

CANADA / JUDGMENT

A Lassonde Inc. v. Sun Pac Foods Ltd.

2003 FCT 294

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T-393-98 Citation: 2003 FCT 294 Ottawa (Ontario), April 2, 2003 Before: The Honourable Mr.
Justice Blais BETWEEN: A. LASSONDE Plaintiff and SUN PAC FOODS LIMITED Defendant
REASONS FOR ORDER AND ORDER

- [1] This is a motion by A. Lassonde Inc. [Plaintiff] against an order by the prothonotary Richard Morneau [Prothonotary] on January 16, 2002, dismissing the Plaintiff's motion for leave to amend his statement of claim dated November 26, 2001, and allowing in part the motion by Sun Pac Foods Limited [Defendant] dated October 4, 2001.
- [2] A stay of execution of the order of January 16, 2002, was granted on February 4, 2002, pending judgment on the motion at bar.

FACTS

- [3] On March 10, 1998, the Plaintiff brought an action against the Defendant for the use by the latter of the mark RHAPSODIE FRUITÉE, [emphasis added] as a French version of its mark FRUIT RHAPSODY, in association with fruit beverages of the same type as the products of the Plaintiff. In the Plaintiff's submission, this use is liable to create confusion with the trade mark FRUITÉ owned by it.
- [4] On February 14, 2000, the Plaintiff filed a motion asking the Court to resolve in its favour certain objections made by counsel for the Defendant at the examination of its representative Lianne Oneschuk on May 6, 1999. At that examination, the Plaintiff justified the relevance of a question to which the Defendant objected by its right to claim punitive damages. The Prothonotary also referred to the punitive damages claimed by the Plaintiff in paragraph 21 of his decision dated February 22, 2000.
- [5] By that decision, the Plaintiff was allowed to file an amended statement of claim, referred to in paragraph 8 of its memorandum dated November 29, 1999, which led to the decision of February 22, 2000.

- [6] Paragraph 8 of the said memorandum dealt with an election in favour of an accounting of profits.
- [7] On February 28, 2000, the Plaintiff amended its statement of claim to include other additions, essentially paragraphs and conclusions dealing with punitive damages. These additions prompted vigorous protests by the Defendant, which culminated in the filing of a motion on December 12, 2001, to strike the amended statement of claim dated February 28, 2000.
- [8] On that date, namely December 12, 2001, the Plaintiff also filed a motion for leave to amend, to be authorized to file the amended statement of claim in the event that the aforesaid motion by the Defendant was granted.
- [9] On January 16, 2002, the Prothonotary made an order dismissing the Plaintiff's motion for amendments and allowing in part the Defendant's motion to strike.
- [10] The latter order is the subject of the motion at bar. POINT AT ISSUE
- [11] Did the Prothonotary make an error of law and fact justifying this Court's intervention?
APPLICABLE LEGISLATION
- [12] Rule 75 of the Federal Court Rules (1998) [Rules] refers to the conditions in which documents may be amended:
75. (1) Subject to subsection (2) and rule 76, the Court may, on motion, at any time, allow a party to amend a document, on such terms as will protect the rights of all parties.
75. (1) Sous réserve du paragraphe (2) et de la règle 76, la Cour peut à tout moment, sur requête, autoriser une partie à modifier un document, aux conditions qui permettent de protéger les droits de toutes les parties.
- (2) No amendment shall be allowed under subsection (1) during or after a hearing unless
- (2) L'autorisation visée au paragraphe (1) ne peut être accordée pendant ou après une audience que si, selon le cas:
- (a) the purpose is to make the document accord with the issues at the hearing;
- (b) a new hearing is ordered; or
- (c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations.
- a) l'objet de la modification est de faire concorder le document avec les questions en litige à l'audience;
- b) une nouvelle audience est ordonnée;

- c) les autres parties se voient accorder l'occasion de prendre les mesures préparatoires nécessaires pour donner suite aux prétentions nouvelles ou révisées.

[13] Rule 200 refers to amendments of documents as of right:

200. Notwithstanding rules 75 and 76, a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto or on the filing of the written consent of the other parties.

200. Malgré les règles 75 et 76, une partie peut, sans autorisation, modifier l'un de ses actes de procédure à tout moment avant qu'une autre partie y ait répondu ou sur dépôt du consentement écrit des autres parties.

[14] Rule 221 refers to the striking of all or part of a pleading:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

- (a) discloses no reasonable cause of action or defence, as the case may be,
- (b) is immaterial or redundant,
- (c) is scandalous, frivolous or vexatious,
- (d) may prejudice or delay the fair trial of the action,
- (e) constitutes a departure from a previous pleading, or
- (f) is otherwise an abuse of the process of the Court, and may order the action be dismissed or judgment entered accordingly.

(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

221. (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

- a) qu'il ne révèle aucune cause d'action ou de défense valable;
 - b) qu'il n'est pas pertinent ou qu'il est redondant;
 - c) qu'il est scandaleux, frivole ou vexatoire;
 - d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
 - e) qu'il diverge d'un acte de procédure antérieur;
 - f) qu'il constitue autrement un abus de procédure. Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
- (2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

[15] Rule 385(1)(a) refers to one of the powers of the case management judge or prothonotary:

385. (1) A case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may

(a) give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits; . . .

385. (1) Le juge responsable de la gestion de l'instance ou le protonotaire visé à l'alinéa 383c) tranche toutes les questions qui sont soulevées avant l'instruction de l'instance à gestion spéciale et peut :

a) donner toute directive nécessaire pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible; [. . .]

[16] Rule 400(1), (2) and (3) refers to the award of costs between parties.

ANALYSIS

Appeal from a prothonotary's order

[17] In *Canada v. Aqua-Gem Investments Ltd.*, [1993] 2 F.C. 425, MacGuigan J.A. laid down a rule for reviewing the decisions of prothonotaries which has subsequently been affirmed several times by this Court. The relevant passage of that decision is the following:

[64] . . . the proper standard of review of discretionary orders of prothonotaries in this Court should be the same as that which was laid down in *Stoicevski* for masters in Ontario. I am of the opinion that such orders ought to be disturbed on appeal only where it has been made to appear that

(a) they are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts, or

(b) in making them, the prothonotary improperly exercised his discretion on a question vital to the final issue of the case.

[65] In each of these classes of cases, the Motions Judge will not be bound by the opinion of the prothonotary; but will hear the matter *de novo* and exercise his or her own discretion. Application that Philippe Leroux's affidavit not be considered by Court

[18] After a painstaking review of documents, the Court decided from the bench to allow Philippe Leroux's affidavit and its appendices, except for appendix H, which was voluntarily withdrawn, although it was afterwards found to be consistent with the verbal amendment obtained on the day of the hearing. Counsel for the Defendant, having been present at that hearing held in December 2001, knew or should have known that the amendment had been allowed by the Prothonotary, however, she argued to the contrary at trial.

- [19] It seems worth mentioning that by their negligence counsel for the Defendant contributed largely to delaying the hearing on this question, which was essentially a minor one, and the Court decided to order the Defendant to pay costs to the Plaintiff, set at \$500, in view of the repeated notices in the record urging the parties to cooperate more fully in the interests of justice. Motions by Defendant to strike and by Plaintiff for leave to amend
- [20] It is clear from reading the applicable Rules that a party may amend a pleading in various circumstances, either with leave of the Court or as of right.
- [21] In the case at bar, the Plaintiff was expressly authorized to amend its statement of claim by an order dated February 22, 2000, regarding the return of profits. This would comply with rule 75.
- [22] However, the Plaintiff's additions regarding punitive damages in its amended statement of claim did not meet either the requirements for amendment by leave in rule 75 or amendment as of right in rule 200. On amendment as of right, no consent from the Defendant was received by the Plaintiff as to these amendments. Of course, this is apparent from the motion at bar.
- [23] In *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3, Décarý J.A. laid down the rules for an application for leave to amend:
- [9] . . . while it is impossible to enumerate all the factors that a judge must take into consideration in determining whether it is just, in a given case, to authorize an amendment, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real questions in controversy between the parties, provided, notably, that the allowance would not result in an injustice to the other party not capable of being compensated by an award of costs and that it would serve interests of justice [footnote omitted]. . . .
- [12] As regards interests of justice, it may be said that the courts and the parties have a legitimate expectation in the litigation coming to an end and delays and consequent strain and anxiety imposed on all concerned by a late amendment raising a new issue may be seen as frustrating the course of justice [footnote omitted]. The principles were in our view best summarized by Lord Griffiths, speaking for the majority in *Ketteman v. Hansel Properties Ltd.* [footnote omitted]. . . . Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes, and the legitimate expectation that the trial will determine the issues one way or the other. Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful

defendant an opportunity to renew the fight on an entirely different defence. Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of the proceedings. [emphasis added] . . .

- [17] . . . Master of the proceedings in his own house, the Trial Judge, who had taken charge of the case before it was to be heard and who had had the benefit of a pre-trial conference and of pre-trial motions, did not, in the exercise of his discretion, commit any error of law that would warrant our intervention. [emphasis added]
- [24] To return to the facts of the motion at bar, at the examination of May 6, 1999, at pages 182 and 183 of the transcript, counsel for the Plaintiff informed the Defendant that certain questions related to a potential claim for punitive damages: [TRANSLATION] Q. If Sun Pac is in good faith, why don't you try to solve the problem by writing "Fruit Rhapsody" on your label? . . . Mr. Clarizio: I direct the witness not to answer the question. Mr. Barrette: Why? Mr. Clarizio: It is not relevant. Mr. Barrette: Why? Mr. Clarizio: It is just not relevant, why somebody is settling or not settling. In fact, you shouldn't even be bringing it up. [TRANSLATION] Mr. Barrette: It certainly may be relevant. . . . Mr. Barrette: Especially for seeking punitive and exemplary damages.
- [25] In the Plaintiff's memorandum dated November 29, 1999, paragraph 14 refers to punitive damages to justify the relevance of the questions to which counsel for the Defendant objected: [TRANSLATION]
14. . . . These questions are designed to uncover the reasons for this choice, not to obtain his opinion on what a correct translation would be. Moreover, it is the defendant's vice-president, Mr. McEwan, who raised this point at the start of the proceeding. What is more, the answers to these questions are necessary to determine the defendant's good or bad faith and justify the awarding of punitive or exemplary damages . . . [emphasis added]
- [26] At paragraph 21 of his decision of February 22, 2000, the Prothonotary stated:
- [21] Since it is claiming exemplary damages, the plaintiff is entitled to know whether the development of the trade mark "FRUIT RHAPSODY" and the words "RHAPSODY FRUITÉE" where the subject of a different creative process from that adopted for the defendant's other trade marks. Questions 25 and 26 therefore appear to the Court to be relevant and they must be answered. [emphasis added]
- [27] However, in the final paragraph of that decision, paragraph 34, the Prothonotary is very clear about what the Plaintiff is authorized to amend in its amended statement of claim:

- [34] Further, the plaintiff shall serve and file on or before February 29, 2000, its amended statement of claim mentioned in paragraph 8 of its memorandum filed on November 29, 1999. [emphasis added]
- [28] At paragraph 8 of its memorandum, the Plaintiff only referred to the return of profits: [TRANSLATION]
8. As already indicated to counsel for the defendant, the plaintiff will opt for the return of profits which the defendant has made or shall make unlawfully from this marketing of the product. The plaintiff further undertakes hereby to file and serve within 15 days of the filing of the instant motion an amended statement of claim in which this option will be explained at further length; [emphasis added]
- [29] It is interesting to compare paragraph 8 with paragraph 14 of the Plaintiff's memorandum. When it refers to the return of profits, the Plaintiff expressly states that an amended statement of claim clarifying this option will be filed; while when punitive damages are in question, the Plaintiff justifies the relevance of certain questions asked at the examination of May 6, 1999, as being to determine the good or bad faith of the Defendant and justify the awarding of punitive damages.
- [30] The Plaintiff could have taken this opportunity to ask the Court for leave to amend its statement of claim, if punitive damages proved justified, as it did for the accounting of profits option. It did not see fit to do this.
- [31] Accordingly, it seems to the Court that it is the Plaintiff's own negligence if the amendments relating to punitive damages were not authorized by the Prothonotary. Why did it proceed in accordance with the Rules for the amendment relating to accounting for profits and not for the amendment relating to punitive damages?
- [32] As soon as it read the order of February 22, 2000, authorizing it to file its amended statement of claim, referred to in paragraph 8 of its memorandum filed on November 29, 1999, the Plaintiff should have taken the necessary steps to obtain either leave from the Prothonotary or consent from the Defendant, allowing it to amend its statement of claim to include a claim for punitive damages in accordance with the Rules. It did not do so.
- [33] Although paragraph 21 of the Prothonotary's decision of February 22, 2000, refers to a claim for exemplary damages, it is apparent that the said "claim" did not materialize in accordance with the Rules set out for that purpose.
- [34] I consider that the Prothonotary, who has control of his procedure and is responsible for management of the case, did not commit any error of law in the exercise of his discretion that would justify intervention by the Court. Closure of written pleadings

- [35] Rule 385(1)(a) is clear: a case management judge or a prothonotary assigned under paragraph 383(c) shall deal with all matters that arise prior to the trial or hearing of a specially managed proceeding and may give any directions that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits.
- [36] The Plaintiff filed its statement of claim on March 10, 1998. It is now 2003. After over five years, the exchange of motions between counsel for the parties is still continuing.
- [37] By issuing a direction to freeze the written pleadings, the Prothonotary sought to avoid further debate between the parties. Part of the order of January 16, 2002, demonstrates this purpose:
- [4] The result is that, almost four years after the filing of the statement of claim, we are still looking at the language of the written pleadings and settling _ which seems to be the next stage in the future _ the outcome of undertakings made or objections raised during the examinations for discovery held in May and November 1999. Once these difficulties have been settled, the parties propose to undertake a second round of examinations for discovery!
- [38] In that order, the Prothonotary cited a passage from *Sawridge Band v. Canada* (C.A.), [2002] 2. F.C. 346, in which Rothstein J.A. said:
- [11] We would take this opportunity to state the position of this Court on appeal from orders of case management judges. Case management judges must be given latitude to manage cases. This Court will interfere only in the clearest case of a misuse of judicial discretion. This approach was well stated by the Alberta Court of Appeal in *Korte v. Deloitte, Haskins and Sells* (1995), 36 Alta. L.R. (3d) 56, paragraph 3, and is applicable in these appeals. We adopt these words as our own. This is a very complicated lawsuit. It is subject to case management and has been since 1993. The orders made here are discretionary. We have said before, and we repeat, that case management judges in these complex matters must be given some "elbow room" to resolve endless interlocutory matters and move these cases on to trial. In some cases, the case management judge will have to be innovative to avoid having the case bog down in a morass of technical matters. Only in the clearest cases of misuse of judicial discretion will we interfere. In this case, the carefully crafted orders made by the case management judge display a sound knowledge of the rules and the related case law. In particular, the order contains a provision that the parties are free to return to the case management judge for relief from the imposition of any intolerable burden imposed by the order. No clear error has been shown and we decline to interfere. While there may be some inconvenience to some of the parties, this does not translate into reversible error. We are not here to fine tune orders made in interlocutory proceedings, particularly in a case such as this one. [emphasis added]
- [39] In the case at bar, I feel that a judicial discretion was not clearly misused by the Prothonotary. Costs

- [40] Also in his decision of February 22, 2000, the Prothonotary referred to the conduct of counsel for the parties. He said:
- [29] Counsel for the parties _ and in particular for the plaintiff, towards his counterpart for the defendant _ will ensure that their mutual cooperation improves in the interest of their respective clients and the harmonious trial of this matter. If this does not occur, it is conceivable that any party at fault may be subject to the payment of costs in the future.
- [41] Rule 400(3) is clear: in exercising its discretion, the Court may consider various factors to determine the amount of costs.
- [42] It seems clear that by ordering the Plaintiff to pay costs, the Prothonotary was reproofing its conduct. In the order of January 16, 2002, he wrote:
- [20] The defendant's motion to strike out will therefore be allowed in part, as stipulated earlier, and the plaintiff's motion to amend will be dismissed, with an award of costs on both motions which I set at \$3,000 payable forthwith to the defendant, given that the plaintiff is at the origin of both of these motions the result of which has been to further delay the progress of the case. Costs in a substantial amount are therefore called for. [emphasis added]
- [43] The awarding of costs on a solicitor-client basis may be granted when the misconduct is related to the issue. The following passage from *Apotex v. Canada (Minister of Health and Welfare)* (2000), 265 N.R. 90, [2000] F.C.J. No. 1919, per Malone J., is of some assistance:
- [8] As well, this Court established a similar rule in its 1986 decision in *Amway Corporation v. R.* [See footnote 12], where Mahoney, J.A., stated: Footnote 12: [1986] 2 C.T.C. 339 (F.C.A.), at pages 340 and 341. Costs as between solicitor and client are exceptional and generally to be awarded only on the ground of misconduct connected with the litigation. [emphasis added]
- [44] Further, in *King v. Canada (Attorney General)* (2000), 261 N.R. 93, [2000] F.C.J. No. 1558, Malone J. said:
- [3] In this case, the Chambers Judge awarded solicitor-and-client costs based on the conduct of the Veterans Appeal Board ("the Board") which failed to follow an earlier court order. [emphasis added]
- [45] In the case at bar, this is also what the Plaintiff did, that is, did not observe the order made by the Prothonotary on February 22, 2000, authorizing it to amend its statement of claim in respect of the accounting for profits and not in respect of the claim for punitive damages.
- [46] Consequently, the Prothonotary made no error justifying this Court's intervention. O R D E R The motion is accordingly dismissed with costs to the Defendant. As to its preliminary motion, the Defendant will have to pay costs in the amount of \$500 to the Plaintiff. "Pierre Blais" J.F.C.C. FEDERAL COURT OF CANADA TRIAL DIVISION SOLICITORS OF RECORD FILE: T-393-98 STYLE OF CAUSE: A. LASSONDE and SUN PAC FOODS LIMITED PLACE OF HEARING: Montréal, Quebec DATE OF HEARING: March 6, 2003 REASONS: BLAIS J. DATE OF REASONS: April 2, 2003 APPEARANCES: Bruno Barrette FOR THE PLAINTIFF Pascal

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