Federal Court  Cour fédérale

Date: 20231221

Docket: T-1374-21

Citation: 2023 FC 1746

Edmonton, Alberta, December 21, 2023

PRESENT: Madam Associate Judge Catherine A. Coughlan

BETWEEN:

HAIDA TOURISM PARTNERSHIP D.B.A.
WEST COAST RESORTS

Plaintiff

and

THE ADMINISTRATOR OF THE
SHIP-SOURCE OIL POLLUTION FUND

Defendant

ORDER AND REASONS

I. Overview

[1] In the underlying action, the Plaintiff, Haida Tourism Partnership d.b.a. West Coast Resorts (Haida), seeks recovery for the second time from the Defendant, the Administrator of the Ship-Source Oil Pollution Fund (SOPF), for the costs it incurred to remediate an oil spill caused by its own Vessel. In an earlier decision of this Court, Madam Justice Cecily Strickland considered

a statutory appeal brought by Haida challenging the decision of the Administrator of the SOPF to deny Haida's claim for recovery. Justice Strickland denied the statutory appeal on the basis that as the owner of the polluting Vessel, no recovery is available under the *Marine Liability Act*, SC 2001, c 6 [*MLA*] and the SOPF established under that legislation.

[2] Having been unsuccessful in its statutory appeal, Haida now brings the present action to obtain reimbursement from the SOPF of the same expenses denied by the Administrator and arising from the same polluting incident.

[3] In this motion, the Administrator moves to strike the action on the basis that Haida has failed to plead a basis in law for the Administrator's alleged liability to Haida. This, the Administrator asserts, is because the *MLA* does not provide the Administrator with a general mandate to participate in litigation and Haida's action does not trigger any of the provisions which provide an express mandate. Thus, Haida does not have a properly constituted claim against the Administrator under the *MLA* and, in any event, as the owner of the polluting Vessel, no recovery is possible under the *MLA*.

[4] For the reasons that follow, the action will be struck without leave to amend.

II. Background and Procedural History

[5] The Plaintiff, Haida, is a limited partnership registered under the laws of British Columbia and the operator and owner of a sports fishing lodge or barge known as "Tasu I" (West Island 395, O.N. 323291) [Vessel].

[6] Haida claims that on September 8, 2018, the Vessel came loose from its moorings in Alliford Bay, Haida Gwaii and drifted aground in Bearskin Bay, British Columbia, leaking a mixture of gasoline and/or diesel. The Vessel was the only ship involved in the incident. Haida contacted the Canadian Coast Guard to advise them of the incident and made efforts to remediate and minimize the potential oil pollution damages along with various other agencies.

[7] Haida alleges that the grounding occurred because of intentional and wilful tampering with the Vessel's mooring lines by a third party or parties, with intent to cause damage.

[8] On December 27, 2018, Haida submitted a claim to the SOPF for reimbursement of all reasonable steps taken to repair, remedy or minimize oil pollution and related preventative measures. The claim was initially framed as a claim under paragraph 101(1)(b) of the *MLA* but was eventually reframed as a claim under subsection 103(1) of the *MLA*.

[9] On August 4, 2021, in a lengthy decision letter, the Administrator of SOPF denied the claim.

[10] On September 7, 2021, three actions related to the decision letter were commenced in this Court.

[11] In Court File No. T-1374-21, Haida commenced the within action, seeking reimbursement from the Administrator of the SOPF for expenses incurred in relation to the grounding.

[12] In Court File No. T-1375-21, Haida brought a statutory appeal from the Administrator's decision pursuant to subsection 106(2) of the *MLA*.

[13] In Court File No. T-1376-21, the Administrator brought an action against Haida seeking special damages by way of subrogation, of $109,518.78 for the reasonable expenses incurred by third parties and paid by the Administrator to remediate or minimize oil pollution caused by the grounding.

[14] Court File Nos. T-1374-21 and T-1376-21, were held in abeyance pending the outcome of the statutory appeal. Court File No. T-1376-21 remains in abeyance pending the outcome of this motion.

[15] In Judgment and Reasons issued August 31, 2022, Justice Strickland dismissed Haida's statutory appeal concluding that the Administrator correctly interpreted subsection 103(1) of the *MLA* as not creating a right for a shipowner to recover costs and expenses incurred to prevent, repair, remedy or minimize potential oil pollution damage resulting from an incident caused solely by its own ship: *Haida Tourism Limited Partnership d.b.a West Coast Resorts v The Administrator of the Ship-source Oil Pollution Fund,* 2022 FC 1249 [*Haida #1*].

[16] By Notice of Appeal dated September 28, 2022, Haida appealed Justice Strickland's Order citing the following grounds of appeal:

> 1. The Learned Judge ("LJ") erred in law in her interpretation of Part 6 and 7 of the *Marine Liability Act,* S.C. 2001 c. 6 ("A/ZN"), in particular, by reference to a misinterpretation of sections 101 and 103 of the *MLA,* a misinterpretation of

> the term "in addition to any rights the Ship-source Oil Pollution Fund under section 101", and a failure to correctly consider the mechanism and purpose of section 10 and Article 3 of the Bunkers convention within the *MLA* as a whole [emphasis added].
>
> 2. The LJ (at paras. 81 to 84) misinterpreted the submission on behalf of the Appellant's in respect of the interplay between of sections 101 and 103 of the *MLA* and the mechanism afforded to a "person" who has incurred costs or expenses in respect of actual or anticipated oil pollution damage under subsection 101(1). Further, the LJ failed to consider the application of subsection 101(2) of the *MLA.*
>
> 3. The LJ erred by making findings in respect of section 101 of the *MLA*, which was outside of the agreed scope of the Judicial Review (at para. 5) [emphasis added].
>
> 4. Such other grounds as counsel for the Appellant shall advise.

[17] On April 12, 2023, Haida filed a Requisition for Hearing of the appeal. However, on May 29, 2023, the parties, on consent, filed a Notice of Discontinuance.

[18] In a motion record filed on August 22, 2023, the Administrator moved to strike Haida's Statement of Claim in this proceeding. Although the action was not commenced as a Simplified Proceeding, the Administrator moves under Rule 298(2)(b) of the *Rules* rather than Rule 221(1)(a). Little turns on this distinction as the test to strike is the same.

III. Legal Principles on a Motion to Strike

[19] To strike a pleading, under Rule 298(2)(b) of the *Rules*, it must be plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action.

Put another way, it must be plain and obvious that the action is certain to fail because it contains a radical defect: *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17.

[20] To disclose a reasonable cause of action, a claim must: (a) allege facts that are capable of giving rise to a cause of action; (b) disclose the nature of the action which is to be founded on those facts; and (c) indicate the relief sought, which must be of a type that the action could produce and the Court has jurisdiction to grant: *Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5.

[21] A plaintiff must plead with sufficient details the constituent elements of each cause of action or legal ground raised: *Pelletier v Canada*, 2016 FC 1356 at paras 8 and 10. The plaintiff needs to explain the "who, when, where, how and what" giving rise to the defendant's liability: *Al Omani v Canada*, 2017 FC 786 at para 14 [*Al Omani*]; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at para 19 [*Mancuso*].

[22] A statement of claim must be read as generously as possible with a view to accommodating any inadequacies in the allegations: *Condon v Canada*, 2015 FCA 159 at para 21. Even where some elements are missing and others are incomplete, if the pleading contains enough information to allow the opposing party to know with some certainty the case to be met, the pleading should not be struck: *Brantford Chemicals Inc v Merck & Co Inc*, 2004 FCA 223 at para 2. However, for the purposes of a motion to strike, a moving party must take the opposing party's pleadings as they find them, and cannot resort to reading into a claim something that is not there: *Canada v Arsenault*, 2009 FCA 242 at para 10.

[23] Further, on a motion to strike, the pleadings must be read in a manner that permits a novel but arguable claim to proceed to trial: *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 19 [*Atlantic Lottery*].

[24] Striking a pleading without leave to amend is a power that must be exercised with caution. If a pleading shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment: *Al Omani* at paras 32-35.

[25] The threshold for striking a pleading is high. No evidence is permitted on a motion to strike based on reasonable cause of action. Instead, the Court is required to limit its examination to the matters set out in the pleadings.

IV. Position of the Parties

A. *The Administrator*

[26] The Administrator advances three arguments in support of its position.

[27] First, it says that the Statement of Claim fails to plead any basis for the Administrator's liability to Haida. In any event, it says that no provision of the *MLA*, or of any other statute, allows the Administrator to be named as a defendant. Therefore, the Administrator claims that Haida has failed to plead a basis in law for its action against the Administrator.

[28] Second, the Administrator asserts that an amendment to name the SOPF as the defendant rather than the Administrator would not cure the defect in the pleadings because the SOPF is not a legal person capable of being sued. Rather, the *MLA* defines the SOPF as an account in the accounts of Canada.

[29] Finally, the Administrator argues that as a shipowner, Haida has no claim against anyone else under the *MLA* for oil pollution incidents that its own ship caused. In respect of this argument, the Administrator relies on paragraph 84 of Justice Strickland's decision. Although the Administrator refers to that paragraph as *obiter dicta*, it nevertheless urges the Court to apply Justice Strickland's findings to the current proceedings and dismiss the action.

B. *Haida*

[30] Haida advances a number of arguments in response to the Administrator's position, including that the Administrator has failed to meet the high threshold required to strike a claim. Haida asserts that its claim is novel and, therefore, it would be improper for the Court to dismiss its claim at this interlocutory stage of the proceedings. It further asserts that the SOPF is capable of being sued and the Administrator's interpretation of section 101 of the *MLA* is incorrect.

[31] Haida asserts that a proper consideration of its claim engages a complex question of statutory interpretation. It urges this Court to show restraint in dealing with this motion. While acknowledging that, as a motions judge, I may determine the motion, Haida suggests that as a general principle "a complex question of statutory interpretation is not appropriate for disposition on a motion to strike pleadings": *British Columbia v Apotex Inc*, 2022 BCSC 1 at para 126.

[32] Here, Haida asserts that given the novel nature of its claim coupled with the complex statutory interpretation required, I ought to leave this issue to be determined at trial.

[33] At paragraph 18 of its written representations, Haida also takes the position that references to other proceedings between the parties set out in the Defendant's motion record are not relevant to the motion before the Court. Haida argues that this proceeding "is to be assessed based on the Statement of Claim and facts alleged therein, not what is said, without evidence, to have happened in the context of another case." Haida notes that there have been many exchanges between the parties, none of which, they say, "are relevant or proper to be put before the Court for this motion."

[34] Before embarking on my analysis, I pause to note that Haida's position above is entirely at odds with the remainder of its lengthy written representations, where the Court is being asked to assume that subsection 101(1)(b) of the *MLA* has been pleaded when in fact, it has not. At the hearing of this matter, and as set out in the Defendant's motion record, the Plaintiff's reliance on subsection 101(1)(b) is not expressed in the pleadings at all but rather arises as a result of discussions between counsel. Indeed, at paragraph 29(a) of the Plaintiff's written representations, it asserts that the failure to refer to subsection 101(1)(b) is not fatal to their position and can be cured by a simple amendment.

[35] It remains, however, that on a motion to strike, the Court is required to address the pleading that is actually before it. Whether or not an amendment should be permitted, will be addressed later in this Order.

V. Analysis

[36] Despite the able arguments of counsel for Haida, I am unable to conclude that the Statement of Claim pleads a cause of action. In any event, I am satisfied that the in addition to failing to plead a cause of action, the matter is *res judicata*.

A. *Is a Cause of Action Plead?*

[37] The Statement of Claim is a brief two-page document. At paragraph 4, the Plaintiff describes the Defendant, as "the administrator of a pollution fund established by statute that is available to pay for claims for pollution cleanup costs and measures taken in anticipation of a discharge of oil and/or caused by the discharge of oil, from all classes of ships on inland and coastal water, including the exclusive economic zone of Canada." Thereafter at paragraphs 5 through 11, the Plaintiff sets out the circumstances alleged to have caused the grounding of the Vessel as well as the "significant efforts to prevent, repair, remedy or minimize potential oil pollution damage…."

[38] At paragraph 12, Haida alleges that it has a complete defence for pollution liability and the related costs of cleanup and mitigation under Article 3, Schedule 8 and/or section 77(3)(b) of the *MLA* because the grounding was caused by a third party with intent to cause damage.

[39] At paragraph 13, Haida alleges that it "has a right to claim against the SOPF for reimbursement of all reasonable steps taken to repair, remedy or minimize oil pollution and related preventative measures."

[40] Nowhere in the claim does Haida particularize the material facts or the legal foundation for its assertion that it is entitled to reimbursement from the SOPF. Rather, paragraph 13, taken at its highest, is a bald conclusory statement of law. Such a pleading fails to tell the Defendant the how and what gives rise to its liability: *Mancuso* at paras 18-19.

[41] The fact that through discussions with counsel, the Defendant understands that the Plaintiff purports or intends to rely upon section 101 of the *MLA* does not assist the Plaintiff. In its present form, the pleading is deficient.

[42] Even if I were to read into the pleading a reliance upon subsection 101(1)(b), the pleading would not survive the motion to strike. It would remain entirely bereft of particulars that support a claim against the Administrator of the SOPF. Such a deficiency might be remedied though an amendment but in view of my conclusion that the matter has already been decided and is *res judicata*, there is no need for me to consider an amendment.

B. *Is the Action Issue Estoppel Res Judicata?*

[43] A pleading may be struck where the moving party alleges that it raises an issue that has been finally determined in an earlier proceeding either under rule 221(1)(a) or rule 221(1)(f): *IMS Incorporated v Toronto Regional Real Estate Board*, 2023 FCA 70 at para 44 [IMS Incorporated]; citing *Apotex Inc v Pfizer Ireland Pharmaceuticals*, 2011 FCA 77; and *Apotex Inc v Laboratories Servier*, 2007 FCA 350.

[44] The preconditions to finding issue estoppel *res judicata* are as follows:

a. the same question has been decided;

b. the judicial decision which created the estoppel was final;

c. the parties to the judicial decision are the same parties to the proceeding in which the estoppel is raised;

d. the question out of which the estoppel arises was fundamental to the decision arrived at: *Hughes Land Co v Manitoba*, 1998 CanLII 17673 (MBCA).

[45] As noted earlier, the Administrator contends that *Haida #1* is *obiter dicta* in so far as it dealt with section 103 of the *MLA* whereas the current action purports to be taken under subsection 101(1)(b). While not expressly asserting the action is *res judicata* in the form of issue estoppel, at paragraph 62 of its written representations, the Administrators says "… the decision in T-1375-21 has not technically decided the issue before this Honourable Court, it is submitted that it can and should be applied, resulting in the dismissal of this action." In my view, the Administrator is inviting the Court to apply the doctrine of *res judicata* in the form of issue estoppel.

[46] By contrast, Haida made extensive arguments throughout its written and oral submissions contending that anything arising in *Haida #1* is *obiter* and should not be considered by this Court. Indeed, at several points in argument, counsel for Haida contended that Justice Strickland's analysis of section 101 of the *MLA* should be accorded little weight because it is far removed from the *ratio decidendi* concerning section 103 of the *MLA*. Moreover, Haida challenges many of Justice Strickland's finding regarding section 101, concluding her interpretation of the overall purpose of section 101 is "overly narrow."

[47] In oral argument, counsel for Haida, argued that it is dangerous for this Court to rely on Justice Strickland's decision because different arguments "may have been made" before her. Counsel suggests that Justice Strickland was addressing section 103 of the *MLA* and opines that section 101 was not thoroughly briefed before her. That, he argued, gets Haida over the "plain and obvious" threshold.

[48] In Reply, the Administrator says that extensive arguments were in fact made by the parties before Justice Strickland regarding section 101 of the *MLA*.

[49] As the Federal Court of Appeal teaches in *IMS Incorporated* at para 46, where, as here, there is no evidence before the Court, the Court must assess whether the same issues were determined in the earlier case by comparing what was decided in the earlier case with what is pleaded in the statement of claim.

Haida #1

[50] Although *Haida #1* is primarily focused on whether the Administrator had correctly disallowed Haida's claim for compensation under Section 103(1) of the *MLA*, Justice Strickland undertook a comprehensive review of the Parts 6 and 7 of the *MLA* and the purpose of the *MLA* as a whole.

[51] For the purposes of this Order and in the interests of brevity, I adopt paragraphs 10-25 of Justice Strickland's Judgement and Reasons, which thoroughly review Parts 6 and 7 of the *MLA*.

After conducting her review of the provisions of the *MLA* at issue, Justice Strickland made several crucial findings, including:

a) The purpose of Parts 6 and 7 of the *MLA* is to establish shipowner liability for ship-source oil pollution and provide compensation to persons who suffer such oil pollution damage based on the polluter pays principles: see paras 61-64, 70.

b) The *MLA* is not environmental legislation, and the primary purpose of the *MLA* is not anticipatory protection of the environment: see para 78.

c) Subsections 101(1) and 103(1) of the *MLA* operate independently of one another, providing distinct avenues for persons who have incurred ship oil pollution damages to obtain compensation: see paras 79-80, 84-91, 93.

d) Subsection 101(1) of the *MLA* is not a mechanism for a claim against the SOPF but rather a backup to a failed action under section 109, which allows the Administrator of the SOPF to intervene to obtain damages on behalf of claimants. If an initial civil claim is unsuccessful and the shipowner avoids liability, then a section 101(1) claim can be made: see para 82.

e) Subsection 101(1) is aimed at protecting and compensating claimants in the event that a shipowner does not, or is not required to, meet its strict liability obligations with respect to oil pollution: see para 81.

f) Subsection 101(1) does not allow a shipowner to advance an action against the SOPF because they allege they are not liable for one of the reasons outlined at subsection 77(3) of the *MLA:* see para 83.

g) A shipowner cannot advance a claim under section 109 because, as the owner of the polluting vessel, they cannot sue themselves: see para 84.

[52] As noted by the Supreme Court of Canada in *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 24, the importance of the doctrine of *res judicata* is to promote the finality of proceedings and prevent collateral attacks on judgments.

[53] The current action represents a collateral attack on Justice Strickland's findings in *Haida #1*. Haida has already had the opportunity to appeal Justice Strickland's decision. As set out above at paragraph 16, Haida alleged that Justice Strickland erred in her interpretation of Parts 6 and 7 and section 101 of the *MLA*. Although not properly pled, these are the very same provisions said to be at play in this proceeding. The Plaintiff's discontinuance of *Haida #1* renders Justice Strickland's decision and findings of fact therein final. Further, I am of the view that Justice Strickland's analysis of the claims scheme found at sections 101-103 of the *MLA* was fundamental to her decision. She was required to undertake the extensive review of Parts 6 and 7 of the *MLA* in order to ground her determination of Haida's statutory appeal. In consequence, her decision in *Haida #1* is binding on the current proceeding and issue estoppel arises.

[54] To complete my analysis, I am of the view that nothing turns of the fact that one proceeding was a statutory appeal and one is an action. Ultimately, Haida seeks the very same relief: the reimbursement of costs incurred in the remediation of an oil pollution event caused by its Vessel.

[55] In these circumstances, and while the Court may exercise its discretion to relieve against an issue estoppel, it is not in the public's interest to permit the re-ligation of issues between the same parties concerning the very same issue.

VI. Costs

[56] The Administrator seeks its costs in this matter. I see no reason to depart from the normal rule that the successful party is entitled to its costs. Costs shall be set at $500 inclusive of tax and disbursements.

ORDER in T-1374-21

THIS COURT ORDERS that:

1. The motion is allowed.

2. The Statement of Claim is struck without leave to amend.

3. The Defendant shall have its costs set at $500 inclusive of taxes and disbursements.

"Catherine A. Coughlan"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1374-21
STYLE OF CAUSE:	HAIDA TOURISM PARTNERSHIP D.B.A. WEST COAST RESORTS v THE ADMINISTRATOR OF THE SHIP-SOURCE OIL POLLUTION FUND
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