Date: 20210720
Docket: CI 18-01-17082
(Winnipeg Centre)
Indexed as: 6165347 Manitoba Inc. et al. v. The City of Winnipeg et al.
Cited as: 2021 MBQB 165

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

	)	Counsel:
	)	
	)	David Hill and Kevin D. Toyne
6165347 MANITOBA INC. and	)	for the plaintiffs
7138793 MANITOBA LTD.,	)	
	)	Vivian F.Y. Li and Nicole K. Beasse
plaintiffs,	)	for the City of Winnipeg
	)	
	)	Thor J. Hansell and Danielle A. Barchyn
-and-	)	for John Kiernan
	)	
	)	Brian J. Meronek, Q.C. and
THE CITY OF WINNIPEG, JOHN KIERNAN,	)	Erin A. Lawlor-Forsyth
BRADEN SMITH, MICHAEL ROBINSON and	)	for Braden Smith
MARTIN GRADY,	)	
	)	Kevin T. Williams and
defendants.	)	Matthew J. Nordlund
	)	for Michael Robinson
	)	
	)	Michael J. Finlayson
	)	for Martin Grady
	)	
	)	JUDGMENT DELIVERED:
	)	July 20, 2021

REMPEL, J.

Issues

[1] As the pre-trial judge assigned to this matter, I already issued an Endorsement in May of this year (document no. 51) regarding the plaintiffs' request for further disclosure and the production of "can say" statements from potential witnesses. The issue before me now is the plaintiffs' attempt to introduce an expert report into evidence very late in these proceedings. The action is set for trial before a different judge starting in September of this year (now less than two months away.) There have already been eight pre-trial conferences in this matter and the trial dates were set on December 3, 2019 at the plaintiffs' behest.

[2] The motion proceeded before me based on written arguments alone. I made a commitment to counsel to publish those reasons before the end of July in order to allow them as much time as possible to complete their trial preparations.

Decision

[3] I am dismissing the motion. My reasons follow.

Circumstances Leading to this Motion

[4] The first pre-trial conference in this matter proceeded at the plaintiffs' behest on April 10, 2019. Despite the protestations of the plaintiffs' counsel that the matter was ready for trial, I screened the matter out as it was abundantly clear that disclosure and production would take many months before multiple rounds of examinations for discovery could be scheduled, never mind concluded. Without the defendants, who were all represented by different counsel, having a sense of the case they had to meet, I was not prepared to take wild guesses as to how much time should be allotted for trial.

[5] At a subsequent pre-trial conference on September 9, 2019 I screened the matter out again, as the matter was not ready for trial. At the third pre-trial conference on December 3, 2019 I yielded to the request of plaintiffs' counsel to set down a two-month trial starting on September 7, 2021. Counsel for the plaintiff were eager to set the matter down for trial and were confident the matter could proceed on time if the pre-trial conference process was aggressively managed.

[6] I expressed misgivings repeatedly during subsequent pre-trial conferences about the ability of the parties to conclude the production of documents and complete examinations for discovery on time. At each pre-trial conference new issues were emerging that would complicate the trial process rather than simplify it. As early as the third pre-trial conference (December 3, 2019) I pressed the parties to be ready to discuss their witness lists and the trial schedule, but the parties could not do that with all of the unresolved "moving parts" related to the production of thousands of documents and examinations for discovery, undertakings and re-examinations.

[7] On September 9, 2020, a fourth pre-trial conference was held. The parties discussed the discoveries that had taken place over the summer and a schedule for the completion of the plaintiffs' undertakings. There was also a discussion surrounding a potential motion for security for costs and a potential summary judgment motion. Counsel for the plaintiffs did not raise the potential of calling expert witnesses at the upcoming trial.

[8] A fifth pre-trial conference was held on October 19, 2020. Trial dates were now less than a year away and the topic of expert witnesses was canvassed. In

paragraph 3.5 of my Memorandum of that pre-trial conference I made the following Order:

> Plaintiffs' Experts
>
> Mr. Toyne will call Jennifer Keesmat as an expert at trial, but if he intends to call other experts he must give notice of his intention to do so and identify the proposed expert **no later than November 13, 2020.** Failing that I will not permit the testimony of the proposed expert.

Why is this Happening?

[9] About seven months prior to trial I presided over the sixth pre-trial conference in this matter. I ordered that the plaintiffs produce the report of Ms. Keesmat by March 31, 2021, failing which she should not be entitled to testify in an expert capacity at trial. Plaintiffs' counsel did not breathe a word about any other expert or extending the explicit deadline of November 13, 2020 as to any expert reports that had long since passed.

[10] A seventh pre-trial conference was held on May 14, 2021, when the trial dates were less than four months away. The plaintiffs had not tendered any expert evidence from Ms. Keesmat and there was a discussion surrounding a motion for non-suit contemplated by the defendants, given the plaintiffs' failure to tender any expert evidence on the issue of damages. The plaintiffs made no reference whatsoever as to any other expert report and in fact, made a specific point of mentioning that damages could be proven ***without*** an expert report. In fact, counsel for the plaintiffs suggested that difficulty in assessing damages did not make it impossible for the court to award damages without expert evidence.

[11] On June 4, 2021, some three months before the trial was set to commence, counsel for the plaintiffs first provided counsel for the defendants notice that they had ordered an expert report from BDO Canada LLP (the "BDO Report") as to damages. At the time of the eighth pre-trial conference on June 18, 2021 the BDO Report had not yet been produced. Counsel subsequently confirmed the BDO Report is over 100 pages and purports to be an economic-loss report that quantifies the plaintiffs' damages between $34,987,545 and $42,548,677.

The Law

[12] Rule 53.03(1) of the ***Court of Queen's Bench Rules***, Man. Reg. 553/88 ("***Queen's Bench Rules***"), requires the disclosure of expert reports at the pre-trial stage. Failing disclosure at the pretrial stage, ***Queen's Bench Rule*** 53.03(3) precludes the admission of expert reports, "*except with leave of the trial judge*."

[13] The test for leave as to the admission of expert reports is set out as follows in ***Queen's Bench Rule*** 53.09(e):

> EVIDENCE ADMISSIBLE ONLY WITH LEAVE
>
> 53.09 Where evidence is admissible only with leave of the trial judge under,
>
> . . .
>
> (e) subrule 53.03(3) (failure to serve expert's report); or
>
> . . .
>
> leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.
>
> [Emphasis added]

[14] There are few cases in Manitoba on the test for leave under ***Queen's Bench Rule*** 53.09(e) and it is instructive to look to the case law in Ontario, which has a substantially similar rule.

Onus

[15] ***Shaw-Vanderholst v. Azzopardi***, 2016 ONSC 6895 (CanLII), places the onus on the responding party and not the moving party in leave motions in cases such as this. The prejudice to be proven by the responding party is of the kind for which costs will not be an adequate answer. In the alternative, the responding party must prove the delay will be more than what would be reasonable in the circumstances (at para. 33).

[16] I agree with this application of the onus, because I am struck by the words "*shall be granted*" that are used in ***Queen's Bench Rule*** 53.09. The wording of the rule itself suggests that I must grant leave it if is requested unless there is proof of prejudice or undue delay. It makes sense, in my view, to place the burden of excluding probative and relevant evidence on the responding party and not the moving party. (See ***Gardner (Litigation Guardian of) v. Hann***, 2011 ONSC 3350, at para. 14.)

Other Key Principles in Leave Motions

[17] In ***Shaw-Vanderholst***, Mullins J., quoting from the decision in ***Gardner***, framed the question for trial judges, at para. 29, as:

> [29] …
> … whether in all of the circumstances and in order to ensure a fair adjudication of the matters before the Court it is in the interests of justice to allow the evidence in.

[18] Another key principle set out in ***Shaw-Vanderholst***, at para. 31, is framed this way:

> [31] Relevant and probative evidence should be admitted.
>
> [A]ny time a Court excludes relevant evidence the Court's ability to reach a just verdict is compromised. Relevant evidence should not be excluded on technical grounds, such as lack of timely delivery of a report, unless the Court is satisfied that the prejudice to justice involved in receiving the evidence exceeds the prejudice to justice involved in excluding it: Hunter v. Ellenberger (1998), 25 C.P.C. (2d) 14 (Ont. S.C. (H.C.)), at para. 7.

[19] In ***Knock v. Dumontier et al***., 2006 MBCA 99 (CanLII), the Manitoba Court of Appeal teaches, at para. 57, that:

> 57 In any event, the key focus to the application of Queen's Bench Rule 53.03 is to ensure that a party is not unfairly taken by surprise by expert evidence on a point that could not have been anticipated. See Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham (2000), 2000 CanLII 16946 (ON CA), 51 O.R. (3d) 97 at para. 38 (C.A.). …

Analysis

[20] The pre-trial conference regime in Manitoba is governed by ***Queen's Bench Rule*** 50. As expressly indicated in Rule 50.01(2), pre-trial management is intended to facilitate the most expeditious determination or disposition of an action possible by having a judge manage the pre-trial conduct of an action. This is consistent with the general principles guiding the interpretation of the ***Queen's Bench Rules***, namely that the rules "… *shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits*."

[21] My responsibility as the pre-trial judge is to manage the issues in dispute in an "expeditious manner" in order to achieve the objective set out in Rule 50.01(2). My authority to issue binding pre-trial orders under Rule 50.05(3) allows me to exercise my

responsibility "… *to facilitate the just, most expeditious and least expensive determination or disposition of an action*." The broad range of the kinds of orders I can issue as a pre-trial judge includes setting deadline dates for the exchange of expert reports under Rule 50.05(4)(g). This is exactly what I ordered in my Pre-Trial Conference Memorandum No. 5 and yet the plaintiffs are bringing this motion to allow an expert report, as if that Order was never made. The argument advanced by the plaintiffs is that the deadline I imposed is subject to Rule 53.09.

[22] I do not accept the argument advanced by the plaintiffs that the principles applicable to the interpretation of Rule 53.09 override the Order I made under Rule 50.05(4). My Order containing the deadline for the disclosure and production of expert reports was not some kind of vague recommendation or suggestion. It was and is a binding Order that is not subsumed by the principles relevant to the interpretation of Rule 53.09.

[23] The plaintiffs never objected to the deadline I imposed or asked for an extension. In fact, they indicated as late as the seventh pre-trial conference that they could prove their case for damages without expert evidence. The plaintiffs even asked (and I agreed) to set a motion seeking a bifurcated trial of this action, so that it could proceed as to liability alone and adjourn the issue of damages to a future unspecified date. The plaintiffs subsequently abandoned this motion.

[24] I am satisfied that it would be fundamentally unjust and highly prejudicial to the defendants to somehow pretend my Order setting a deadline date for the disclosure of

expert witnesses and any subsequent expert reports was never made and that it is not binding on the plaintiffs.

[25] In light of my decision, a detailed analysis of the principles relevant to the late admission of expert reports under Rule 50.03 is not necessary. But if I had to complete such an analysis, I would conclude that the defendants had met their onus prohibiting the late filing of the BDO Report.

[26] The delay in the plaintiffs' disclosure of the fact that they were contemplating the production of an expert report and then releasing it at the eleventh hour prior to trial reeks of trial by ambush. The plaintiffs are seeking leave to file an 118-page, economic-loss report quantifying damages in a range of $34,987,545 and $42,548,677 a mere eight weeks prior to the commencement of a two-month trial. This late-breaking disclosure is being made despite the fact that the plaintiffs filed their statement of claim in 2018 and alleged they were ready for trial at the very first pre-trial conference in 2019 when they clearly were not. My Order at the fifth pre-trial conference, demanding that the plaintiff disclose all of their expert witnesses by November 13, 2020, was part of an effort on my part to avoid the fundamental unfairness to the defendants of having to respond to a potential expert witness at the last minute in a complicated trial.

[27] The ***Queen's Bench Rules*** are intended to avoid the kind of fundamental unfairness and injustice that arises from trial by ambush. It stretches my credulity past its breaking point that the request for the creation of an expert report that is as extensive as the BDO Report was not contemplated well in advance of the seventh pre-trial conference. This is not the kind of report that takes a few weeks to prepare, yet counsel

for the plaintiffs made no mention of it while the preparation of the BDO Report was in progress.

[28] Forcing the defendants to retain an expert to respond to the BDO Report at this late stage would not only be extremely costly, but impossible in practical terms given that it is now the summer vacation season and the pool of available experts on this kind of complex subject area is likely limited.

[29] It would also force the defendants to upend their pre-trial preparation schedules on the eve of trial. It seems to me that the plaintiffs have made a calculated decision to either force the defendants to seek an adjournment, which they have thus far declined to do, or to gain a tactical advantage by forcing the defendants to proceed to trial and deal with the BDO Report as best they can without adequate time to prepare. I cannot countenance these kinds of dubious tactics by the plaintiffs to gain an unfair advantage in the litigation process.

Conclusion

[30] The plaintiffs are bound by my Order excluding expert reports submitted past the deadline date I imposed. If I am wrong on that point, I am satisfied the defendants have satisfied their onus that the admission of the BDO Report into evidence would constitute a fundamental unfairness to them. It is a surprise attack made in defiance of my Order that would create the kind of prejudice that could not be compensated by an order of costs. Adjourning a trial at this late date, after the defendants have invested enormous resources in preparing for trial, would cause undue delay in the conduct of the trial.

[31] The plaintiffs' motion is dismissed. Costs will be in the cause, but in any event of the cause.

REMPEL J.