Case Name:

Robinson v. Terra Nova Shoes Ltd.

Between
Clifford Nelson Robinson and Rotary Drum Corporation, plaintiffs, and Terra Nova Shoes Limited, Terra Footwear Limited, CSA International, also known as Canadian Standards Association, Hughes Petroleum Ltd. and Hughes Petroleum Ltd., defendants

[2005] A.J. No. 283

2005 ABQB 187

138 A.C.W.S. (3d) 46

Docket: 9903 15706

Alberta Court of Queen's Bench
Judicial District of Edmonton

Watson J.

Heard: February 18, 2005.
Oral Judgment: February 18, 2005.
Filed: March 16, 2005.

(32 paras.)

Civil procedure -- Trials -- Severance of issues or parties.

Application by the defendants, Terra Nova Shoes Ltd. and Terra Footwear Ltd., for severance of issues of quantum and liability. The action involved a slip and fall in which there were no witnesses. Expert evidence was going to be presented regarding the construction, format, operation, and efficacy of the boot which was being worn by the plaintiff, Robinson.

HELD: Application allowed. The suit could be resolved, there would be a saving in time and money

spent on litigation, there would be no advantage to one party over the other, and the issues were complex or difficult. A condition of the severance order was that the trial date not be adjourned.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rules 220, 221, 221(1), 221(2).

Counsel:

Ms. B. Harnum for the Applicants Terra Nova Shoes Limited, Terra Footwear Limited

B. Mohan, Esq. For the Respondent, Plaintiff Clifford Nelson Robinson

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REASONS FOR JUDGMENT

WATSON J. (orally[1]):--

1. Introduction

1 This is Action Number 9903-15706, the matter of Clifford Nelson Robinson as Plaintiff and Terra Nova Shoes Limited and Terra Footwear Limited as Defendants and Applicants on the application.

2 There are other companies which were listed as parties to this action, but it has been indicated to me that those parties have been removed from this action by operation of the Workers' Compensation Statute. So the only issue that arises then is between Mr. Robinson as individual Plaintiff and the footwear manufacturer and supplier in this instance.

3 The application that is brought by the footwear manufacturer and supplier as Defendants is pursuant to Sections 220[2] and 221[3] of the Rules of Court, which provide for a methodology by which the Court exercises a discretion to sever the issues that may arise from time to time in a case.

2. Analysis

4 It is quite clear from the context of that particular language of those Rules, that those Rules were intended to serve efficiency in the administration of civil justice in the Province of Alberta without, in any way, damaging adjudicative fairness to either of the parties.

5 It is clear that in some instances the severance of issues can, in fact, operate as a particular type of procedural advantage or forensic advantage to a particular party, and as a consequence could operate in an unfair manner towards the other party in that particular case.

6 The tradition of having everything tried at the same time in front of the same Judge has a great deal of policy behind it. A noteworthy element of that policy, of course, is to make sure that there is no inconsistency of judicial finding.

7 That, it seems to me, is probably one of the key issues which prevents severance of issues where, in fact, issues are ineluctably tied together as they were in the City Cab case[4] that I wrote a number of years ago. It would be a serious risk to unfairness to both parties to have a separate adjudicator deal with the factual issues in the matter.

8 The guiding principles have been set out incase of Tanguay[5] which I have referred to in the past, and also in the case of Ratcliffe[6] and the Esso Resources case[7], judgment of Mr. Justice Côté with his usual crisp and succinct style.

9 The principles set out by Madam Justice Moen in Ratcliffe can be used as the methodology for outlining the circumstances here.

10 It should be indicated that this lawsuit concerns a slip and fall case on a premises, where the allegation as against the Defendant is going to involve expert opinion evidence relative to the construction, format, operation, and efficacy of the boot which was being worn by the Plaintiff.

11 However, there were no eyewitnesses to the incident involving the Plaintiff which would be called by the Defendant. As a consequence the actual transaction as to how the Plaintiff fell and so forth, would not be anything but from the Plaintiff.

12 In that respect, of course, the Defendant would still have the opportunity to examine the Plaintiff and to suggest that the Plaintiff may or may not be accurate in relation to its recitation of how the incident occurred in itself and could call evidence to interpret that particular matter.

13 But it would not be a situation where there would be a direct conflict as between a Plaintiff and a Defendant witness that would be carried over as between issues of liability and issues of quantum in this instance.

14 It seems to me that the nature of the case that a liability trial would be addressing would be an expert evidence issue, and mostly based on interpretation of events on the effect of weather, on the effect of surface conditions of the place where the fall occurred and so forth.

15 With that in mind, I would then turn to the question of the factors in Ratcliffe. The first factor is, will it end the suit at least if decided one way? The answer to that question is yes, according to the position for the Applicants and I agree. It seems to me that this suit would be, in fact, resolved completely if decided one way.

16 Now, Mr. Mohan for the Plaintiff even suggested that himself in an indirect way, when he suggested that if, in fact, they had agreed on the money he would have been quite happy to have a

liability trial separately in relation to this particular case[8].

17 Mr. Mohan also forcibly - and with some value in his submissions in this respect - suggested there is no undertaking not to appeal in this particular instance by either party. That is true. That is a situation which could perhaps be relevant to the factor number five as to delay of the matter, subject to what I am about to say on that context.

18 However, it does seem to me that the answer to the first question is yes and as a consequence, that part of the basis of application of Rules 220 and 221 exists here.

19 The second factor in Ratcliffe is, will there be a saving in time or money spent on litigation, again, at least if decided one way? I believe that there would be a saving in time or money on this particular litigation, even if not decided in one way because the experts who are going to be in conflict relative to the question of the condition of the road surface, the effect of the manufacturer of the boot and so forth will all be listening to one another during the course of trial, as experts are normally allowed to do. And in any event, they will not be waiting around for three or four weeks possibly to listen to experts on medical factors and so forth.

20 As pointed out by Counsel for the Applicants in this instance, this case could take a great deal of time and - as usual in most trials - might be somewhat out of the handling of the lawyers themselves and prediction of when a witness or witnesses might have to be necessary. This is really beyond their pale of analysis at this stage so far in advance.

21 It does seem to me that for both parties there would be a saving of time or money if they could focus the trial on the issue of liability only and that, consequently, the answer to question number two is also in favour of the motion in this instance[9].

22 Question number three is: will it create an injustice? This issue is a situation which, as I mentioned before, concerns itself with the question of denial of adjudicative fairness to either of the parties in this instance or, in fact, the creation of a unfair forensic advantage for one party as against the other.

23 It seems to me that in this instance, I am not satisfied that there could be any particular advantage to either party to focus the issues in the manner in which has been described by the Defendants, although Mr. Mohan suggests to us that that would be, in fact, in some way an injustice to him.

24 The only injustice that I can see - which would not constitute a forensic denial of adjudicative fairness in this instance - might be the fact that Mr. Mohan's client would be unable to lever out of the Defendants any sort of agreement, because of the fact that they might be intimidated by the Schedule C costs which might land on them as a result of a 23-day trial in this particular instance.

25 It does seem to me that there is no evidentiary problem, though, that would be caused - that I

can discern anyway - for the Plaintiff to have the Plaintiff testify on more than one occasion. If he testifies on more than one occasion over the stretch of the same time period, it seems to me that nothing really has affected him one way or the other and certainly nothing which would rise to the level of injustice. So, in my opinion, the answer to question number three is in favour of severance as well.

26 As to question number four: are the issues complex or difficult? Yes, the issues are complex or difficult so I would accept that from the point of view of Mr. Mohan's position.

27 However, they are not going to be less complex or difficult by having this mish-mashed together with everything being heard at the same time. It seems to me the complexity, if anything, might be actually improved by focussed attention on the right issues at the right time. So the answer to question number four is in favour of severance.

28 As far as question number five is concerned which has to do with delay of the trial, this also relates to the question of injustice. It is my view that if I was to grant severance in this particular instance, I would have to make a condition of the severance order that, in fact, this trial proceed prior to June of 2005 and that the trial that is set for September of 2005 would not be adjourned if the decision in relation to liability should go adverse to the Defendants.

29 If it should go adverse to the Plaintiffs, of course the effect is necessarily what it is. But it seems to me that if it is adverse to the Defendants, the Defendants would not be granted a stay by this Court, pending any appeal the Defendants might wish to take on the question of liability. They would just have to undergo the trial in September as specified. In that respect, I would attempt to prevent any further delay of this particular matter for Mr. Robinson.

30 I might say though, in passing, that insofar as what delay effect might be on Mr. Robinson in a slip and fall case where it is already years past what happened, it is difficult to discern. Other than frustration on his part it is difficult to discern what exactly would be the consequence on delay of this matter for another few months.

31 But I do not wish to be dismissive of Mr. Mohan's point because I think that there is some merit. He can always make that argument that that is the issue that the Court has to be concerned with. But as I said before, I will not grant an adjournment and the Court will not grant an adjournment of the September trial, regardless of the outcome.

3. Conclusion

32 So severance is granted, the liability questions will be stated in accordance with the pleadings, and the parties will, in fact, proceed on that basis. Expert evidence will be called, the deadlines specified by Mr. Justice Hillier will also still continue to apply.

WATSON J.

cp/e/qlmmm

1 Edited for publication. Headlines and footnotes added.

2 Rule 220 of the Alberta Rules of Court, AR 390/68 as amended, provides as follows: "220 Where any point of law has been raised by the pleadings, it may, by leave of the court, be set down for hearing at any time before trial; otherwise it shall be disposed of at trial."

3 Rule 221(1) of the Rules of Court provides as follows: "221(1) The court may order any question or issue arising in a proceeding whether of fact or law or partly fact and partly law to be tried before, at or after the trial and may give direction as to the manner in which the question or issue is to be stated, and may direct any pending application to be stayed until the question or issue has been determined." Rule 221(2) goes on to allow judgment to be entered on the case arising from the adjudication under Rule 221(1).

4 City Taxi Cab #1 Ltd v. Canada Post Corporation, (October 10, 2000) 276 A.R. 159, [2000] A.J. No. 1206, 2000 CarswellAlta 1128 (Alta. Q.B. No. 9003-24381; 2000 ABQB 696).

5 Tanguay (René) and Bordeleau (Diane) v. Vincent (Dr. Denis) (November 2, 1999) 75 Alta. L.R. (3d) 90, [1999] A.J. No. 1229, 1999 AR Uned 510 (MLB), 1999 CarswellAlta 991 (Alta. Q.B. No. 9603-12539).

6 Ratcliffe (Calvin) v. Nakonechny (Randy Owen) et al., (July 24, 2003) 23 Alta. L.R. (4th) 21, 44 C.P.C. (5th) 325, [2003] A.J. No. 1040, 2003 CarswellAlta 1184 (Alta. Q.B. Nos. 9803-08167, 9803-11218, 9803-11382, 9803-11984; 2003 ABQB 667).

7 Esso Resources Canada Ltd. et al. v. Stearns Catalytic Ltd. et al. (February 12, 1999) 114 A.R. 27, 79 Alta. L.R. 1, 77 D.L.R. (4th) 557, 50 C.P.C. (2d) 192, [1991] A.J. No. 129, 1991 CarswellAlta 31, DRS 91-02922, (Alta. C.A. No. 12239).

8 Nonetheless, Counsel for the Plaintiff suggested that severance was "exceptional": see e.g. Bakker (Legal Guardian of John Peter) et al., v. Van Santen (Maria H.) et al., (November 7, 2003) [2003] A.J. No. 1398, 2003 CarswellAlta 1618 (2003 ABQB 921; Alta. Q.B. Nos. 0103 09077 and 0203 12546). To my mind, calling severance "exceptional" sheds little light on the nature of the discretion to be exercised. That adjective does not assist in deciding which cases are or are not appropriate for severance. Justice must be served; when it is, the situation should never be "exceptional".

9 See by comparison, Hinton (Theresa Alice) v. Hinton (John Frederick), (May 12, 2004)

[2004] A.J. No. 551, 2004 ABQB 369 (Alta. Q.B. No. 4803 120804; 2004 ABQB 369), where severance was not appropriate.