

**Date: 20071026**

**Docket: T-484-06**

**Citation: 2007 FC 1112**

**BETWEEN:**

**BANK OF THE WEST.  
A body corporate, having its head office at  
Walnut Creek, California, USA**

**Plaintiff**

**and**

**THE 26' WELL CRAFT SCARAB SHIP  
"WELDGA281596 and DARRIN GOODALL, and  
LLOYD'S UNDERWRITERS, and THE OWNERS and  
ALL OTHERS INTERESTED IN  
THE SHIP "WELDGA281596**

**Defendants**

**REASONS FOR ORDER**

**MACTAVISH J.**

[1] This is an appeal from an order of a Prothonotary denying leave to the defendant insurer to amend its statement of defence to plead a limitation period contained in a policy of marine insurance.

[2] At the conclusion of the hearing of the appeal, I advised counsel that the appeal would be allowed. These are my reasons for that decision.

### **Standard of Review**

[3] Insofar as the standard of review with respect to the merits of the Prothonotary's decision is concerned, where a discretionary order of a Prothonotary is vital to the final issue in a case, the decision should be reviewed on a *de novo* basis: see *Merck & Co. Inc. v. Apotex*, [2003] F.C.J. No. 1925, 2003 FCA 488 at ¶18-19.

[4] However, where the decision under review is not vital to the final issue in the case, it ought not to be disturbed on appeal unless the order is clearly wrong, in the sense that the exercise of discretion by the Prothonotary was based upon a wrong principle or upon a misapprehension of the facts: *Merck*, at ¶19.

[5] As to what sort of questions are vital to the final issues in a case, *Merck* teaches that the test is a stringent one. Examples of issues that would be considered to be vital were cited by Justice Reed in *James River Corp. of Virginia v. Hallmark Cards, Inc.* (1997), 72 C.P.R. (3d) 157 (F.C.T.D.). This list included a decision not to allow an amendment to pleadings [at page 160].

[6] In this case, the proposed amendment adds an entirely new defence, which goes directly to the ultimate issue in this case, which is the liability of the defendant insurer to the plaintiff under the insurance policy. As a consequence, I am of the view that the decision of the Prothonotary should be reviewed on a *de novo* basis.

[7] In any event, the failure of the Prothonotary to give any reasons for his decision further dictates that I exercise my discretion *de novo*. While a lack of reasons alone does not automatically give rise to a hearing *de novo* on an appeal from a Prothonotary's decision (see *Anchor Brewing Co. v. Sleeman Brewing & Malting Co.*, 2001 FCT 1066), in this case, I am unable to ascertain from the record before me whether the Prothonotary acted on a wrong principle or a misapprehension of the facts.

[8] Finally, I am mindful of the fact that the Prothonotary was acting in his capacity as case manager in rendering the decision in issue, which would ordinarily lead to greater deference being shown: see *Apotex Inc. v. Merck & Co.*, 2007 FC 250. However, this is not a case where the Prothonotary has had a lengthy history managing the file, as he had only recently been appointed to manage this proceeding, and little had transpired on the file until he rendered the decision in question.

[9] As a consequence, I intend to consider the defendant insurer's motion for leave to amend on a *de novo* basis.

### **Analysis**

[10] In order to grant leave to amend the defendant insurer's Statement of Defence, the Court must first be satisfied that the proposed amendment raises a triable issue: see *Merck & Co. v. Apotex Inc.*, previously cited, at ¶39. In this case, it is conceded that the proposed limitation defence does indeed raise a triable issue.

[11] The general principles governing the amendment of pleadings are set out in *Canderel Ltd. v. Canada*, [1994] 1 F.C. 3 (F.C.A.), where Justice Décaré observed that:

[W]hile 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.** [emphasis added]

[12] Factors relevant to the determination of whether an amendment would cause prejudice to the other party that cannot be compensated by an award of costs include the timeliness of the motion to amend, the extent to which the amendment would delay an expeditious trial, the extent to which the original position of the party seeking the amendment caused another party to follow a course which is not easily altered, and whether the amendment facilitates the Court's consideration of the merits of the action: see *Valentino Gennarini SRL v. Andromeda Navigation Inc.* (2003), 232 F.T.R. 256, and *Scannar Industries Inc. (Receiver of) v. Canada (Minister of National Revenue)* (1994), 172 N.R. 313 (F.C.A.).

[13] While some 14 months have passed since the defendant insurer filed its original Statement of Defence, the proceeding has not advanced significantly since then. Affidavits of documents have been exchanged, but examinations for discovery have not yet commenced. As a consequence, I am not persuaded that the original position taken by the defendant insurer in this case has caused the plaintiff to follow a course which is not easily altered.

[14] Moreover, the plaintiff's counsel has not identified any prejudice that will be suffered by his client if the amendment is allowed that could not be compensated for by an award of costs.

[15] The plaintiff does argue that granting the amendment will likely result in a delay of the trial in this matter, as the result of the amendment will likely be a motion for summary judgment brought by the defendant insurer. The answer to this, of course, is that a motion for summary judgment has the potential to result in the speedy and more economical resolution of the entire matter.

[16] In these circumstances, the interests of justice are best served by allowing the amendment. As a consequence, the appeal is allowed, and leave is granted to the defendant insurer to file its amended Statement of Defence.

[17] The plaintiff shall be entitled to its costs thrown away, on the ordinary scale. The parties shall have 10 days in which to reach an agreement on the question of costs. If no agreement is possible, each party shall then have one week to serve and file submissions in writing regarding costs. The parties will each then have one further week in which to serve and file any reply submissions.

“Anne Mactavish”

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Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-484-06

**STYLE OF CAUSE:** BANK OF THE WEST v.  
THE 26' WELL CRAFT SCARAB SHIP ET AL

**PLACE OF HEARING:** St. Johns, Nfld.

**DATE OF HEARING:** October 25, 2007

**REASONS FOR ORDER:** Mactavish J.

**DATED:** October 26, 2007

**APPEARANCES:**

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FOR THE PLAINTIFF

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FOR THE DEFENDANT,  
LLOYDS UNDERWRITERS

**SOLICITORS OF RECORD:**

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