Federal Court  Cour fédérale

Date: 20210525

Docket: T-675-19

Citation: 2021 FC 486

Ottawa, Ontario, May 25, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

THERESE A. ONISCHUK
WORLD PARK FOTO

Plaintiffs

and

CANADA REVENUE AGENCY, EXELBY & PARTNERS LTD.,
OFFICE OF SUPERINTENDENT OF BANKRUPTCY,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA,
ATTORNEY GENERAL FOR CANADA,
GARY HOWITT, R. DONALD WILSON, LAURA LEE,
AMY FORCE, PAT CHMILAR, JENNIFER YOUNG,
DAMEN GREWAL, JULISA CHENG, AL MIYAI, MEGAN KOWALCHUK,
EVA GOLDSTEIN, CHARMAINE MARTIN, JONATHAN LEE,
WILLIAM JAMES, GEORGE BODY, JOHN DOE 1, JANE DOE 1,
JOHN DOE 2, JANE DOE 2, JOHN DOE 3, JANE DOE 3

Defendants

ORDER AND REASONS

[1] Ms. Onischuk brought an action against several defendants. She now appeals two decisions of a prothonotary. The first decision was a case management order setting out the steps

leading to the hearing of a motion to strike and prohibiting other steps from being taken before a decision was made on that motion. By the second decision, the prothonotary struck out the statement of claim and dismissed the action, as it did not show a reasonable cause of action and constituted an abuse of process.

[2] I am dismissing the appeals. Prioritizing the motion to strike was well within the prothonotary's case management powers. I find no error in the prothonotary's findings that the statement of claim did not show a reasonable cause of action and constituted an abuse of process. Indeed, the prothonotary chose an appropriate manner of securing an expeditious determination of the case that is fair to both parties.

I. Background

[3] The plaintiff, Ms. Therese Onischuk, or her husband, Mr. Daniel Onischuk, were, at various times, the owners of a sole proprietorship called "World Park Foto." In 2012 or 2013, they had a dispute with the Canada Revenue Agency [CRA] regarding their tax liability related to their business. Ms. Onischuk alleges that, because of the CRA's collection efforts, she and her husband were forced to file for bankruptcy.

[4] In 2017, Mr. and Ms. Onischuk were declared vexatious litigants in the Alberta courts: *Onischuk v Edmonton (City)*, 2017 ABQB 647; *Onischuk (Re)*, 2017 ABQB 659.

[5] In 2019, Ms. Onischuk and World Park Foto initiated the present action in damages against Her Majesty the Queen and various organizations and employees of the federal

government [the federal defendants], as well as their former trustee in bankruptcy, a firm called Exelby & Partners Ltd., and two of its employees [the Exelby defendants]. She claims various heads of damages totaling more than $6 million.

[6] My colleague Prothonotary Kathleen Ring was designated as the case management judge. It is unnecessary to provide a detailed procedural history of the action. The following facts are sufficient to understand the context of the two decisions that are being appealed.

[7] On July 7, 2020, Prothonotary Ring held a case management conference. Several issues were discussed, including whether the action was properly designated as a simplified action, which version of the statement of claim was the current one, whether it was possible to amend the statement of claim, in particular to add new parties to the proceeding, and the timing of various motions. On July 13, 2020, Prothonotary Ring issued a case management order that is the subject of the plaintiff's first appeal. This appeal focuses on the Prothonotary's decision to prioritize motions to strike brought by the defendants, to set a calendar for these motions and to prohibit the parties from taking any other steps in the action until the disposition of these motions.

[8] Two motions to strike the actions were then filed, one by the federal defendants and the other by the Exelby defendants. By judgment issued on January 4, 2021, Prothonotary Ring struck the statement of claim in its entirety without leave to amend. She first noted that the action against the Exelby defendants and the Office of the Superintendent in Bankruptcy was a nullity because Ms. Onischuk did not obtain leave, as required by section 215 of the *Bankruptcy and*

Insolvency Act, RSC 1985, c B-3. She then found that the statement of claim did not disclose a reasonable cause of action, because it did not describe a coherent set of facts giving rise to a recognizable cause of action. She also analyzed certain legal concepts that Ms. Onischuk referred to in her statement of claim and found that the facts necessary to substantiate these claims were lacking. For the same reasons, she found that the statement of claim was vexatious. Lastly, she found that the statement of claim constituted an abuse of process, as it was an indirect attack on tax assessments that can only be challenged in the Tax Court of Canada as well as an attempt to relitigate issues that were the subject of an action that Ms. Onischuk initiated in the Alberta Court of Queen's Bench and that was struck out by that Court. As she found that the statement of claim was "beyond redemption," she struck it out without leave to amend.

II. Scope of Appeal and Standard of Review

[9] An appeal pursuant to rule 51 is directed at a specific order made by a prothonotary. Where a prothonotary makes several orders in the course of case management, each one may be appealed separately. Thus, if no appeal is brought against an order, the order stands and cannot later be put in question in the context of the appeal of a subsequent order. Moreover, "the general rule is that appeals from orders of prothonotaries are to be decided on the basis of the material that was before the prothonotary": *Shaw v Canada*, 2010 FC 577 at paragraph 8; see also *Papequash v Brass*, 2018 FC 325 at paragraph 10.

[10] In *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 FCR 331 [*Hospira*], the Federal Court of Appeal held that the standard of review established by the Supreme Court of Canada in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2

SCR 235, applies to appeals from decisions of prothonotaries. It summarized this standard as follows, at paragraph 66:

> …with respect to factual conclusions reached by a trial judge, the applicable standard was that of palpable and overriding error. […] with respect to questions of law and questions of mixed fact and law, where there was an extricable legal principle at issue, the applicable standard was that of correctness.

[11] Ms. Onischuk disagrees with this. She argues that *Hospira* and *Housen* were wrongly decided and that the standard of review that they establish opens the door to injustice. *Housen* and *Hospira*, however, are decisions of the Supreme Court of Canada and of a five-judge panel of the Federal Court of Appeal, respectively. They are binding on me. I am not at liberty to depart from them. I cannot entertain Ms. Onischuk's submissions in this regard.

III. Analysis

[12] As I mentioned above, these two appeals pertain only to the orders made by Prothonotary Ring on July 13, 2020 and January 4, 2021. Ms. Onischuk, however, seeks to indirectly challenge other orders made by the prothonotary, in particular the refusal to allow Mr. Onischuk, who is not a lawyer, to represent her. She also claims other relief that has nothing to do with the prothonotary's orders under appeal, including an interlocutory injunction and orders that the Canada Revenue Agency reassess her tax file. I cannot entertain these submissions, which are not properly the subject of the present appeals.

[13] Moreover, Ms. Onischuk attempted to submit evidence that was not before the prothonotary. This evidence is inadmissible and I will not consider it.

A. *Which Motion Goes First?*

[14] In substance, Ms. Onischuk's first appeal pertains to the prothonotary's decision to prioritize the defendants' motions to strike and to prohibit her from taking any other steps in the proceeding until a decision is made on these motions.

[15] The prothonotary's reason for making this order is as follows:

> AND UPON considering the submissions of the parties regarding the sequencing of the interlocutory motions noted above, the Court concludes that it is most expeditious to first determine the motions to be brought by the Defendants because these motions result in a final disposition of the claim if successful;

[16] When considering the issue on appeal, the starting point is the very broad powers granted by rule 385(1) to a prothonotary acting as a case management judge. Under this provision, a prothonotary may:

(a) give any directions or make any orders that are necessary for the just, most expeditious and least expensive determination of the proceeding on its merits;	**a)** donner toute directive ou rendre toute ordonnance nécessaires pour permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible;
(b) notwithstanding any period provided for in these Rules, fix the period for completion of subsequent steps in the proceeding;	**b)** sans égard aux délais prévus par les présentes règles, fixer les délais applicables aux mesures à entreprendre subséquemment dans l'instance;
[…]	[…]

[17] These powers allow the prothonotary to decide which motions will be heard in what order and to set a calendar for the filing of the parties' motion records. They also allow the prothonotary to prohibit the parties from taking other steps while a particular motion is decided.

[18] A motion to strike is a tool that promotes judicial economy by "avoiding burdening the parties and the court system with claims that are doomed from the outset": *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at paragraph 14. By its own nature, it should be brought and disposed of at the earliest possible stage of the proceedings. Moreover, if it is to accomplish its aim of ensuring the efficient use of judicial resources, prothonotaries must have the latitude to prohibit the parties from taking other steps until it is known whether the action survives this preliminary test. Indeed, in similar circumstances, the Federal Court of Appeal dismissed an appeal from a judge's decision to prioritize the hearing of a motion to strike and noted that "It was within the Judge's discretion to determine in what order the motions should be heard": *Badawy v 1038482 Alberta Ltd*., 2019 FCA 150 at paragraph 17.

[19] In this case, the prothonotary exercised her discretion reasonably. Even though her reasons are short, they are sufficient to understand why she made the order and they are compatible with the principles reviewed above.

[20] For the same reasons, the prothonotary did not exercise her discretion unreasonably by denying Ms. Onischuk the opportunity to amend the statement of claim. As I note later in these reasons, the defects of the statement of claim cannot be cured by amendment. Where a statement of claim appears to exhibit defects of this nature, it is entirely reasonable for a case management

judge to direct that a motion to strike be considered first. The plaintiff is not entitled to make the statement of claim a moving target, by making repeated amendments in the hopes of deflecting the motion to strike.

B. *Motion to Strike*

[21] Ms. Onischuk's second appeal is directed at Prothonotary Ring's judgment striking out the statement of claim.

[22] In her written submissions, Ms. Onischuk mainly reiterates allegations of the statement of claim, instead of pointing to errors made by the prothonotary. As a result, many aspects of the prothonotary's decision are not seriously challenged.

[23] After reviewing the statement of claim, the prothonotary's reasons and Ms. Onischuk's submissions on appeal, I conclude that the prothonotary correctly stated the law and made no palpable and overriding error in its application to Ms. Onischuk's claim. I will explain my conclusion by first analyzing the parts of the judgment dismissing the action because Ms. Onischuk did not obtain leave pursuant to section 215 of the *Bankruptcy and Insolvency Act* and because the statement of claim does not show a reasonable cause of action. I will then turn to the part of the judgment that holds that the statement of claim is an abuse of process. Lastly, I will consider whether the prothonotary committed an error when she decided not to grant Ms. Onischuk leave to amend.

(1) Failure to Obtain Leave

[24] Section 215 of the *Bankruptcy and Insolvency Act* reads as follows:

215 Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.	**215** Sauf avec la permission du tribunal, aucune action n'est recevable contre le surintendant, un séquestre officiel, un séquestre intérimaire ou un syndic relativement à tout rapport fait ou toute mesure prise conformément à la présente loi.

[25] The prothonotary struck out the action against the Exelby defendants – who are a "trustee" – and the Office of the Superintendent in Bankruptcy, because Ms. Onischuk does not allege that she obtained the required leave and there is no evidence to that effect. This conclusion is indisputably correct, and Ms. Onischuk does not argue otherwise.

(2) No Reasonable Cause of Action

[26] The prothonotary began this part of her reasons by correctly stating the test for striking out an action, relying on leading cases from the Supreme Court of Canada: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *R v Imperial Tobacco Ltd*, 2011 SCC 42, [2011] 3 SCR 45. She also reviewed relevant case law pertaining to the manner in which the inquiry is to be conducted. In particular, relying on cases such as *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, and *Canada v Harris*, 2020 FCA 124, she noted that a statement of claim may be struck out where the facts supporting the cause of action are not sufficiently described.

[27] She then applied these principles to Ms. Onischuk's statement of claim and found it wanting, as it consisted simply "of a rambling and fragmented narrative of facts, random elements of assorted legal concepts, and bare conclusions, cobbled together in a disjointed manner." She also concluded that the statement of claim failed to disclose the essential elements of the torts of misfeasance in public office, conspiracy and negligence, or facts that could give rise to a claim based on the *Canadian Charter of Rights and Freedoms*.

[28] I fail to see in the prothonotary's decision any incorrect statement of the law or any palpable and overriding error in the application of the law to Ms. Onischuk's statement of claim. I have reviewed the statement of claim and, unfortunately for Ms. Onischuk, the prothonotary gave a fair description of it and properly struck it out.

[29] Ms. Onischuk's submissions on the appeal appear to be a restatement of the facts and issues raised in her statement of claim, interspersed with references to statutory provisions and case law. In her reply, she also provided a three-page summary of the statement of claim. I have read these submissions carefully, but I have not found anything that demonstrates that the prothonotary made an error in her analysis.

[30] In her submissions, Ms. Onischuk repeatedly asserts that the summary dismissal of her action is contrary to rule 3 of the *Federal Courts Rules*, SOR/98-106, which reads as follows:

3. These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceedings on its merits.	**3.** Les présentes règles sont interprétées et appliquées de façon à permettre d'apporter une solution au litige qui soit juste et la plus expéditive et économique possible.

[31] Nothing in rule 3 is incompatible with the summary dismissal of an action by way of a motion to strike. Rule 3 implicitly embodies a principle of proportionality. In *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, the Supreme Court of Canada found that proportionality is not inimical to, and even requires more expeditious processes for the determination of legal claims, and that a full trial is not warranted in all cases. While the case dealt with a motion for summary judgment, the principles the Court laid out equally apply to motions to strike. Insofar as Ms. Onischuk relies on the part of rule 3 that mentions a "determination … on its merits," I would observe that a motion to strike is a determination of the merits of the case, albeit after an abbreviated process. Moreover, nothing in the French version of rule 3, which refers to "*une solution au litige*," suggests that a full trial is warranted in all cases.

[32] Ms. Onischuk also argues that the prothonotary should have allowed her to submit evidence to buttress her arguments in respect of the motions to strike. This is incorrect. Rule 221(2) states that no evidence shall be heard where a motion to strike is based on the fact that the statement of claim discloses no reasonable cause of action.

(3) Abuse of Process

[33] Although the foregoing is sufficient to dispose of the matter, the prothonotary also struck out Ms. Onischuk's statement of claim because it is an abuse of process. The reason for doing so was that Ms. Onischuk was attempting to relitigate issues that were the subject of an action instituted by Ms. Onischuk in the Alberta Court of Queen's Bench or that should have been the subject of proceedings in the Tax Court of Canada.

[34] In this regard, Ms. Onischuk argues that dismissal for abuse of process is a discretionary remedy and that proceedings ought to be allowed to continue when the previous proceedings were "tainted," as were the proceedings in the Alberta Court of Queen's Bench.

[35] Even assuming Ms. Onischuk is right in saying that the protonothary had discretion, I am of the view that she made no palpable and overriding error in the exercise of that discretion. In particular, Ms. Onischuk did not provide any factual basis for her assertion that the proceedings in Alberta were tainted, other than the fact that the outcome was not to her liking. As far as one can tell from the statement of claim in the present proceedings and the judgments rendered by the Alberta Court of Queen's Bench, Ms. Onischuk is complaining about the same facts and issues in both courts. Moreover, as the prothonotary noted, the statement of claim makes numerous references to the proceedings in Alberta.

[36] The protonothary's decision regarding matters that should have been dealt with under the *Income Tax Act*, RSC 1985, c 1 (5th suppl), and eventually by way of an appeal to the Tax Court

of Canada, was consistent with the decision of the Federal Court of Appeal in *Canada v Roitman*, 2006 FCA 266 [*Roitman*]. Ms. Onischuk argues that *Roitman* has been overtaken by a subsequent decision of the Supreme Court of Canada, *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62, [2010] 3 SCR 585 [*TeleZone*]. As I explained in *M.S. v Canada*, 2020 FC 982 at paragraph 69, this is simply not the case. *TeleZone* did not involve legislation, such as the *Income Tax Act*, that sets out an exclusive process for settling a category of disputes. *TeleZone* merely stands for the proposition that it is not necessary to bring an application for judicial review against a decision before bringing an action in damages with respect to the consequences of that decision.

(4) Leave to Amend

[37] Having struck out the statement of claim, the prothonotary went on to consider whether she should grant Ms. Onischuk leave to amend. She considered the relevant case law, in particular *Simon v Canada*, 2011 FCA 6, and correctly stated that the test is whether "the defects in the claim can potentially be cured by amendment." On this basis, she found that the statement of claim was affected by radical defects and that it was "beyond redemption."

[38] In my view, the prothonotary made no palpable and overriding error in the application of the rule she correctly stated. It bears repeating that she found the statement of claim to be "a rambling and fragmented narrative of facts, random elements of assorted legal concepts, and bare conclusions, cobbled together in a disjointed manner." It is difficult to imagine that defects of this magnitude can be cured by amendment.

C. *Allegations of Procedural Unfairness*

[39] In both appeals, Ms. Onischuk alleges that various directions given by Prothonotary Ring gave rise to procedural unfairness. In particular, she complains that the prothonotary refused to extend the page limit for her memorandum of facts and law, extend the time limit for the submission of her motion record and scheduled the hearing of the motion to strike at a time inconvenient for her.

[40] In my view, none of these allegations gives rise to procedural unfairness. The complexity of the case is not such that a lengthier memorandum of facts and law was warranted. The request for an extension of time appears to relate to Ms. Onischuk's desire to submit large amounts of evidence in her motion record. As I mentioned above, however, evidence is not admissible regarding the absence of a reasonable cause of action, which was the main ground invoked by the defendants. I see nothing unreasonable in the calendar set by the prothonotary for the steps leading to the hearing of the motion to strike. In fact, this calendar gave Ms. Onischuk three months to file her written submissions on the motion to strike, much more than the usual time provided by the *Federal Courts Rules*. With respect to the scheduling of the hearing itself, litigants must make themselves reasonably available and cannot ask for a postponement for the sole reason that they are working during the day.

[41] As I indicated earlier, a motion to strike is a tool to put an early end to proceedings that have no chance of success, in order to allocate scarce judicial resources to more meritorious cases. To achieve this purpose, motions to strike must be disposed of quickly. I understand that

litigants facing a motion to strike would much prefer to "keep their cases alive," but there is no unfairness in striking out an action through the streamlined process of a motion.

D. *Allegations of Bias*

[42] Lastly, Ms. Onischuk impugns Prothonotary Ring's impartiality. Of course, judges of this Court, including prothonotaries, must be impartial. There is a presumption that judges act impartially: *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paragraph 25, [2015] 2 SCR 282. For this reason, "the threshold for a finding of real or perceived bias is high": *R v S (RD)*, [1997] 3 SCR 484 at paragraph 113.

[43] There is no bias, real or perceived, solely because a judge makes a decision unfavourable to a party: *Bruzzese v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1119 at paragraphs 27-37, [2017] 3 FCR 272. Even where a judge makes an error, "such an error might be a basis to allow the appeal, but it would not, without more, suggest bias": *Ahamed v Canada*, 2020 FCA 213 at paragraph 7.

[44] These principles are especially important in the context of case management. Case management judges are called upon to make multiple decisions with respect to the conduct of an action. This need is particularly acute with respect to "ungovernable litigants: those who flout procedural rules, ignore orders and directions of the Court, and relitigate previously-decided proceedings and motions": *Canada v Olumide*, 2017 FCA 42 at paragraph 22, [2018] 2 FCR 328. Case management judges do not show bias simply by discharging their duty of managing the

proceeding in a fair and efficient manner or by requiring compliance with the *Federal Courts Rules*.

[45] Ms. Onischuk's allegations of bias are essentially based on her disagreement with case management decisions made by Prothonotary Ring, in particular those subject to the present appeals. There is no basis whatsoever for these allegations. These decisions were the result of the lack of merit of Ms. Onischuk's arguments, not of any bias or predisposition on the prothonotary's part.

[46] Mr. Onischuk's submissions contain assertions that seem to imply that Prothonotary Ring is employed by the Department of Justice. This is incorrect. Judges of this Court, including prothonotaries, are not employees of the Department of Justice nor of any government department. Once appointed, they do not answer to the government. They are independent. To the extent that Ms. Onischuk's allegations are based on this misunderstanding, they are plainly wrong.

IV. Disposition and Costs

[47] For the foregoing reasons, Ms. Onischuk's appeals will be dismissed.

[48] The defendants represented by the Attorney General are seeking costs in the amount of $250 for each appeal. I agree that this is a reasonable amount.

ORDER in T-675-19

THIS COURT ORDERS that:

1. The appeal from the case management order made by the prothonotary on July 13, 2020 is dismissed.

2. The appeal from the judgment of the prothonotary striking out the statement of claim is dismissed.

3. The plaintiffs are condemned to pay costs to the defendants represented by the Attorney General in the amount of $500, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-675-19
STYLE OF CAUSE:	THERESE ONISCHUK, WORLD PARK FOTO v CANADA REVENUE AGENCY, EXELBY & PARTNERS LTD., OFFICE OF SUPERINTENDENT OF BANKRUPTCY, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, ATTORNEY GENERAL FOR CANADA, GARY HOWITT, R. DONALD WILSON, LAURA LEE, AMY FORCE, PAT CHMILAR, JENNIFER YOUNG, DAMEN GREWAL, JULISA CHENG, AL MIYAI, MEGAN KOWALCHUK, EVA GOLDSTEIN, CHARMAINE MARTIN, JONATHAN LEE, WILLIAM JAMES, GEORGE BODY, JOHN DOE 1, JANE DOE 1, JOHN DOE 2, JANE DOE 2, JOHN DOE 3, JANE DOE 3

MOTION MADE IN WRITING PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES* CONSIDERED AT OTTAWA, ONTARIO.

ORDER AND REASONS:	GRAMMOND J.
DATED:	MAY 25, 2021

APPEARANCES:

Therese Onischuk	FOR THE PLAINTIFFS (ON HER OWN BEHALF)
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