COURT OF APPEAL FOR ONTARIO

CITATION: Boyer v. Callidus Capital Corporation, 2023 ONCA 233
DATE: 20230406
DOCKET: C70855

Gillese, Benotto and Coroza JJ.A.

BETWEEN

Craig Boyer

Plaintiff
(Appellant/Defendant by Counterclaim)

and

Callidus Capital Corporation

Defendant
(Respondent/Plaintiff by Counterclaim)

Peter Griffin and Jonathan McDaniel, for the appellant

David Moore and Ken Jones, for the respondent

Heard: February 24, 2023

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated June 23, 2022.

Benotto J.A.:

OVERVIEW

[1] The appellant, Craig Boyer, was an employee of the respondent Callidus Capital Corporation ("Callidus"). He sued for wrongful dismissal, alleging constructive dismissal due to a toxic work environment. Callidus responded with a

counterclaim for $150 million alleging that Mr. Boyer had breached fiduciary duties during his employment.

[2] Mr. Boyer moved to strike or dismiss the counterclaim on the basis that it is a proceeding limiting freedom of expression on matters of public interest pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). He also alleged that the counterclaim should be dismissed pursuant to r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, because it is frivolous and vexatious and discloses no reasonable cause of action. At the same time, he sought leave to amend his Statement of Claim to include a claim for deferred bonuses and sought summary judgment on the action. The parties and the court agreed that these motions should be heard together.

[3] The motion judge dismissed the s. 137.1 motion; dismissed the motion for leave to amend the Statement of Claim; deferred the motion to dismiss the counterclaim until after the s. 137.1 motion was disposed of; and deferred the summary judgment motion in the main action until after a decision is made on the motions to dismiss the counterclaim.

[4] Mr. Boyer appeals the orders. He claims the motion judge erred in law by dismissing the s. 137.1 motion and by refusing leave to amend the Statement of Claim. He also submits that the motion judge erred by deferring his decisions on the r. 21 motion and the summary judgment motion.

[5] For the reasons that follow, I would allow the appeal, dismiss the counterclaim, allow the amendment and return the matter to the motion judge to determine the summary judgment motion.

FACTS

[6] Callidus is a lender to distressed businesses in Canada and the United States. In 2009, Mr. Boyer joined the firm as a Vice President. He was responsible for underwriting new loans and assessing potential borrowers. He would make recommendations on lending to the credit committee, which was responsible for approving the loans. If the credit committee approved the loan, Mr. Boyer would be responsible for the portfolio management. Mr. Boyer had no written employment contract.

[7] Sometime in 2015, Mr. Boyer testified, he became concerned about the direction the company was taking. This fact together with personal health issues led him, in July 2015, to give 18 months' notice of his intention to retire at the end of 2016.

[8] Unfortunately, Mr. Boyer testified, his concerns about the company grew. He faced and witnessed verbal abuse and criticism, including threats. He testified that this situation culminated in April 2016 when a senior executive physically assaulted Mr. Boyer's supervisor in his presence. By July 2016, all of Mr. Boyer's

files had been transferred from him. He left the company the following month, four months earlier than planned.

[9] On February 6, 2017, Mr. Boyer commenced the action for wrongful dismissal. He claimed vacation pay, stock options and the value of lost benefits. Fifteen days later, Callidus issued a counterclaim for $150 million alleging breaches of fiduciary duties relating to three borrower clients: XTG Group (“XTG”), Horizontal Well Drillers (“Horizontal”) and Gray Aqua Group (“Gray Aqua”).

[10] The counterclaim alleges that Mr. Boyer was Callidus’ fiduciary and that his obligations as a fiduciary were breached because he failed to provide honest and transparent reporting to Callidus. Callidus relies on loans made to the above mentioned three companies.

XTG

[11] XTG sold and rented IT hardware. It became a Callidus borrower in 2012. Callidus alleged that Mr. Boyer encouraged XTG to artificially inflate its financial projections. The allegations against Mr. Boyer rest on an email exchange in which Alan Rupp, the CFO of XTG, complained about future forecasting. On cross-examination, Mr. Rupp denied that XTG’s financial statements were based on inflated forecasts and that Mr. Boyer ever directed him to artificially inflate forecasts. He said that his conversations with Mr. Boyer were consistent with his dealings with the company and it was expected in the course of interactions with

him that there would be discussions about forecasts. Callidus owned XTG and members of Callidus sat on XTG's board. Callidus suffered no loss from the XTG loan.

Horizontal

[12] Horizontal was bidding for a well drilling contract in Venezuela. Callidus alleged that Mr. Boyer allowed Horizontal to make financial commitments to the Venezuelan government on Callidus' behalf. Mr. Boyer denied that there was ever such a commitment. His superiors were briefed on all communications, and neither Horizontal nor the Venezuelan state entity administering the contract ever claimed there was any commitment. In any event, Callidus stated in its public disclosure that the losses on the loan to Horizontal were because U.S. sanctions prevented machinery from entering Venezuela.

Gray Aqua

[13] Gray Aqua operated a fish farm which suffered a sea lice infestation. Callidus alleged that Mr. Boyer failed to properly monitor the loans. The infestation was in 2015 – a year after another employee took over the file.

THE MOTIONS

[14] Against this backdrop, Mr. Boyer brought the following motions:

1. A motion to dismiss the counterclaim pursuant to s. 137.1 of the *Courts of Justice Act*.

2. A motion to dismiss the counterclaim as frivolous and vexatious pursuant to r. 21.01(3) (d) of the *Rules of Civil Procedure*.

3. A motion for leave to amend the statement of claim to include a claim for deferred bonuses.

4. A motion for summary judgment in the main action.

THE MOTION JUDGE'S DECISION

[15] The motion judge considered that s. 137.1(5) of the *CJA* prevented him from deciding any motions, except for the amendment, until the s. 137.1 motion was disposed of. That section provides that there be no "further steps … in the proceeding by any party" until the final disposition of the motion, including any appeal. He therefore deferred the r. 21 motion to dismiss or strike the counterclaim and the summary judgment motion and proceeded with the s. 137.1 motion and the motion for leave to amend.

[16] The motion judge dismissed both of these motions.

The s. 137.1 motion

[17] The motion judge found that the appellant cleared the initial threshold burden to show that (i) the statements in his Statement of Claim about the poisoned workplace qualify as "expression" under the *CJA*; and that (ii) the expression "relates to a matter of public interest" considering that Callidus was once among Canada's most influential publicly traded companies and its business practices had attracted national news coverage.

[18] However, he found that the counterclaim did not "arise from" the expression at issue. He did not accept that, because that the counterclaim was thinly pleaded and included a large, unjustified amount of damages, it was brought to silence Mr. Boyer. Rather, the motion judge found that the counterclaim was premised on Callidus' allegations of misconduct, breach of fiduciary duty and resignation without adequate notice. In short, he saw no causal connection between the claim and the counterclaim. Because Mr. Boyer did not clear this threshold hurdle, the motion judge found it unnecessary to address the remainder of the s. 137.1 test.

Deferral of the motion to dismiss or strike the counterclaim

[19] The motion judge deferred the motion to dismiss or strike the counterclaim on the ground that it is statutorily prohibited by s. 137.1(5) of the *CJA*. The section provides:

> Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

[20] Citing *The Catalyst Capital Group Inc. v. West Face Capital Inc*., 2021 ONSC 125, he found that the plain wording of the s. 137.1(5) makes it apparent that it is non-discretionary and permits no exceptions regardless of parties' consent to have him determine all issues before him.

[21] The motion judge distinguished this court's decisions in *Zoutman v. Graham*, 2020 ONCA 767, and *Labourers' International Union of North America, Local 183*

v. Castellano, 2020 ONCA 71, on the ground that in those cases, the plaintiff brought a motion for summary judgment and subsequently the defendant brought the s. 137.1 motion. He concluded that once Mr. Boyer brought a motion under s. 137.1 for an order dismissing the counterclaim, he is prohibited from taking further steps until his motion has been finally disposed of.

Deferral of the summary judgment motion

[22] Callidus claimed a right of set-off against any damages awarded to Mr. Boyer. Thus, the motion judge concluded it would not be just or proper to decide the summary judgment motion until the motions to strike or dismiss the counterclaim were dealt with.

Dismissal of the appellant's motion for leave to amend

[23] The motion judge also dismissed the appellant's motion to amend his Statement of Claim to add a claim for payment of deferred bonus payments on the ground that the claim was statute barred. The trial judge found that the appellant discovered his claim no later than September 6, 2016, as on this date he sent a letter to the President of Callidus notifying that the company had failed to arrange for the payment of "those elements of deferred compensation". The motion for leave to amend was brought on April 20, 2022, more than two years after the date of discovery and therefore it was statute barred. Allowing the claim to be added would prejudice the respondent.

ISSUES ON APPEAL

[24] The following issues are raised on this appeal:

1. Did the motion judge err by not dismissing the counterclaim pursuant to s. 137.1?

2. Did the motion judge err by deferring the r. 21 motion and the summary judgment motion?

3. Did the motion judge err by refusing leave to amend the Statement of Claim?

ANALYSIS

Issue 1: Did the motion judge err by not dismissing the counterclaim pursuant to s. 137.1?

[25] I begin with a review of the provisions of s. 137.1, and the shifting burdens set out. I then apply those provisions to the facts here.

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d)to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, “expression”

(2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii)the moving party has no valid defence in the proceeding; and

(a) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3. [Emphasis added]

[26] The shifting burdens on a s. 137.1 motion were explained in the oft-quoted passage by Côté J. from *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22, 449 D.L.R. (4th) 1, at para. 18:

> In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed. It is important to recognize that the final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis: as noted repeatedly above, the [advisory panel report] and the legislative debates emphasized balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest. Section 137.1(4)(b) is intended to optimize that balance.

[27] I will now address the factors in s. 137.1: the threshold burdens as outlined in the legislation; the substantial merits requirement; the valid defences; and finally the public interest/harm balancing.

The threshold burden on the moving party: s. 137.1(3)

[28] The threshold issues are: (i) there must be an expression; (ii) the expression must relate to a matter of public interest; and (iii) the proceeding for which dismissal is sought must arise from the expression.

[29] Here, the motion judge determined that the threshold issues of "expression" and "public interest" had been met. The motion judge was satisfied that the statements pleaded by Mr. Boyer concerning the "poisoned workplace" qualify as an expression within the meaning of s. 137.1(2). He further concluded that the business practices of Callidus relate to a matter of public interest.

[30] No issue is taken on appeal with these findings. At issue is the next threshold requirement: whether the proceeding "arises from" Mr. Boyer's expression.

[31] The motion judge concluded that the term "arises from" implies an element of causality such that the moving party must show that the expression is causally related to the proceeding. In other words, Mr. Boyer must show that the comments about the toxic work environment caused Callidus to issue the counterclaim. The motion judge pointed to Côté J.'s statement at para. 24 of *Pointes:*

> …what does "arises from" require? By definition, "arises from" implies an element of causality. In other words, if a proceeding "arises from" an expression, this must mean that the expression is somehow causally related to the proceeding.

[32] The motion judge concluded that the counterclaim did not arise from Mr. Boyer's statement of claim because they were not causally connected.

[33] I conclude that the motion judge erred in law by interpreting "arises from" too narrowly.

[34] The threshold burden is not intended to be onerous. The balance of para. 24 in *Pointes* makes that clear:

> …what does "arises from" require? By definition, "arises from" implies an element of causality. In other words, if a proceeding "arises from" an expression, this must mean that the expression is somehow causally related to the proceeding.[1] What is crucial is that many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework. [Emphasis added]

[35] The footnote at the end of the second sentence provides further guidance:

> I do not believe that a precise level of causation needs to be identified, as courts have consistently been able to grapple with and apply the "arising from" standard. [Citations omitted]

[36] Instead of taking a broad and liberal approach, the motion judge took a literal approach by comparing the allegations in pleadings with those in the counterclaim. He said, at paras. 50-51:

> Although Callidus, in its Statement of Defence and Counterclaim, denies Mr. Boyer's pleaded statements alleging a poisoned work environment at Callidus resulting from its abusive management style, it does not make a claim in the Counterclaim that is premised, even

> in part, on these expressions. The Counterclaim is premised on Callidus' assertions that (i) Mr. Boyer engaged in misconduct and breached his fiduciary duties to Callidus by allegedly failing to provide honest and transparent reporting to Callidus' credit committee and by allegedly misleading the credit committee on certain matters, involving three companies in his loan portfolio, and (ii) Mr. Boyer resigned without adequate notice to Callidus.
>
> Even if I were to accept that the Counterclaim is, as Mr. Boyer contends, "thinly pleaded", and even having regard to the very large claim for damages as pleaded, these matters do not show a causal relationship between the Mr. Boyer's expressions and the Counterclaim.

[37] The motion judge did not consider the context in which the counterclaim was issued. I read the direction to take a "broad and liberal" approach to the threshold burden to mean that the court should consider the context and not pursue a rigid, formalistic view of the pleadings. Once the context is considered, it becomes clear that the counterclaim arose from the expressions in the appellant's claim.

[38] When the allegations of a toxic work environment were made public by the appellant, Callidus immediately responded with a claim for $150 million. No underpinning is given for the quantum of damages. The claim is based on bald allegations with no itemization or explanation of loss suffered. It is based on events that Callidus had known about for years and never mentioned before. Only when the allegations of a toxic work environment were made public by the appellant was there a claim made. The cross-examinations show the allegations are unsubstantiated. Callidus' own representatives confirmed as much.

[39] By interpreting s. 137.1(3) too narrowly and by failing to consider the context of the counterclaim, the motion judge erred in law in his application of the test in *Pointes*.

[40] At this point, the burden shifts to Callidus. Since the motion judge did not consider the burden on Callidus under s. 137.1(4), it falls to this court to do so. I turn to consider the substantial merits, the valid defence, and the public interest components of its burden.

The "substantial merits" burden: s. 137.1(4)(a)(i)

[41] Callidus is required to satisfy the court that the counterclaim has substantial merits. This "necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record" (*Pointes,* at para. 38). It also involves "an assessment of the evidentiary basis for the claim — this is why the claim must be supported by evidence that is reasonably capable of belief" (*Pointes*, at para. 50).

[42] Applying these directives to the counterclaim, I conclude that Callidus has not met its burden.

[43] The claims by Callidus stem from the allegation that Mr. Boyer was a fiduciary, but Callidus has failed to plead either the required elements at law or the details of fact to support the claim.

[44] The nature of a fiduciary relationship was set out in *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247. The Supreme Court confirmed that there must

be an undertaking, either express or implied, that the fiduciary will act in the best interests of the other party, in accordance with the duty of loyalty reposed on him or her. The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement, or simply an undertaking to act in this way. The critical point is that in both *per se* and *ad hoc* fiduciary relationships, there will be some undertaking on the part of the fiduciary to act with loyalty.

[45] Callidus never pleaded any sort of undertaking, express or implied, on Mr. Boyer's part to act in Callidus' best interests. This is fatal to the counterclaim.

The moving party has no valid defence burden: s. 137.1(4)(a)(ii)

[46] In *Pointes*, Côté J. explained at para 56 and 57:

> s. 137.1(4)(a)(ii) operates as a *de facto* burden-shifting provision in itself, under which the moving party (i.e. defendant) must *first* put in play the defences it intends to present and the responding party (i.e. plaintiff) must *then* show that there are grounds to believe that those defences are not valid.

[47] In other words, once the moving party has put a defence in play, the onus is back on the responding party (i.e. plaintiff) to demonstrate that there are grounds to believe that there is "no valid defence".

[48] Even though the counterclaim does not plead the elements of a fiduciary relationship, Mr. Boyer has clearly put in play valid defences:

1. All the decisions were made by the credit committee, not by him.

2. For XTG: the president of XTG swore that there was no impropriety committed by Mr. Boyer. More importantly, no loss was suffered by Callidus.

3. For Horizontal: the impugned letters did not create a commitment. Moreover, Callidus confirmed that any losses were attributable to U.S. sanctions on Venezuela.

4. For Gray Aqua: Mr. Boyer did nothing to betray the company's trust. The loss to the company arose from a fish disease outbreak in 2015, a year after another employee had taken over the account.

[49] Callidus has not shown that these defences are not valid and thus has not discharged its burden under s. 137.1(4)(a)(ii).

Public Interest Hurdle: Section 137.1(4)(b)

[50] Section 137.1(4)(b) has been referred to as the crux of the analysis.[1] Here, Callidus must satisfy the court that the harm suffered as a result of the expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. While it is not, strictly speaking, necessary to address this stage in light of my conclusion on the merits-based stage,[2] for the sake of completeness I will do so.

[51] Callidus has neither pleaded nor shown that the statements in the Statement of Claim against it has or will cause any harm. Nor is there evidence from which harm can be inferred. While failure to suffer a loss is not necessarily a bar to a

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[1] *Pointes*, para. 30
[2] See *Pointes,* at para. 33.

breach of fiduciary duty claim,[3] the failure to itemize or explain how the millions in damages were calculated weighs against the public interest in permitting the proceeding to continue.

[52] On the other hand, there is a public interest in protecting Mr. Boyer's expression in relation to the business practices of a major financial entity.

[53] The weighing exercise inherent in this stage of the analysis was discussed by Côté J. She referred to Doherty J.A.'s comments in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, where he held that when certain indicia are present, the weighing exercise favours granting the s. 137.1 motion. Those indicia are: (1) a history of the plaintiff using litigation or the threat of litigation to silence critics; (2) a financial or power imbalance that strongly favours the plaintiff; (3) a punitive or retributory purpose animating the plaintiff's bringing of the claim; and (4) minimal or nominal damages suffered by the plaintiff. Côté J. cautioned that, because this stage is a public interest weighing exercise, these four indicia may bear on the analysis only to the extent that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature. She added, at paras. 80 and 81:

> Accordingly, additional factors may also prove useful. For example, the following factors, in no particular order of importance, may be relevant for the motion judge to consider: the importance of the expression, the history of

[3] See *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 32.

> litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise.
>
> Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s.137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy. [Emphasis added]

[54] Here, the factors that tilt the balance in favour of granting the motion dismissing the counterclaim are:

1. A financial imbalance between the parties.

2. A punitive or retributory purpose in bringing the claim.

3. The minimal link between Mr. Boyer's conduct and any damages suffered by Callidus.

4. Callidus' acknowledgement that the $150 million claimed was baseless.

> 5. The chilling effect the action would have on other employees bringing claims or raising issues relating to toxic work environments.
>
> 6. The fact that the counterclaim was initiated over five years ago and after numerous motions, case conferences and examinations, Callidus has not taken steps to advance the claim on its merits. The proposed amendment to reduce the damages claimed to $3 million was delivered on March 31, 2022. Still no itemization to substantiate the quantum has been produced.

[55] When the context is scrutinized, what is "really going on" with the counterclaim is an attempt to silence a former employee seeking recovery in his wrongful dismissal claim and create a chilling effect for other employees.

[56] I note that, in *Park Lawn Corporation v. Kahu Capital Partners*, 2023 ONCA 129, this court recently determined that a counterclaim should not be dismissed under s. 137.1 but allowed to continue. The present case is distinguishable. First, the motion judge in *Park Lawn* had found as fact that there was significant harm to the responding party's reputation. Second, if the s. 137.1 motion succeeded in dismissing the counterclaim and the main action was unsuccessful, the responding party's reputational damages would be unrecoverable. The weighing exercise conducted by the motion judge and upheld by this court thus favoured allowing the counterclaim to continue. As I have indicated, the weighing exercise here clearly favours dismissing the counterclaim.

[57] I conclude that the criteria in s. 137.1 are satisfied and I would grant the motion and dismiss the counterclaim.

Issue 2: Did the motion judge err by deferring the r. 21 motion and the summary judgment motion?

[58] The motion judge concluded that s. 137.1(5) precluded him from considering the motion to dismiss the counterclaim as frivolous and vexatious and the summary judgment motion.

[59] The parties and the supervising judge of the Commercial List had agreed that all motions be heard together.

[60] In *Zoutman v. Graham*, 2020 ONCA 767, this court determined that a s. 137.1 motion did not preclude the court from deciding a summary judgment motion in the same action. The motion judge distinguished this case because in *Zoutman*, the summary judgment motion was brought first and then combined with the s 137.1 motion. I do not agree that is a requirement. To sequence motions in this fashion would add expense and delay to an already expensive process. This was confirmed in *Labourers' International Union of North America, Local 183 v. Castellano,* 2020 ONCA 71, at paras 7-9:

> …we agree with the appellant's position that the motion judge made no error in hearing the s. 137.1 motion at the same time as the summary judgment motion. There is no statutory or other prohibition against proceeding in this manner and it was within the discretion of the motion judge to determine the order in which the motions would be addressed.
>
> Moreover, the purpose of s. 137.1 could be undercut if the bringing of a summary judgment motion precluded a

> defendant from bringing a s. 137.1 motion. While mindful that the efficacy of s. 137.1 could be undermined if the motion is not brought on a timely basis, there is no statutory timeline for its hearing.
>
> There should be no hard and fast rule dictating when such a motion should be brought; otherwise, the inherent discretion of a motion judge to manage the proceedings before him or her would be fettered. We do not read para. 50 of *Zoutman v. Graham*, appeal as of right to the Court of Appeal filed, as purporting to set down as general principle anything to the contrary.

[61] Moreover, the goals of efficiency and economy would be lost if the motions are not heard together. The procedure was meant to be efficient and inexpensive. As Pepall J.A. said in *Park Lawn*, at para. 40:

> I would also add that the cost of litigation is a plague that has infected our system of justice and serves to undermine its efficacy. Here the Legislature enacted a provision designed to help people avoid a costly defamation lawsuit and preserve the opportunity for public discourse and expression, but at the same time allow legitimate actions to proceed. The procedure was to be efficient and inexpensive. Ironically, a procedure intended to avoid costly, unmeritorious, protracted defamation lawsuits has developed into a platform for sometimes costly, unmeritorious and protracted litigation. This is not to say that [s. 137.1] motions should not be brought, but rather the parameters of the ensuing litigation should be limited in scope.

[62] While a motion judge has discretion to organize the conduct of a motion, the principles animating the discretion should be based on efficiency and economy. Section 137.1(5) does not preclude the motions in the present case from being heard and decided together.

Issue 3: Did the motion judge err by refusing leave to amend the statement of claim?

[63] The motion judge dismissed the appellant's motion to amend the Statement of Claim to add a claim for payment of deferred bonus payment on the ground that it was a new cause of action that was statute barred. The trial judge found that the appellant discovered his claim no later than September 6, 2016, as on this date he sent a letter to the President of Callidus notifying that the company had failed to arrange for the payment of "those elements of deferred compensation". He concluded that the motion for leave to amend, brought on April 20, 2022, came more than two years after the date of discovery.

[64] The appellant submits that the motion judge erred by characterizing the claim as a new cause of action. Rather, he submits that it is a head of damage arising out of his wrongful dismissal action. The respondent submits that it is an entirely separate action that has nothing to do with an additional head of damages.

[65] In *Ridel v. Cassin*, 2014 ONCA 763, this court considered a motion for leave to amend a claim in a cross-appeal. The action was for damages arising out of a failed investment. The trial judge had dismissed leave to amend on the basis the claim was statute barred. This court allowed the amendment. At para.10:

> In our view, this was not the assertion of a new cause of action, which would have been barred by the *Limitations Act, 2002*, but was simply a claim for additional damages arising from an existing cause of action. The tax liability

> arose out of the wrongful and unauthorized trading activity of the appellants. It was a dead loss to the respondents that is simply to be added to the loss of their investment money. [Citations omitted]

[66] When an amendment is "simply a claim for additional damages arising from an existing cause of action", an "elaboration of the original pleading", or "can reasonably be seen as falling within the four corners of the existing claim" it will be permitted, and the amendment will not trigger the statute of limitations: *Ridel*, at para. 10; *Britton v. Manitoba*, 2011 MBCA 77, 270 Man. R. (2d) 43, at paras. 34-40; *Farmers Oil and Gas Inc. v. Ontario (Natural Resources)*, 2016 ONSC 6359, 134 O.R. (3d) 390, at para. 31 (Div. Ct.). See also *Cahoon v. Franks*, [1967] S.C.R. 455.

[67] In a wrongful dismissal action, the plaintiff claims the amounts owing as a result of the dismissal. A claim for deferred bonus payments falls squarely within the four corners of the claim. The motion judge erred in principle by concluding it was a separate cause of action.

[68] Under r. 26.01, the court shall grant leave to amend a pleading unless it would result in prejudice that "could not be compensated for by costs or an adjournment". Although the motion judge referred to prejudice to the respondent arising from having to defend a new claim that is statute barred, once the amendments are properly considered, there is no evidence of specific prejudice relating to this head of damages.

[69] I would grant leave to amend the Statement of Claim.

CONCLUSION

[70] I would allow the appeal and vary the order below as follows:

1. The Respondent's counterclaim be dismissed pursuant to s. 137.1 of the *Courts of Justice Act*.

2. Leave be granted to the appellant for the amendments sought to the Statement of Claim.

3. The motion be returned to the motion judge to complete the summary judgment motion.

[71] If the parties cannot agree on costs of the s. 137.1 motion, I would ask for brief written submissions within 15 days of the release of these reasons.

[72] I would order that costs of the appeal be payable to the appellant in the agreed upon amount of $25,000, inclusive of disbursements and HST.

Released: 20230406. "E.E.G."

"Mary Lou Benotto J.A."
"I agree. E.E. Gillese J.A."
"I agree. Coroza J.A."