

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Madam Justice Holly C. Beard  
Mr. Justice Marc M. Monnin  
Mr. Justice William J. Burnett

***BETWEEN:***

<b><i>STEPHEN JAMES LOWELL</i></b>	)	<b><i>D. A. Mayer</i></b>
	)	<b><i>for the Appellant</i></b>
<b><i>(Plaintiff) Appellant</i></b>	)	
	)	<b><i>K. M. Coutts</i></b>
<b><i>- and -</i></b>	)	<b><i>for the Respondent</i></b>
	)	
<b><i>GERALD BRIAN GRIFFITH</i></b>	)	<b><i>Appeal heard and</i></b>
<b><i>(Operating as G&amp;J INTERIORS)</i></b>	)	<b><i>Decision pronounced:</i></b>
	)	<b><i>January 22, 2019</i></b>
<b><i>(Defendant) Respondent</i></b>	)	
	)	<b><i>Written reasons:</i></b>
	)	<b><i>January 25, 2019</i></b>

**BEARD JA** (for the Court):

**I. THE ISSUES**

[1] The plaintiff is appealing the striking of his statement of claim in March 2017, which occurred pursuant to the defendant's motion under r 20A(52) of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, as it appeared in February 2017. The appeal was dismissed at the end of the hearing with brief reasons to follow. These are those reasons.

[2] The motion was brought to remedy the plaintiff's failure to comply with directions given at a case conference held under r 20A. The essence of the plaintiff's appeal is that the remedy that was granted was disproportionate

to the seriousness of the non-compliance that occurred and constituted an injustice.

## **II. THE FACTS**

[3] The plaintiff filed his statement of claim on October 11, 2013, in which he claimed damages for alleged breaches of his partnership agreement with the defendant, which he states occurred in 2008. The total amount claimed in the statement of claim was \$42,769.59 plus pre- and post-judgment interest. The defendant filed his statement of defence on February 5, 2014, in which he admitted that the parties had a partnership agreement but alleged that the plaintiff had been paid all amounts owing to him.

[4] There were three case conferences held, being on July 28, 2015, October 13, 2015, and February 17, 2016. At the last case conference, the matter was set for trial from June 5-9, 2017. In addition, the parties were directed to file an agreed book of documents, an agreed statement of facts and briefs of law with any relevant case law by October 1, 2016.

[5] The motion judge made the following findings as to the parties' efforts to comply with those directions:

I am satisfied [the defendant's lawyer] made every reasonable effort to comply with the deadlines. [The plaintiff's lawyer] did not. In fact, he did not do anything really on the file between the case conference in February of 2016 until September of last year [i.e. 2016], at which point he thought that he sent a fax letter to [the defendant's lawyer] resolving some of the issues with respect to the three items that I had ordered. But he admits that through inadvertence the fax never got sent. Unfortunately [the plaintiff's lawyer] thereafter required some surgical procedures which took him out of the office for some two months. And then even in

November it did not twig to him that he had not complied with the deadline set out in my memo of February 17, 2016.

There was a flurry of correspondence earlier this winter. But I note that even today [the plaintiff's lawyer] has not filed a brief of law as I ordered in February of 2016, even in the face of a motion to strike which was filed by [the defendant's lawyer] on February the 7th.

So we are now some eight weeks from the filing of the motion when [the plaintiff's lawyer] knew his client was in jeopardy, and not even then did he file his brief. And, again, it is clear that a brief was to be filed.

Today we are some 66 days prior to trial. Trial dates were set commencing June 5th, 2017. The trial date was set way back in February of 2016 when we last met. And not even [the plaintiff's lawyer's] brief is on the record.

[6] The defendant's lawyer advised that, if the trial were to proceed, she would require an adjournment of the dates as there would not be sufficient time for her to prepare properly in the few weeks remaining. She also stated that her client had moved back to the United Kingdom and, given his limited financial means, he would need some time to make the arrangements to return to Winnipeg. The motion judge indicated that the earliest available dates for a four-day civil trial would be in the spring of 2019.

### **III. THE LEGISLATION**

[7] Rule 20A(52) stated:

#### **Sanctions**

**20A(52)** The case conference judge must

- (a) make an order for costs against a party; or
- (b) strike out the claim or defence of a party;

when the party, without reasonable excuse,

- (c) fails to obtain a case conference date from the trial coordinator, as required by this Rule;
- (d) fails to comply with a time limit imposed by this Rule; or
- (e) fails to abide by an order or direction of the case conference judge.

#### **IV. THE PARTIES' POSITIONS**

[8] The plaintiff argues that the remedy of the striking of the statement of claim was disproportionate to the seriousness of his non-compliance with the case conference judge's directions. He takes the position that the parties still had time to file the necessary documents before the trial or, if not, to proceed without them. Regarding the brief of law, he states that there was no point of law or statute that was at issue; rather, this was a case that would be determined on its facts. As a result, he concluded that the brief did not need to be filed, although he did not so advise opposing counsel or obtain the consent of the court to dispense with compliance with this direction.

[9] He also points out that there was only one other sanction imposed in this matter, and that was against the defendant, who was ordered to pay costs of \$150.00 for failing to file an affidavit. He states that, if a sanction against him was appropriate, dismissal was not proportional and that there should have been an order of costs.

[10] The defendant argues that a sanction was mandatory under r 20A(52) where there has been no reasonable excuse offered for the failure to comply, but that the nature of that sanction was discretionary.

[11] The defendant's position is that, without the plaintiff's pre-trial brief outlining his arguments for trial, the agreed book of documents and agreed statement of facts, he was precluded from properly preparing for trial. He says that this is a particular issue in this type of case, where there could be no discoveries. He points out that the plaintiff had several weeks between being notified of the defendant's motion to strike his claim and the hearing to provide the missing documents, but he still failed to produce the brief of law. He argues that the cumulative effect of the failure to provide the three missing documents in a timely manner amounts to a flagrant abuse of the court's process. In light of that, he states that the motion judge's decision to strike the statement of claim was reasonable and certainly was not so clearly wrong as to amount to an injustice.

## **V. STANDARD OF REVIEW**

[12] The plaintiff states that the applicable standard of review is that of correctness, while the defendant argues that the essential decision is whether the motion judge erred in exercising his discretion and that the applicable standard is whether his decision was so clearly wrong as to amount to an injustice.

[13] The plaintiff has not argued that the motion judge erred in principle, in the interpretation of the law, or in the facts; rather, his essential argument is that the motion judge erred in the exercise of his discretion when he struck the statement of claim. The applicable standard of review is that summarized in *Hanson v Hildi Warkentin Tax Ltd et al*, 2017 MBCA 99 (at para 12):

.... In summary, an error in principle or in the interpretation of the law is reviewed on the correctness standard, while an error on

a question of fact is reviewed on the standard of palpable and overriding error. The decision as to which sanction to apply is discretionary and, provided there is no error of law or fact, it will not be overturned on appeal unless it is so clearly wrong as to amount to an injustice. ....

## **VI. THE MOTION JUDGE'S DECISION**

[14] The motion judge noted that the defendant's lawyer had failed to comply with three directions that he made in February 2016 in a timely manner. He explained his decision to strike the statement of claim as follows:

I agree with [the defendant's lawyer] that one strike is an innocent mistake perhaps, and maybe even strike two. But we have now crossed into a flagrant abuse on the part of [the plaintiff's lawyer] here. And the result is prejudice. We are now some 66 days from trial and [the defendant's lawyer] is still not in a position where she can properly prepare her client and her other witnesses for trial.

So what is the appropriate sanction? The plan "B" offered by [the defendant's lawyer] was to adjourn the trial dates as a matter of fairness to her. I do not think I am far off in saying that a week-long trial now would be set well into 2019. I do not think that, given that there is \$43,000 at stake, it is fair or just that the matter be adjourned for another two years. The question remains if an order of costs can repair the prejudice to the defendant.

I think that it cannot. I think the appropriate remedy is to strike the statement of claim, and I am going to make that order.

## **VII. ANALYSIS AND DECISION**

[15] It is clear that the plaintiff's lawyer failed to comply with the directions given in February 2016 in a timely manner and that he took no steps to notify opposing counsel and/or the motion judge, to obtain an alternative filing date or other accommodation, or to propose any other solution for the

non-compliance. This, on its own, may not have been sufficient to justify the striking of the statement of claim. Notwithstanding the new rules, striking a claim remains a harsh penalty that should normally be imposed only in particularly egregious circumstances. Had the plaintiff's counsel taken earlier steps to address the non-compliance and/or complied with all outstanding directions before the hearing of the motion, it is arguable that striking the claim would have been too harsh and unjust and may have led to a different outcome.

[16] In this case, however, the failure to comply with the directions was seriously compounded when the plaintiff's lawyer failed to provide all of the missing documents in the seven weeks between being served with the defendant's motion to strike and the hearing of that motion. There was absolutely no explanation offered for that further failure to act when he was on notice of the serious sanction that was being requested.

[17] In our view, on the facts of this case, the decision to strike the statement of claim, while severe, was not so clearly wrong as to amount to an injustice.

[18] For these reasons, the appeal was dismissed.

[19] The defendant will have his costs on the appeal.

Beard JA

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Monnin JA

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Burnett JA

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