Canderel Ltd. v. Canada, [1994] 1 FC 3, 1993 CanLII 2990 (FCA)

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canderel ltd. *v.* canada

A-421-93

Her Majesty the Queen (*Appellant*)

v.

Canderel Limited (*Respondent*)

Indexed as: Canderel Ltd. v. Canada (***C.A.***)

Court of Appeal, Desjardins, Décary and Létourneau JJ.A."Montréal, August 3, 4 and 5, 1993.

Practice " Pleadings " Amendments " Appeal from denial of motion for leave to amend amended reply to notice of appeal for fourth time " Where delay in bringing motion too great, where new issue raised, and where amendment could lead to recall of all witnesses and experts, amendment refused " Amendment must be relevant, must not result in injustice not compensable by award of costs, and must serve interests of justice (legitimate expectation of courts, parties litigation coming to end).

The issue in the case, as agreed between the parties, was whether tenant inducement payments were deductible when made, as claimed by the respondent, or whether they should be amortized over the term of the lease, as determined by Revenue Canada (the timing issue). On the fifth day of the trial before the Tax Court of Canada, the Crown presented a motion for leave to amend its reply to the notice of appeal for the fourth time. The proposed amendment raised a new issue. The motion was dismissed on the grounds that the timing of the motion was not proper and that it could have been brought much earlier. There was an implicit rejection of the appellant's allegation of surprise to explain the delay in bringing the motion. This was an appeal from that interlocutory judgment.

Held, the appeal should be dismissed.

It is well established that the Court of Appeal cannot intervene, in the absence of an error of law, with a discretionary order of a judge.

With respect to amendments, the general rule is that an amendment should be allowed at any stage of an action for the purpose of determining the real question in controversy between the parties,

provided, notably, to do so 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 the interests of justice (courts and parties having a legitimate expectation in the litigation coming to an end).

In the case at bar, the real question in controversy had been known to both parties and agreed upon by them long before the trial began. All the facts were disclosed before the beginning of the trial. There was no justification for waiting until the fifth day of the trial to bring the motion for leave to amend. Furthermore, the amendment could not stand with the admission by counsel for the appellant that the expenses were not on account of capital, and no leave was sought to withdraw that admission. While an admission may be withdrawn with leave of the Court, the motion to amend cannot be considered an implicit motion for leave to withdraw the admission.

On the facts of this case, it was open to the Trial Judge to find that the proposed amendment, in the circumstances, manner and time in which it was sought, by its very nature and by its impact on a trial that was coming to an end was an abuse of process.

statutes and regulations judicially considered

Federal Court Rules, C.R.C., c. 663, R. 420.

Income Tax Act, S.C. 1970-71-72, c. 63, s. 18(1)(*b*).

Tax Court of Canada Rules (General Procedure), SOR/90-688, R. 54.

cases judicially considered

applied:

The Queen v. Aqua-Gem Investment Ltd. (1993), 93 DTC 5080; 1993 CanLII 2939 (FCA), 149 N.R. 273 (F.C.A.); *The Queen v. Murphy and ABC Steel Building Ltd.* (1988), 88 DTC 5028; 99 N.R. 75 (F.C.A.); *Birkett v. James*, [1978] A.C. 297 (H.L.); *Meyer v. Canada* (1985), 62 N.R. 70 (F.C.A.); *Glisic v. Canada*, [1988] 1 F.C. 731; (1987), 80 N.R. 39 (C.A.); *Steward v. North Metropolitan Tramways Company* (1886), 16 Q.B.D. 556 (C.A.); *Ketteman v. Hansel Properties Ltd.*, [1988] 1 All E.R. 38 (H.L.); *Continental Bank Leasing Corporation et al. v. The Queen* (1993), 93 DTC 298 (T.C.C.).

referred to:

Northwest Airporter Bus Service Ltd. v. The Queen and Minister of Transport (1978), 23 N.R. 49 (F.C.A.); *The Queen v. Special Risks Holdings Inc.*, [1984] CTC 563; (1984), 84 DTC 6215 (F.C.A.); affg [1984] CTC 71; (1983), 84 DTC 6054 (F.C.T.D.); *Francoeur v. Canada*, [1992] 2 F.C. 333 (C.A.); *Johnston v. Law Society of Prince Edward Island* (1988), 69 Nfld. & P.E.I.R. 168; 211 A.P.R. 168 (C.A.); *Gardiner v. Minister of National Revenue*, 1963 CanLII 89 (SCC), [1964] S.C.R. 66; (1963), 63 DTC 1219; *Vineland Quarries & Crushed Stone Ltd. v. M.N.R.*, [1970] C.T.C. 12; (1970), 70 DTC 6043 (Ex. Ct.).

APPEAL from an interlocutory judgment of the Tax Court of Canada ([1993] T.C.J. 298 (QL)) dismissing the appellant's motion, on the fifth day of trial and raising a new issue, for leave to amend her amended reply to the notice of appeal for a fourth time. Appeal dismissed.

counsel:

Alnasir Meghji for appellant.

Guy Du Pont and *S. Klar* for respondent.

solicitors:

Deputy Attorney General of Canada for appellant.

Phillips & Vineberg, Montréal, for respondent.

The following are the reasons for judgment of the Court delivered orally in English by

Décary J.A.: This is an appeal from an interlocutory judgment of the Tax Court of Canada [[1993] T.C.J. 298 (QL)] dismissing the appellant's motion for leave to amend her amended reply to the notice of appeal for a fourth time. The motion was made on the fifth day of the trial. The issue until then, as agreed between the parties, was whether tenant inducement payments, which the appellant had admitted to be a current expenditure, were deductible when made, as claimed by the respondent, or whether they should be amortized over the term of the lease, as determined by Revenue Canada (the timing issue). The appellant, through the proposed amendment, wanted to raise for the first time an argument (the capital expenditure issue), which she thus framed:[1]*ftnote[1] A.B., at p. 40.

In the alternative, if this Honourable Court find that the payments of the tenant inducements in question are properly characterized as being on capital account, he submits that no amount in respect thereof may be deducted in computing the Appellant's income by virtue of paragraph 18(1)(*b*) of the *Act* other than those amounts in respect thereof which may be deducted pursuant to paragraph 20(1)(*b)* of the *Act*.

The Trial Judge, in refusing to grant leave to amend, found as follows:[2]*ftnote[2] A.B., at pp. 59-61.

Basically the appeal of Canderel involves the issue of whether tenant inducement payments may be expensed when made, as is claimed, or whether such payments should be amortized over the term of a lease, as is the position of Revenue Canada.

In June of 1990 the appellant was reassessed with reference to the expensing of the payments in 1986 and such reassessment was objected to, subsequently confirmed, and the appeal filed. No mention was made of the payments being characterized on capital account.

The reply made no mention of capital, nor did an amended reply consented to by the appellant. In 1992 in the amended reply reference was made to the company in its financial statements capitalizing the payments and amortizing them over the term of the lease. This however was not the income tax treatment followed by the appellant.

After a status hearing held in August of 1992 the appeal was scheduled to be heard on March 3, 1993 and continuing for a total of three days.

Lists of documents were exchanged, examinations for discovery were held and the original date of March 3, 1993 for the hearing was adjourned so that two motions could be made, one by each party. Of significance at the motions' hearing was that the counsel who appeared for the respondent clearly indicated that the matter would be decided likely on the testimony of the various experts as to which method of expensing the payments was correct. No mention was made that such payments would be considered in whole or in part as capital.

The trial commenced on May 31, 1993 and on the sixth day, after several witnesses were heard, including various experts, this motion was presented to the Court.

It was the opinion of the Court that, given the delay in this motion, it is an abuse of process in that it could have been brought much earlier. The proposed amendment raised a new issue and therefore constituted a new reassessment. Such an amendment at a late stage was considered and refused in the case of *The Queen v. Cecil McLeod* (1990), 90 DTC 6281 (F.C.T.D.).

The timing of the amendment was not proper. It could lead to a recall of all the witnesses and the experts to consider in their testimony the proposed change. A similar situation was held to be an abuse of process in *Special Risks Holdings Inc. v. The Queen* (1984), 84 DTC 6054 (F.C.T.D.), where Walsh J., said at page 6057:

" . . . no proceeding should be entertained, even if it might be found to have some relevance, when it seeks the introduction of material, which the parties could have sought to introduce many months earlier, and which if granted would have the effect of preventing the action from proceeding. For this reason alone therefore the motion is an abuse of the process of the Court and cannot be entertained."

This judgment was upheld by the Federal Court of Appeal.

While it may be argued that the amendment could be remedied to the appellant by way of costs such does not override the decision in the *Special Risks Holding Inc.*, case (*supra*).

The motion is dismissed, with costs, to the appellant and he is allowed to submit all documents which form the basis of his objection to the motion.

We may add that on May 16, 1989, the Minister of National Revenue (the Minister) had conceded that the payments in issue were deductible on account of income and were not eligible capital expenditures as that expression is defined in the *Income Tax Act* [S.C. 1970-71-72, c. 63] (the Act). He had recognized that the issue was not one of deductibility, but one of timing of the deduction. Later, on February 14, 1990, the Minister's auditor had indicated in his report that [translation] "The payments are deductible, but they should be amortized over the term of the lease, not deducted in the year they are made".[3]*ftnote[3] A.B., at p. 102. Further, on August 18, 1992, during the examination for discovery on behalf of the Minister of his own auditor, the auditor admitted that there was an agreement between Revenue Canada and the taxpayer that the inducement payments were expenses incurred for the purposes of gaining or producing income from the taxpayer's business and that there was no issue here of these expenses being on account of capital within the meaning of paragraph 18(1)(*b*) of the Act. Finally, on May 31, 1993, the first day of the trial, counsel for the appellant stated as follows:[4]*ftnote[4] Supp. A.B., at p. 41.

Now, the issue at the end of the day . . . , of course is, when you compute your profits under S. 9: what method of computing most nearly accurately reflects the profit for the year? That's the ultimate legal question in respect of any dispute under the *Income Tax Act* within the confines of 9(1).

At the beginning of the trial, counsel for the respondent made a rather extensive opening statement wherein he outlined respondent's case to the Court. The statement contained various allegation of fact upon which the respondent intended to rely in advancing its case or refuting the appellant's case. After hearing the outline of the respondent's case, counsel for the appellant objected to the admission of any evidence in respect of various facts outlined in the statement on the basis that a substantial number of these facts had not been pleaded in the notice of appeal. In particular, counsel objected to the admission of any evidence relating to Canderel's impairment of capital and Canderel's reputation. The Trial Judge dismissed the objection and the appellant did not appeal his ruling.

In his submissions, counsel for the appellant had said the following:[5]*ftnote[5] Supp. A.B., at p. 42.

Now at this date, in my respectful submission, this evidence should either not go in at all, or if it goes in, we should have time to examine it and, if necessary, ask questions in respect of it in the normal course of civil procedure by way of examination for discovery.

He did not intimate that he would seek leave to amend in order to add a new issue (the capital expenditure issue), nor did he ask to examine for discovery some witnesses with respect to this allegedly new evidence. He was satisfied with not appealing the ruling dismissing his objection. The trial, therefore, started and went on for four days on the very issue (the timing issue) that had been agreed upon by counsel. Counsel for the appellant conceded before us that the allegedly new evidence could have been brought by the respondent in support of the position it was taking with respect to the timing issue and was thus not necessarily related to the capital expenditure issue. One must assume that the Trial Judge in dismissing the objection found the allegedly new facts to be relevant to the timing issue, the only issue which was then before him.

On the fifth day of the trial, counsel for the appellant came up with his proposed amendment. He made his request on the basis that the respondent had led evidence in respect of various allegations of fact made in the opening statement that had not been pleaded and which, if accepted by the Court, might properly lead to the legal result that the payments were capital in nature.

In dismissing the motion to amend, the Trial Judge found, as we have seen, that the timing of the motion was "not proper" and that "it could have been brought much earlier". Implicit in that finding, in our view, is the rejection of the appellant's allegation of surprise to explain why her motion was not made at an earlier time. There is, indeed, ample evidence to support this implicit finding of fact that the allegedly new evidence appeared in or transpired from the evidence already in the record. Suffice it to refer to the respondent's representations made in April 1989 to the Minister, to the examination for discovery of a representative of the respondent in August 1992, to the expert reports and to the further discovery by the appellant of a representative of the respondent five days before the date set for the beginning of the trial. Naivety and passivity should not be confused with lack of knowledge.

This Court, in *The Queen v. Aqua-Gem Investment Ltd*,[6]*ftnote[6] (1993), 93 DTC 5080 (F.C.A.) at p. 5096. has reaffirmed that it "cannot intervene in the absence of an error of law" with a discretionary order of a judge. MacGuigan J.A. went on to quote from *The Queen v. Murphy and ABC Steel Building Ltd.* (1988), 89 DTC 5028 (F.C.A.), at page 5029, where Mahoney J.A. had applied the principles as stated by Lord Diplock in *Birkett v. James*, [1978] A.C. 297 (H.L.) at page 317:

. . . an appellate court ought not to substitute its own "discretion" for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either . . . where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account;

With respect to amendments, it may be stated, as a result of the decisions of this Court in *North- west Airporter Bus Service Ltd. v. The Queen and Minister of Transport*;[7]*ftnote[7] (1978), 23 N.R. 49 (F.C.A.). *The Queen v. Special Risks*

Holdings Inc.;[8]*ftnote[8] [1984] CTC 563 (F.C.A.); affg [1984] CTC 71 (F.C.T.D.). *Meyer v. Canada*;[9]*ftnote[9] (1985), 62 N.R. 70 (F.C.A.). *Glisic v. Canada*[10]*ftnote[10] [1988] 1 F.C. 731 (C.A.). and *Francoeur v. Canada*[11]*ftnote[11] [1992] 2 F.C. 333 (C.A.). and of the decision of the House of Lords in *Ketteman v. Hansel Properties Ltd*[12]*ftnote[12] [1988] 1 All ER 38 (H.L.). which was

referred to in *Francoeur*, that 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 the interests of justice.[13]*ftnote[13] Rule 54 of the *Tax Court of Canada Rules (General Procedure)*, [SOR/90-688] which applies in this instance, is not substantially different from Rule 420 of the *Federal Court Rules* [C.R.C., c. 663].

As regards injustice to the other party, I cannot but adopt, as Mahoney J.A. has done in *Meyer*,[14]*ftnote[14] *Supra*, note 9 at p. 72. the following statement by Lord Esher, M.R. in *Steward v. North Metropolitan Tramways Company* (1886), 16 Q.B.D. 556 (C.A.), at page 558:

There is no injustice if the other side can be compensated by costs: but, if the amendment will put them into such a position that they must be injured, it ought not to be made.

and the statement immediately following:

And the same principle was expressed, I think perhaps somewhat more clearly, by Bowen, L.J., who says that an amendment is to be allowed "whenever you can put the parties in the same position for the purposes of justice that they were in at the time when the slip was made."

To apply that rule to the present case; if the amendment is allowed now, will the plaintiff be in the same position as if the defendants had pleaded correctly in the first instance?

While written in a slightly different context, the following remarks by Stone J.A. in *Glisic*[15]*ftnote[15] *Supra*, note 10, at p. 740. are particularly relevant:

In my view, a plaintiff ought not to be left to guess what provisions, in addition to those expressly pleaded, may be relied upon at trial by way of defence. The record suggests that the respondent was aware of this possible ground of defence shortly after the seizure occurred . . . . Had it been properly raised prior to commencement of the trial, the appellant would have been able to prepare his case accordingly and, if he thought fit, to retain counsel. On the other hand, had it been raised earlier in the trial itself, before the parties had closed their respective cases, its propriety could have been ruled upon in good time and the learned Trial Judge could have determined whether any prejudice to the appellant might result.

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 well be seen as frustrating the course of justice.[16]*ftnote[16] See *Johnston v. Law Society of Prince Edward Island* (1988), 69 Nfld. & P.E.I.R. 168 (C.A.); *Glisic v. Canada, supra*, note 10. The principles were in our view best summarized by Lord Griffiths, speaking for the majority, in *Ketteman v. Hansel Properties Ltd*:[17]*ftnote[17] *Supra*, note 12, at p. 62.

This was not a case in which an application had been made to amend during the final speeches and the court was not considering the special nature of a limitation defence. Furthermore, whatever may have been the rule of conduct a hundred years ago, today it is not the practice invariably to allow a defence which is wholly different from that pleaded to be raised by amendment at the end of the trial even on terms that an adjournment is granted and that the defendant pays all the costs thrown away.

There is a clear difference between allowing amendments to clarify the issues in dispute and those that permit a distinct defence to be raised for the first time.

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. [My emphasis.]

and by Bowman T.C.J. in *Continental Bank Leasing Corporation et al. v. The Queen*:[18]*ftnote[18] (1993), 93 DTC 298 (T.C.C.), at p. 302.

. . . I prefer to put the matter on a broader basis: whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied. The tests mentioned in cases in other courts are of course helpful but other factors should also be emphasized, including the timeliness of the motion to amend or withdraw, the extent to which the proposed amendments would delay the expeditious trial of the matter, the extent to which a position taken originally by one party has led another party to follow a course of action in the litigation which it would be difficult or impossible to alter and whether the amendments sought will facilitate the court's consideration of the true substance of the dispute on its merits. No single factor predominates nor is its presence or absence necessarily determinative. All must be assigned their proper weight in the context of the particular case. Ultimately it boils down to a consideration of simple fairness, common sense and the interest that the courts have that justice be done.

While it is true that leave to amend may be sought at any stage of a trial, it is safe to say that the nearer the end of the trial a motion to amend is made, the more difficult it will be for the applicant to get through both the hurdles of injustice to the other party and interests of justice. We note that in all the tax cases referred to by counsel for the appellant, the motion to amend had been made before trial or was

made at trial but was to be expected by the opposing counsel during trial.[19]*ftnote[19] In *Gardiner v. Minister of National Revenue*, 1963 CanLII 89 (SCC), [1964] S.C.R. 66, the amendment was sought after examination for discovery. In *Continental Bank Leasing Corporation et al. v. The Queen, supra* note 18, it was sought before the examination for discovery of an officer of the Crown. In *Meyer v. Canada, supra*, note 9, the opposing counsel had been aware for three months before the trial began that an amendment to the statement of claim would likely be sought. In *Vineland Quarries & Crushed Stone Ltd. v. M.N.R.*, [1970] C.T.C. 12 (Ex. Ct), the amendment was sought before trial.

In the case at bar, the real question in controversy (the timing issue) had been known to both parties and agreed upon by them long before the trial began. Facts enabling counsel for the appellant to try to characterize the payments on capital account were in evidence well before the trial began. Even when the allegedly undisclosed facts were disclosed to counsel just prior to the beginning of the trial, counsel did not then seek leave to amend and waited until ten o'clock on the night of the fourth day of the trial before he raised the issue with counsel for the respondent. By then, of course, witnesses, including expert witnesses, had already testified, and discoveries had been held. It was the view of the Trial Judge that the amendment "could lead to a recall of all the witnesses and the experts to consider in their testimony the proposed change.[20]*ftnote[20] A.B., at p. 60.

Furthermore, the proposed amendment, while drafted "in the alternative", is obviously not an alternative argument. The Trial Judge would logically dispose of the capital expenditure issue before disposing of the timing issue. As conceded by counsel for the appellant, the Trial Judge, were he to deal first with the proposed issue as might be expected, would not even be in a position to rule in favour of the appellant on that issue because the appellant had admitted that the expenses were not on account of capital and had not sought leave to withdraw the admission. Counsel recognized, and I quote: "The amendment cannot stand with the admission." He expressed, however, the opinion that the motion to amend implicitly constitutes a motion to withdraw the admission. We cannot agree. The case-law is clear: an admission may be withdrawn, but with leave of the Court, and we simply cannot find in this instance that leave was implicitly sought, assuming for the sake of discussion that it could have been so.

With an admission on file which is inconsistent and irreconcilable with the proposed amendment, what will the Trial Judge and the respondent do if the proposed amendment is granted? On what basis will the respondent prepare itself for the continuation of the trial? How can it rely on an admission the appellant obviously intends to ignore? How can an alternative argument be made when such argument is contrary to admissions agreed upon by both parties and upon which the trial proceeded and which have not been withdrawn? Surely, such an embarrassing pleading constitutes an "injustice" within the meaning of the rule respecting amendments and does not in any way help in determining the real question in controversy.

On the facts of this case, it was therefore open to the Trial Judge to find that the proposed amendment, in the circumstances, manner and time in which it was sought, by its very nature and by its impact on a trial that was coming to an end was an abuse of process. 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.

The appeal shall be dismissed with costs.