Citation: Knight v Daraden Investments Ltd et al, 2022 MBCA 69
Date: 20220908
Docket: AI22-30-09731

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

MARCIA LEE KNIGHT	)	***A. R. Foderaro***
	)	*for the Applicants*
(Plaintiff) Respondent	)	
	)	***R. Walichnowski***
- and -	)	*for the Respondent*
	)	
DARADEN INVESTMENTS LTD. and PHILLIPS AIELLO	)	*Chambers motion heard:* ***May 12, 2022***
	)	
(Defendants) Applicants	)	*Decision pronounced:* ***September 8, 2022***

PFUETZNER JA

[1] The defendants move for leave to appeal an interlocutory order of a judge of the Court of Queen's Bench as is now required under section 25.2(1) of *The Court of Appeal Act*, CCSM c C240 (the *Act*). This is the first opportunity for this Court to consider the test to be applied to such a motion.

Background

[2] The plaintiff brought a claim in January 2015 seeking damages for personal injuries suffered in a slip-and-fall accident that occurred on the defendants' premises. In August 2015, there was an exchange of communications between the plaintiff's lawyer and the defendants' insurer regarding the necessity to file a statement of defence.

[3] The plaintiff characterizes this exchange as an agreement to delay the proceedings, while the defendants say that it was nothing more than the extension of a professional courtesy.

[4] In December 2018, the plaintiff's lawyer delivered a lengthy medical report to the defendants' insurer (the medical report).

[5] In June 2020, the defendants filed a motion to dismiss the plaintiff's action on account of delay pursuant to rr 24.01 and 24.02 of the MB, *Court of Queen's Bench Rules*, MR 553/88 (the *QB Rules*). The motion was initially heard by a master who granted the motion.

[6] On appeal from the order of the master, the judge granted the appeal, allowing the plaintiff's claim to proceed (see 2021 MBQB 279). Key to his decision was the finding that the exchange of communications in August 2015 "constituted an express agreement to delay the proceedings, triggering the exception to the long delay rule in Rule 24.02(1)(a)" (at para 18). In addition, he found that the delivery of the medical report was, in the circumstances of this case, "a significant advance in the action within the meaning of Rule 24.02(1)" (at para 29). Finally, he found that, while there had been "inordinate delay . . . within the meaning of Rules 24.01(2) and (3)" (at para 32), that delay was excusable in light of the express agreement to delay the proceedings.

The Motion for Leave to Appeal

[7] The defendants now seek leave to appeal the judge's order. The parties agree, as do I, that the judge's order was interlocutory. His order disposed of the issue raised on the appeal but did "not determine the real

matter in dispute between the parties—the very subject matter of the litigation—or any substantive right" (*Nguyen v Winnipeg (City of)*, 2022 MBCA 33 at para 15), as the effect of the order was to allow the plaintiff's claim to proceed to trial.

[8] The *Act* was recently amended in January 2022 to require leave for almost all interlocutory appeals (see *The Court Practice and Administration Act (Various Acts Amended*), SM 2021, c 40, section 3). Section 25.2 of the *Act* now states:

> **Leave required for interlocutory appeals**
> **25.2(1)** Subject to subsection (2), an appeal must not be made to the court with respect to an interlocutory order of a judge of the Court of Queen's Bench unless leave to appeal is granted by a judge or the court.
>
> **Exceptions**
> **25.2(2)** Leave to appeal an interlocutory order is not required
>
> (a) in a proceeding involving the liberty of a person or the custody of a minor;
>
> (b) if the order grants or declines to grant a stay or an interlocutory injunction; or
>
> (c) in other cases specified in the rules.

[9] The defendants' proposed grounds of appeal raise two main issues: (1) whether the judge erred in concluding that there was an express agreement to delay the proceedings, and (2) whether the judge erred in concluding that the delivery of the medical report was a significant advance of the action.

[10] This motion poses two questions. First, what is the test to be applied on a motion for leave to appeal an interlocutory order under section 25.2(1)

of the *Act*? Second, should leave to appeal be granted in the circumstances of the present case?

Positions of the Parties

[11] Both parties submit that the test this Court should apply to a motion for leave to appeal an interlocutory order is the one set out by the Saskatchewan Court of Appeal in *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2002 SKCA 119. As I will explain, this test has two general criteria. First, the proposed appeal must have sufficient merit to warrant the attention of the Court and, second, the proposed appeal must be of sufficient importance to justify determination by the Court. The parties also submit that this Court should consider its own jurisprudence on the general issue of granting leave to appeal in other contexts.

[12] The defendants argue that the judge committed palpable and overriding errors in his findings regarding the agreement to delay the proceedings and the delivery of the medical report. They also assert that the proposed appeal is very important to the outcome of the action and raises unsettled points of law regarding "whether a routine courtesy extension, without more, is sufficient to qualify as a standstill agreement."

[13] The plaintiff's position is that the grounds of appeal lack merit. She asserts that the judge's finding that there was an agreement to delay the proceedings is a factual finding that is "not 'clearly wrong' so as to warrant appellate scrutiny." As for the medical report, the plaintiff points out that this ground of appeal is moot if the defendants are not granted leave to appeal in respect of the agreement. In any event, the plaintiff argues that the judge made no error in finding that the provision of the medical report met the functional

test for determining whether a particular step constituted a significant advance in the action. Finally, the plaintiff maintains that the proposed grounds of appeal do not raise unsettled points of law and that the judge's decision is highly fact based and is entitled to significant deference.

Analysis

The Test for Leave to Appeal

[14] Section 25.2 of the *Act* is substantially similar to the parallel provision of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, section 8. As a result, I agree with the parties that *Rothmans* and the subsequent jurisprudence of the Saskatchewan Court of Appeal is instructive.

[15] In *Rothmans*, Cameron JA wrote (at para 6):

> . . . The governing criteria may be reduced to two—each of which features a subset of considerations—provided it be understood that they constitute conventional considerations rather than fixed rules, that they are case sensitive, and that their point by point reduction is not exhaustive. Generally, leave is granted or withheld on considerations of **merit** and **importance,** as follows:
>
> > First: Is the proposed appeal of **sufficient merit** to warrant the attention of the Court of Appeal?
> >
> > - Is it *prima facie* frivolous or vexatious?
> > - Is it *prima facie* destined to fail in any event, having regard to the nature of the issue and the scope of the right of appeal, for instance, or the nature of the adjudicative framework, such as that pertaining to the exercise of discretionary power?
> > - Is it apt to unduly delay the proceedings or be overcome by them and rendered moot?
> > - Is it apt to add unduly or disproportionately to the cost of the proceedings?

> Second: Is the proposed appeal of **sufficient importance** to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
>
> - does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
> - does it raise a new or controversial or unusual issue of practice?
> - does it raise a new or uncertain or unsettled point of law?
> - does it transcend the particular in its implications?

[16] The Court subsequently clarified that the merit component of the test "must be addressed in light of the applicable standard of review" (*Saskatoon (City) v The Canadian Nationalist Party Inc*, 2021 SKCA 22 at para 28; see also *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 74).

[17] In addition, as noted in *Hoedel v WestJet Airline Ltd*, 2022 SKCA 27, "[t]hese questions are not exhaustive" and "[t]he authority to grant leave is discretionary and calls for the Chambers judge to decide whether they are sufficiently concerned about the correctness of a decision to warrant its exercise" (at para 12).

[18] Although the test for leave to appeal under section 25.2 of the *Act* has not previously been addressed, this Court has considered the test for leave to appeal under a variety of other statutes. Familiar themes emerge.

[19] Generally, for leave to appeal to be granted, this Court has required an applicant to show that the question raised has "arguable merit; that is to say, the applicant must have a reasonable prospect of success", and is "of

sufficient importance to warrant consideration by the province's highest court" (*Harder v Manitoba Public Insurance Corp et al*, 2012 MBCA 20 at para 12).

[20] In considering the merit of a proposed appeal, the Court should bear in mind the standard of review that will be applied by a panel of the Court if leave is granted (see *Manitoba Hydro-Electric Board v Public Utilities Board (Man) et al*, 2019 MBCA 54 at para 9). If the standard of review to be applied calls for significant deference, an applicant will have a higher hurdle to overcome than if the standard of review is correctness.

[21] In addition, the Court will consider the overarching concern for the interests of justice. Ultimately, if the refusal of leave might result in an injustice, leave to appeal may be granted (see *Harder* at para 13).

[22] To conclude, in my view, an applicant seeking leave to appeal under section 25.2 of the *Act* must satisfy the following criteria:

1. first, the proposed ground of appeal must have arguable merit; and

2. second, the proposed ground of appeal must be of sufficient importance to warrant the attention of a full panel of this Court.

[23] In assessing the first criterion, arguable merit, the Court may consider any one or more of the following non-exhaustive list of factors in respect of the proposed ground of appeal:

- Is it prima facie frivolous or vexatious?

- Is it prima facie destined to fail, taking into account the standard of review that will likely be applied?
- Does it have a reasonable prospect of success?
- Can it be dismissed through a preliminary examination?
- Is it likely to be rendered moot due to the natural progression of the proceedings?
- Will it unduly or disproportionately delay or add to the cost of the proceedings?

[24] At the risk of stating the obvious, some of the above questions are merely different ways of approaching the same task—determining the arguability of the proposed ground of appeal.

[25] As for the second criterion, whether the proposed ground of appeal is of sufficient importance, the Court may consider any one or more of the following non-exhaustive list of factors:

- Does it raise a novel or unsettled point of law or of practice?
- Will resolution of the issue likely affect the determination of disputes between others (aside from the parties to the proceedings)?
- How significant is the order to the course or outcome of the proceedings?

[26] Finally, the decision to grant leave to appeal is ultimately a matter of discretion. From time to time, circumstances may present themselves where leave to appeal should be granted, even though both of the above criteria have not been met, if denying leave might result in an injustice (see *Rolling River School Division v Rolling River Teachers' Association of the Manitoba Teachers' Society et al*, 2009 MBCA 38 at para 13).

Application of the Test to the Present Case

[27] As I have indicated, the proposed grounds of appeal allege that the judge erred in finding that the parties agreed to delay the proceedings and that he erred in finding that the delivery of the medical report was a significant advance of the action.

[28] Prior to assessing whether either issue has arguable merit, I will consider the standard of review that would likely be applied if a panel of this Court were to hear this appeal.

[29] As explained in *WRE Development Ltd v Lafarge Canada Inc*, 2022 MBCA 11 at para 15, the articulation and application of the legal test under r 24.02(1) of the *QB Rules* is a question of law reviewed for correctness; questions of mixed fact and law, such as determining whether the facts satisfy the legal test, are reviewed on the standard of palpable and overriding error; and, similarly, findings of fact will not be disturbed absent palpable and overriding error.

[30] It bears repeating that a palpable and overriding error "is an obvious error that can be plainly identified in a judge's reasons that is determinative of the outcome of the case" (*Albo v The Winnipeg Free Press et al*, 2020

MBCA 50 at para 19). It is not enough that the judge might have made an error. The impugned finding must be clearly wrong and must affect the result.

[31] I am not persuaded by the defendants' submission that there is an arguable case to be made that the judge failed to apply the correct legal test by ignoring or failing to apply *Charik Custom Homes Ltd v Sara Development Inc*, 2014 ABQB 63; or *Nygard International Partnership v Canadian Broadcasting Corporation et al*, 2020 MBQB 71.

[32] Rather, I agree with the plaintiff that the judge's finding that the parties had entered into an express agreement to delay the proceedings was a finding of fact reviewable on a standard of palpable and overriding error. As explained in *WRE*, "[d]etermining if such an agreement exists and its nature depends on the facts and circumstances of the case" (at para 28).

[33] In my view, there is no arguable merit to the position that the judge made a palpable and overriding error in finding that there was an express agreement to delay the proceedings. This finding is not clearly wrong and is supported by the evidence.

[34] In finding an express agreement, the judge relied on the evidence of the plaintiff's lawyer, who participated in the exchange of communications with the defendants' insurer in August 2015, that he "agreed to provide to the defendants an extension of time to file a Statement of Defence." Moreover, the evidence of the plaintiff's lawyer was that, after he agreed to the extension of time to file the statement of defence, he was "of the belief that the time lines in this case would be held in abeyance". From this, the judge was entitled to infer that this belief arose because the parties had, in fact, agreed to delay the proceedings.

[35] Not only is this proposed ground of appeal not arguable considering the standard of review, there is no significant legal or practice issue that arises. The judge did not, as the defendants argue, decide that a "routine courtesy extension" qualified as a "standstill agreement." Rather, he found, as a fact, that this was not a routine courtesy extension. The issue for determination for the judge was factual and will not have significance to other cases, each one of which stands to be determined on its own particular circumstances.

[36] I turn now to the proposed ground of appeal related to the judge's finding that the delivery of the medical report was a significant advance in the action. I agree with the plaintiff that this issue is effectively moot if the defendants are denied leave to appeal the question of whether there was an express agreement to delay the proceedings.

[37] However, applying the test for leave to appeal that I have adopted, I would also deny leave to appeal on this second question. In finding that the delivery of the medical report was a significant advance in the action, the judge correctly articulated the "functional test" set out in *Buhr v Buhr*, 2021 MBCA 63 at para 78, and applied that test to the facts of the present case. The latter exercise is reviewable on the standard of palpable and overriding error. The judge found that the medical report was a "relatively comprehensive assessment of the plaintiff's medical condition, its relationship to her accident . . . and her prognosis" (2021 MBQB 279 at para 28); that it would allow the defendants' insurer to engage in a "meaningful analysis of the likely value of the plaintiff's claim for general damages" (*ibid*); and that, in the context of this "run of the mill" slip-and-fall claim, it was a significant advance (at para 29). All of this is supported by the evidence. There is no reasonable

prospect that the defendants would succeed in arguing that the judge's finding that the facts met the legal test was clearly wrong.

[38] As the judge's decision was highly context and fact specific, I also conclude that the second criterion of the test for leave to appeal is not met. The issue raised would have no precedential value and is not of significance other than to the parties to this action.

[39] Finally, I have not been persuaded that there is a risk of an injustice if I do not grant leave to appeal.

Conclusion

[40] For these reasons, the motion for leave to appeal is dismissed with costs to the plaintiff.

Pfuetzner JA