Date: 20090316

Docket: T-1075-08

Citation: 2009 FC 265

Ottawa, Ontario, March 16, 2009

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

STEPHEN ZOLOTOW

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The Attorney General of Canada (the "Defendant") appeals from the Order of Prothonotary Milczynski dated November 27, 2008. In that Order, the Prothonotary dismissed the Defendant's motion to strike the Statement of Claim issued by Mr. Stephen Zolotow (the Plaintiff") on July 11, 2008. The appeal is taken pursuant to Rule 51 of the *Federal Courts Rules*, SOR/98-106 (the "Rules").

Background

[2] The Plaintiff commenced an action relating to the recovery of diamonds that were taken from him in April, 2000, allegedly pursuant to the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.), (the "Customs Act"). On November 22, 2005, he commenced an action in the Ontario Superior Court in cause number 05-CV-300923-PD-3. The Defendant moved to dismiss the action pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C-43.

[3] Mr. Justice Jarvis of the Ontario Superior Court declined to strike out the action on the grounds of lack of jurisdiction, but in the exercise of his discretion, he ordered that the action be stayed on the grounds that the Federal Court of Canada is the preferred jurisdiction to adjudicate the Plaintiff's claim.

[4] The Plaintiff appealed to the Court of Appeal for Ontario in cause number C47248. By an endorsement dated March 6, 2008, the Ontario Court of Appeal dismissed the appeal, on the grounds that the Motions Judge had properly exercised his discretion to stay the action, in finding that the Federal Court "is the Court of preferred jurisdiction" for the disposition of the Plaintiff's claim.

[5] On July 11, 2008, the Plaintiff commenced his action in this Court seeking the following relief:

a. an order that the Attorney General of Canada return Mr. Zolotow's 20 cut diamonds to him;

b. in the alternative, an accounting for and payment of all proceeds received on the sale of the diamonds;

c. pre-judgment interest to the date of judgment;

d. post-judgment interest;

e. costs of this claim with all applicable taxes thereon; and

f. such further and other relief as this Honourable Court deems just.

[6] The allegations about the circumstances of the Plaintiff's loss of possession of his diamonds is set out in the following paragraphs of the Statement of Claim that was issued in the Federal Court:

> 4. Mr. Zolotow owns 20 cut diamonds (diamonds).
>
> 5. Mr. Zolotow had his diamonds in Toronto, Ontario, Canada in May 1993. Mr. Zolotow rented a safety deposit box at the branch of the Canadian Imperial Bank of Commerce located at 135 St. Clair Avenue West in Toronto, Ontario, Canada. Mr. Zolotow stored his diamonds in the safety deposit box from about May 11, 1993 until about April 13, 2000.
>
> 7. When he arrived at the airport, Mr. Zolotow went to clear United States Customs.
>
> 8. United States Customs took Mr. Zolotow's diamonds from him. United States Customs gave Mr. Zolotow a receipt for his diamonds.
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> 9. Mr. Zolotow petitioned United States Customs to give his diamonds back to him. United States Customs refused. Instead, United States Customs gave Mr. Zolotow's diamonds to the Royal Canadian Mounted Police.
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> 10. On or about April 19, 2000, the Royal Canadian Mounted Police had Mr. Zolotow's diamonds appraised. The appraiser estimated that the replacement cost of the diamonds was $885,900.00.

> 11. In or about March 2002, the Royal Canadian Mounted Police gave Mr. Zolotow's diamonds to Canada Customs and Revenue Agency.
>
> 12. On or about October 12, 2001, Mr. Zolotow asked Canada Customs and Revenue Agency to return his diamonds to him. Canada Customs and Revenue Agency refused.

[7] By Notice of Motion dated October 28, 2008, the Defendant moved to strike out the Plaintiff's Statement of Claim. Several grounds were advanced in the Notice of Motion, as follows:

> 1. *Res judicata* in the form of *issue estoppel*. The allegations in the statement of claim conflict with the decision of the Superior Court of Justice in the identical case which determined that the matter is an appeal from a seizure under the *Customs Act* and that the *Act's* provisions apply. Mr. Justice Jarvis' ruling is binding on the plaintiff;
>
> 2. By ignoring the ruling and forcing the defendant to re-argue a merit less issue, the claim is scandalous, vexatious and an abuse of process;
>
> 3. The time limits in the *Act* bar the claim. As an appeal it is time-barred by section 135(a) and, as a cause of action, by section 106(2);
>
> 4. The Crown is immune from *in rem* proceedings against its property;
>
> 5. Rules 221(1), (a), (c) and (f);

[8] In her Order dismissing the Defendant's Notice of Motion, the Prothonotary noted that the application of the time limitation contained in the Customs Act depends upon whether a "seizure" was made under that statute.

[9] She said the following:

> There must have been a seizure under the *Customs Act*. Mr. Zolotow submits that the seizure by U.S. Customs officials and the subsequent hand-off of the diamonds (which he claims were brought into Canada over 6 years before) to the Royal Canadian Mounted Police, which in turn gave the diamonds to Canada Customs and Revenue Agency (now the Canadian Revenue Agency) does not constitute a seizure under the *Customs Act*. It is Mr. Zolotow who is, in effect arguing that the purported seizure was time-barred, and the Act cannot govern his property.

[10] The Prothonotary said that she was not satisfied that it “was plain and obvious or without doubt” the Plaintiff’s claim cannot succeed.

[11] The Prothonotary dismissed the Defendant’s arguments that the Plaintiff’s action should be dismissed on the basis of issue estoppel and abuse processes arising from the earlier Order made by the Ontario Superior Court and the Ontario Court of Appeal on May 5, 2007 and March 6, 2008, respectively. She determined that, contrary to the submissions of the Defendant, the Ontario Courts had not decided that the seizure of the Plaintiff’s diamonds in April, 2000 was a “seizure” within the scope of the Customs Act. Rather, she found that the key issue addressed before the Ontario Courts was that of jurisdiction. She quoted the following passage from the endorsement of the Ontario Court of Appeal:

> …even if he [Mr. Zolotow] is correct in his assertion that the action constitutes a common law property claim, and not a claim subject to the *Customs Act*, **the jurisdictional issue remains an open question for determination.** It is agreed that both the Superior Court of Justice and the Federal Court have jurisdiction over a common law action in detinue against the Federal Crown. In circumstances of concurrent jurisdiction, s. 106 of the *Courts of Justice Act* gives the motion judge the discretion to determine the preferred forum.

> Here, the motion judge exercised this discretion upon proper principles to draw the conclusion that the preferred jurisdiction for Mr. Zolotow to advance his claim in relation to his property was the Federal Court.
>
> The motion judge observed that the Notice of Seizure was evidence that the seizure took place, purportedly at least, under the authority of the *Customs Act*. Indeed Mr. Zolotow challenged that Notice of Seizure, albeit belatedly, under the procedure in the *Customs Act*.
>
> Against that background, the motion judge recognized, correctly in our view, that **the determination of the pivotal issue of the jurisdiction of the *Customs Act*, - regardless of whether or not it is held that the *Customs Act* applies – will involve some examination of the provisions of the Act and related jurisprudence** (emphasis in the original)

[12] In his Notice of Motion filed on January 22, 2009, the Defendant sets out several grounds of appeal as follows:

> 1. The Prothonotary's exercise of discretion, involving an issue vital to the disposition of the case, is wrong in principle and in its appreciation of an important fact. The errors prevented her from properly exercising her discretion;
>
> 2. Prothonotary Milczinski failed to find that it is plain and obvious that the claim cannot succeed because of the limitation periods in the *Customs Act* ("*Act*") at sections 106(2) and 135(1) and also because the defendant is immune from the claim for the return of the plaintiff's diamonds;
>
> 3. The Prothonotary erred when she failed to find as a fact before her, and to follow Justice Jarvis of the Ontario Superior Court who found that the plaintiff's diamonds were seized under the *Act* and that the case is a claim for their return. She misinterpreted the *Act* in failing to find that sections 106(2) and 135(1) are limitation periods that bar the claim for the return of diamonds seized under the *Act*. Prothonotary Milczinski failed to decide it is plain and obvious that because the case is a self-described claim for the return of diamonds seized under the *Act* it is time-barred by these sections.

> 4. Prothonotary Milczinski further erred in law in considering that there is an issue whether a seizure which might be found at trial to have occurred outside of the six year time limit for seizures, in section 113 of the Act, will thereby escape the limitation periods particularly in section 106(2) time-barring the bringing of actions such as this. She erred in not ruling that the claim is an appeal on the merits of the seizure, i.e., whether it was out-of-time, and therefore specifically caught by s. 106(2).
>
> 5. Prothonotary Milczinski erred in law when she did not rule that since the diamonds were seized under the *Act*, claims for their return were subject to section 106(2) regardless of whether the seizure was subsequently found, on an appeal under the statute, to be out-of-time under section 113, or is overturned or disallowed on any other ground.
>
> 6. The Prothonotary failed to find as *issue estopped* the fact of a customs seizure and that the claim is an appeal from the seizure and failed in law to apply Crown immunity which protects the diamonds in the defendant's hands and misinterpreted sections 106, 110, 113, 129 and 135 of the *Act*; and
>
> 7. The claim cannot succeed because it is a collateral attack on the defendant's decision to seize the diamonds. In addition, a civil claim under section 17 of the *Federal Courts Act* challenging an illegal or unauthorized administrative action cannot proceed. The issue of legality must proceed by judicial review.
>
> 8. Federal Courts Rule 51(1) and such other grounds as the Court may admit. (emphasis in the original)

[13] The Defendant stated that the following documentary evidence would be used upon the hearing of this Notice of Motion:

> 1. Notice of Motion before the Prothonotary dated October 28, 2008,
>
> 2. Order of Prothonotary Milczynski, dated November 27, 2008,
>
> 3. Copy of Affidavit of Kathy Rush dated March 17, 2006,

4. Statement of Claim in this Court issued July 11, 2008,

5. Statement of Defence in this Court issued August 27, 2008,

6. Statement of Claim in the Ontario Superior Court of Justice issued November 22, 2005,

7. Reasons for Decision of Jarvis, J., Ontario Superior Court of Justice issued May 11, 2007 and

8. Endorsement of the Court of Appeal for Ontario issued March 6, 2008.

[14] The Defendant submits, generally, that the Prothonotary erred by failing to apply the Customs Act and as a result, erred in failing to find that a seizure had been effected. He further argues that the Prothonotary erred by failing to acknowledge the legal consequences of a seizure under the *Act*, that is the transfer of title in the diamonds to the Crown in Right of Canada.

[15] The Defendant argues that the Prothonotary erred by failing to recognize, pursuant to the decision of Mr. Justice Jarvis of the Ontario Superior Court, affirmed by the Ontario Court of Appeal, that issue estoppel applies to the Plaintiff's claim.

[16] As well, the Defendant submits that the Prothonotary erred by failing to follow the teaching of the Federal Court of Appeal in *Canada v. Grenier,* [2006] 2 F.C.R. 287 (F.C.A.), as discussed in the recent decision of the Ontario Court of Appeal in *TeleZone Inc. v. Canada (Attorney General)*, [2008] O.J. No. 5291, 2008 ONCA 892.

[17] The Defendant argues that the Plaintiff, in his action, is attempting to make a collateral attack on an administrative process for which a remedy lies under the *Federal Courts Act*, R.S.C. 1985, c. F-7 section 18, not by way of action pursuant to section 17.

Discussion and Disposition

[18] The standard of review applicable to an appeal from the decision of a prothonotary was restated by the Federal Court of Appeal in its decision in *Merck & Co. v. Apotex Inc.* (2003), 24 C.P.R. (4th) 240 where the Court concluded that a decision that can be either interlocutory or final depending on the result is vital to the final disposition of the case and subject to review on appeal on a *de novo* basis. That standard will be applied here.

[19] The Defendant seeks to strike out the Plaintiff's Statement of Claim. The test for striking out a statement of claim was addressed by the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 where the Court said that the test in Canada to strike out pleadings is whether it is plain and obvious that the claim discloses no reasonable cause of action.

[20] In the earlier decisions of *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 and *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 the Supreme Court of Canada said that "plain and obvious" means that the case is beyond doubt.

[21] In the present case, the Defendant is essentially challenging the jurisdiction of the Federal Court to adjudicate the Plaintiff's claim. He argues that the Plaintiff was first required to seek

judicial review of the decision to seize his property, relying in this regard upon the decision in *Grenier*. He also submits that the issue of the validity of the seizure has already been determined by the Ontario Superior Court in the ruling of Mr. Justice Jarvis.

[22] The application of *Grenier* to the present case is not “plain and obvious” and “beyond doubt”. The factual allegation raised by the Plaintiff in his Statement of Claim is that the diamonds were not seized, within the meaning of the Customs Act. That is a justiciable issue that can be determined only upon a full evidentiary basis. That basis is not yet before the Court.

[23] The issue of the validity of the seizure has not been determined as a result of the proceedings in the Ontario Superior Court or before the Ontario Court of Appeal. The Defendant is misreading the rulings delivered by those Courts. All that was decided in the Ontario Superior Court was the recognition of jurisdiction in the Federal Court to entertain the Plaintiff’s claim. For its part, the Ontario Court of Appeal found that the trial judge had properly exercised his discretion to defer to the jurisdiction of the Federal Court.

[24] The Defendant has failed to show that the Plaintiff’s claim is “beyond doubt” and that it is plain and obvious that it is doomed to fail. Accordingly, the appeal is dismissed with costs to the Plaintiff.

[25] If the parties cannot agree on costs, brief submissions in writing not to exceed five (5) pages may be made on or before March 31, 2009.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the appeal is dismissed with costs to the Plaintiff. If the parties cannot agree on costs, their brief submissions can be made on or before March 31, 2009.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1075-08
STYLE OF CAUSE:	STEPHEN ZOLOTOW v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR JUDGMENT:	HENEGHAN J.
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