12] The respondents brought the motion that is the subject of this appeal pursuant to rr. 21.01(1)(a), 21.01(3)(d) and 25.11 to strike out the appellants' Response, and paras. 3 to 7 of their Reply. The motion judge granted that motion and the relief requested, based on the doctrines of *res judicata*, issue estoppel and

abuse of process arising out of the appellants' attempt to relitigate issues resolved by the Master in the pleadings motion.

ISSUES AND ANALYSIS

[13] The appellants raise a number of grounds of appeal, with some overlap. Those grounds of appeal can be organized into eight grounds of appeal, which I identify below as "A" – "H".

A. DID THE MOTION JUDGE ERR BY DEFERRING TO THE MASTER?

[14] The appellants argue that the motion judge was obliged in a motion to strike hearing to conduct his own assessment of the extent of the pleadings and whether the grounds for striking the Response and the designated passages from the Reply are "plain and obvious". They submit that the motion judge erred by instead deferring to the findings made by the Master, considering himself bound by her decision.

[15] In my view, this submission mischaracterizes the motion judge's ruling. The motion judge undertook his own assessment and found as a matter of law that, given the necessary findings that the Master had made in resolving the pleadings motion, the causes of action in the pleadings that were the subject of the motion to strike before him were prohibited by the re-litigation doctrines. This outcome was not the result of deference but rather the result of the motion judge's

independent assessment of the operation of the re-litigation doctrines in face of the Master's previous decision.

B. DID THE MOTION JUDGE ERR BY EFFECTIVELY GIVING THE MASTER'S DECISION EFFECT BEYOND HER JURISDICTION?

[16] The appellants submit that the motion judge's decision to rely on the decision of the Master as a basis for striking pleadings gives the decision of the Master the effect of a summary judgment or of a decision striking the appellants' pleadings, neither of which a master has jurisdiction to order as an associate justice. Once again, these arguments mischaracterize the motion judge's decision.

[17] A summary judgment is a determination of a pleaded action. The decision of the Master was about what had not been pleaded. Therefore her decision was not tantamount to a summary judgment and nothing the motion judge did gave it that effect.

[18] Moreover, the Master did not strike pleadings. She denied amendments that had not previously been pleaded. It was the motion judge that made the order striking pleadings. The fact that he did so as a result of a ruling made by the Master within her jurisdiction does not give the Master's decision the extra-jurisdictional effect of a motion to strike pleadings.

C. DID THE MOTION JUDGE ERR IN A RULE 21 MOTION BY APPLYING *RES JUDICATA*, ISSUE ESTOPPEL, AND ABUSE OF PROCESS TO A PLEADINGS DECISION OF AN ASSOCIATE JUSTICE?

[19] Relatedly, the appellants argue that a decision of an associate justice in a Rule 26.1 pleadings motion cannot support the application of the re-litigation doctrines in a Rule 21 motion. This ground of appeal is multi-layered.

[20] First, the appellants argue that there is no case supporting the use of an associate justice's decision to trigger the re-litigation doctrines. In fact, we have not been directed to any cases addressing this question. The applicability of these re-litigation doctrines in this situation must therefore be resolved as a matter of principle, and there is no principled basis for accepting the prohibition the appellants advance.

[21] Arbour J. described the re-litigation doctrines in *Toronto (City) v. CUPE*., *Local 79*, 2003 SCC 63, [2003] 3 SCR 77. At para. 23, she said:

> Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies. [Emphasis in original, citations omitted.]

[22] It can be seen that the second element of the issue estoppel test describes the decisions that can trigger its application. Those decisions must be "prior judicial decisions". There can be no question that the Master acted within her jurisdiction, as a court of competent jurisdiction and that her decision denying the pleadings motion was a "prior judicial decision". To suggest that re-litigation doctrines cannot be applied to decisions of an associate justice would make many applications before associate justices pointless.

[23] Arbour J. also described the doctrine of abuse of process in *CUPE*, at para. 37, where she quoted with approval the articulation of the doctrine that Goudge J.A. provided in his dissenting decision in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, which decision was later approved, 2002 SCC 63, [2002] 3 S.C.R. 307:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis in the original, citations omitted.]

[24] It can be seen that there is nothing in the doctrine of abuse of process that precludes its application to the decisions of associate judges as a basis for

preventing unfair re-litigation or re-litigation that damages the repute of the administration of justice. Indeed, the flexibility and purpose of the doctrine support its application.

[25] The appellants also argue that the Master did not have jurisdiction to resolve issues of fact in a pleadings motion, and they maintain that the re-litigation doctrines apply only when there have been findings of fact. I do not agree. Both doctrines operate to prevent the improper re-litigation of issues decided, whether those issues are of fact, mixed fact and law, or law. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, at para. 24, Binnie J. quoted, with approval, the description provided by Middleton J.A. in *McIntosh v. Parent*, [1924] 4 D.L.R. 420 (Ont. C.A.), at p. 422 as to the reach of issue estoppel, as follows:

> Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established as long as the judgment remains. [Emphasis added.]

[26] Moreover, the motion judge explained persuasively, and correctly, why the re-litigation doctrines must, legally and practically, extend to pleadings motions. “Pleadings set the issues from the very outset of the case”, define the scope of production and discovery and define the issues that have to be proved at trial. If

parties could disregard pleadings rulings in the expectation that they can be re-litigated later, it would unsettle the efficient and fair administration of justice and render pleadings rulings and appeals from those rulings pointless.

[27] If I am interpreting their submissions correctly, the appellants may also be arguing that a r. 26.01 decision cannot support a finding of *res judicata*, issue estoppel and abuse of process based on re-litigation in a motion to strike hearing, because the motions address different questions. This is incorrect. As the legal test for issue estoppel shows, the material inquiry is not whether the two hearings address the same kind of motions. It is whether the issue that needs to be resolved in the subsequent motion is the same as the one decided in the prior motion.

[28] The final argument the appellants make is that the decision of a Master on a pleadings motion cannot support the application of the re-litigation doctrines because their application would impede the almost inviolable right of trial judges to determine the scope of the pleadings, which they are better suited to do in the context of the evidence at trial. I do not question the authority of trial judges to make appropriate determinations related to the scope of the pleadings, but I cannot agree with this submission. As the motion judge said, “[a] defendant does not have to get to trial to discover the causes of action pleaded against him or her”, yet the appellants’ conception of the right of trial judges to determine the scope of pleadings would produce this result. Moreover, the scope of pleadings is to be determined on their face, not on the evidence presented. There is no need to wait

until the evidence at trial to resolve the scope of the pleading, and every reason why this should not be done.

D. DID THE MOTION JUDGE ERR BY APPLYING *RES JUDICATA*, ISSUE ESTOPPEL AND ABUSE OF PROCESS TO THE MASTER'S REASONING RATHER THAN TO HER DECISION?

[29] The appellants argue that the motion judge erred in applying the doctrines of *res judicata*, issue estoppel and abuse of process to the "reasoning" of the Master, when these doctrines apply to decisions, not reasoning. They argue that the only thing the Master decided was stated in her formal order, namely, that leave to amend the statement of claim was dismissed. Even if it was appropriate to go beyond the formal order to identify the decision, they argue that the most that the Master decided was that the specific amendments sought in the pleadings motion could not be made.

[30] I do not agree. Issue estoppel applies to determinations that are fundamental to a judicial decision. In *Danyluk*, at para. 24, Binnie J. instructed:

> The question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceeding. In other words, … the estoppel extends to the material facts and the conclusions of law or of mixed fact and law … that were necessarily (even if not explicitly) determined in the earlier proceedings.

[31] The motion judge found that as part of her "fundamental holding" the Master concluded that "the original, unamended claim does not contain any causes of

action relating to 2008 and 2009". The motion judge correctly interpreted the essential holding of the Master. In order to resolve the leave application in the pleadings motion, the Master needed to determine the scope of the pleaded negligence actions and concluded that "negligence alleged [in the statement of claim] against the [respondents] concerns the placing of the D&O insurance policies in 2010 and 2011".

E. DID THE MOTION JUDGE ERR BY FAILING TO APPLY THE "PLAIN AND OBVIOUS" TEST?

[32] The appellants argue that the motion judge erred by failing to apply the "plain and obvious" test, which applies in motions to strike pleadings: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 36. I do not agree. Although the motion judge did not articulate this test, it is clear that this is the standard he applied. The parties agreed during the motion hearing that this was the governing test, and the language of the motion judge's decision reflects his conclusion that it is plain and obvious that the pleadings he struck were caught by the re-litigation doctrines.

[33] Specifically, the motion judge found the appellants' submission that the original claim included causes of action related to events in 2008 and 2009 to be "directly contrary" to the decision of the Master, and he found that it would "[turn] the rules upside down" if the appellants could ask the trial judge to find that their

pleadings contained causes of action they were already held not to contain. He said that the appellants were trying to do precisely what prior decisions "say is precluded by the doctrine of issue estoppel" and that "fair process cannot abide" the outcome the appellants propose, which would "render the motion and appeal a waste of time".

[34] For these reasons, it is so clear that the motion judge applied a "plain and obvious" standard that it is unnecessary in rejecting this ground of appeal to invoke the presumption that judges know commonly used principles of law, affirmed in *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 54.

F. DID THE MOTION JUDGE ERR IN FAILING TO FIND THAT THE PLEADINGS COULD BE INTERPRETED TO INCLUDE EVENTS IN 2008 AND 2009?

[35] The appellants argue that the motion judge erred because their pleadings "could be interpreted to plead causes of action in relation to events in 2008 and 2009". In support, they cite the fact that their pleadings contain multiple references to events in 2008 and 2009; that the respondents provided substantial production and discovery for the years before 2010 and 2011; that the Response confirms the inclusion of claims before 2008 and 2009; and that para. 33 of their statement of claim is cast in broad terms, including by describing the respondents' failure to

provide adequate insurance protection, to provide adequate advice referable to their insurance needs, and to understand the appellants' insurance needs.

[36] The short answer to this ground of appeal is that the motion before the motion judge was not an appeal of the decision of the Master. Appeals as to the correctness of the conclusion of the Master that the statement of claim does not allege negligence prior to 2010 had already been heard and dismissed. Even if the motion judge had disagreed with the decision of the Master as to the scope of the pleadings, he could not participate in a collateral attack on that decision when the issue before him was whether, in light of the final decision of the Master, he should strike the pleadings based on the re-litigation doctrines.

[37] In any event, the appellants' arguments about the scope of the statement of claim is unpersuasive, even on a generous reading. The motion judge recognized correctly that the pre-2010 facts were included in the appellants' statement of claim to support the negligence claims the appellants made relating to 2010 and 2011. This pre-2010 information was needed to show that the respondents had acquired the information in those years that they allegedly should have used to ensure that the appellants had made full disclosure in 2010 and 2011. In this context, the presence of pre-2010 factual information in the pleadings does not assist in establishing that the statement of claim included claims from before 2010 and 2011.

[38] Nor is the appellants' interpretation of the pleadings aided by the fact that extensive production and discovery has been made from periods prior to 2010. This material was provided because it was relevant to the 2010 and 2011 claims that were pleaded on the basis I have just described. In any event, the scope of pleadings is not determined by what production or disclosure the parties make. The relationship is to the contrary. Discovery and production are determined by the scope of pleadings. Nor can a party unilaterally expand the scope of their pleadings in a response to a request for particulars.

[39] As for para. 33, on its face, this paragraph does not describe the claims being made. Instead, para. 33 specifies the "damages suffered by the [appellants]" arising from the claims that are identified in prior paragraphs.

G. DID THE MOTION JUDGE ERR IN RELYING ON *RES JUDICATA*, ISSUE ESTOPPEL AND ABUSE OF PROCESS WHEN THERE WAS NEW EVIDENCE?

[40] The appellants argue that the motion judge erred in applying the re-litigation doctrines, despite the fact that new evidence has emerged since the pleadings motion. I would reject this argument. There was no new evidence before the motion judge, and the appellants did not seek leave to adduce it. If the appellants wanted their pleadings to reflect new evidence, they could have brought a new motion to amend, either by cross-motion or beforehand, but they did not do so.

H. DID THE MOTION JUDGE ERR BY FAILING TO APPLY THE CORRECT TEST?

[41] The appellants argue that the motion judge erred by striking pleadings without determining whether "the determination of law sought under Rule 21.01 would, dispose of all or part of the action, substantially shorten the trial or result in a substantive savings of costs", which "is the applicable test set out in Rule 21.01(1)".

[42] The first problem with this submission is that this is not "the applicable test set out under Rule 21.01(1)". Only a motion based on r. 21.01(1)(a) applies this test. The respondents' motion was also based on r. 21.01(3)(d), that "the action is … otherwise an abuse of the process of the court", which does not employ this test, and r. 25.11, which permits pleadings or other documents to be struck, including on the ground that they may "prejudice … the fair trial of an action" or constitute "an abuse of the process of the court". Therefore, even if the appellants are correct and the motion judge failed to consider the r. 21.01(1)(a) test, this could not support an appeal of the motion judge's order, which does not depend on r. 21.01(1)(a).

[43] In any event, the motion judge made a finding of fact that permitting the 2008 and 2009 claims to proceed would almost certainly expand the expert evidence required and would be inconsistent with the efficient scheduling of the trial. This

finding, which necessarily addresses the issue of trial efficiency and costs savings, is entitled to deference.

CONCLUSION

[44] I would therefore dismiss the appeal.

[45] Costs are awarded to the respondent in the agreed upon amount of $25,000 inclusive of applicable taxes and disbursements.

Released: January 27, 2023 “D.M.P”

“David M. Paciocco J.A.”
“I agree. Harvison Young J.A.”
“I agree. J.A. Thorburn J.A.”