Federal Court of Appeal  Cour d'appel fédérale

Date: 20191213

Docket: A-142-18

Citation: 2019 FCA 312

CORAM: **NADON J.A.**
RENNIE J.A.
RIVOALEN J.A.

BETWEEN:

QIANHUI DENG, ADMINISTRATOR ON BEHALF OF SHIMING DENG (DECEASED)

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on December 13, 2019.

REASONS FOR JUDGMENT BY: NADON J.A.

CONCURRED IN BY: RENNIE J.A.
RIVOALEN J.A.

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REASONS FOR JUDGMENT

NADON J.A.

[1] Before us is an appeal from a decision of Boswell J. of the Federal Court (the Judge) dated May 9, 2018 (2018 FC 495) wherein he allowed a motion brought by the respondent, pursuant to Rule 221 of the *Federal Courts Rules*, S.O.R./98-106 (the Rules), to strike the appellant's Statement of Claim.

[2] Following a request by the appellant that his appeal be dealt with in writing without the appearance of the parties, the Chief Justice made the following order on August 19, 2019:

> The appellant having asked that this matter be dealt with in writing without the appearance of the parties, and the respondent having advised that they are not insisting on having an oral hearing, this appeal will be assigned to a panel of three judges who will dispose of it on the basis of the written materials.

[3] The background to the appellant's action against the respondent is the death by suicide of his son, Shiming Deng (the appellant's son), on November 22, 2005, following the issuance of a Deportation Order against him by the Immigration Division of the Immigration and Refugee Board (the Board).

[4] The appellant's son, a citizen of China, came to Canada as a foreign student in 1999 and, following his arrival in this country, made a successful refugee status claim. In due course, he became a permanent resident of Canada.

[5] On August 4, 2004, the appellant's son was convicted of aggravated assault in Canada contrary to subsection 268(2) of the *Criminal Code*, R.S.C. 1985 c. C-46. On October 26, 2005, following his return to Canada from a trip to China, the Canada Border Services Agency seized his passport and prepared an Inadmissibility Report because of serious criminality resulting from his conviction. As a result, the appellant's son was referred to an admissibility hearing before the Board.

[6] At the first hearing, on November 14, 2005, the Board explained to the appellant's son the nature of the proceedings and the process, including his right to appeal any Deportation Order made against him. At that time, the appellant's son indicated that his intention was to leave Canada voluntarily if his passport was returned to him. Although he was offered an adjournment of one month, in order to allow him to speak to counsel, he decided to appear without counsel at a hearing fixed for the following week, *i.e.* on November 22, 2005. Following the second hearing, the Board found him to be inadmissible to Canada by reason of serious criminality. Consequently, the Board issued a Deportation Order against the appellant's son. Later in the day, the appellant's son committed suicide at his residence.

[7] Before it, at the second hearing, the Board was in possession of the appellant's son's certificate of conviction with the terms of his probation, namely that he was to manage his schizophrenia so as not to cause danger to himself or others or commit further offenses.

[8] The appellant, who is suing in his capacity of administrator to his son's estate, seeks the relief which he has set out at paragraph 30 of his Statement of Claim (reproduced as drafted):

> a) Issuing the permanent visiting visa or other visa for the deceased Shiming's parent to enter Canada to visit their son grave every year;
>
> b) Honour citizenship of Canada to the deceased Shiming;
>
> c) A formal national apology to plaintiff for causing Shiming's death by Crown's unconstitutional policy, which violated the deceased Shiming's right under Charter, Crown's breaches of Duty, and Crown's servants' intentional torts;
>
> d) Demanding an award of compensatory, general, and special damages (including but not limited,) Shiming's death, damages for the deceased Shiming's family for losing their son, damages for the deceased Shiming's

family (his parent and him)'s emotional distress, humiliation, anxiety, mental anguish, PTDS, physical pains and sufferings, past, future loss of earning, and damages flowing from that the deceased Shiming family (his parent and him)'s lives were turned into a hellish, a torturous experience; damages for the deceased Shiming's family (his parent and him) subjected to a devastated life environment; and permanent damages on deceased Shiming's family (his parent and him)'s life style, enjoyment of life, personalities, economic well-being and general emotional well-being, and treatment costs on his family PTDS and other sufferings against the Defendant the Crown in the amount of 200 millions ($200,000,000.00);

e) Demanding an award of punitive damages against defendant the Crown in the amount of $ 100 millions ($100,000,000);

f) Awarding all fees and costs, including, but not limited to, travel cost, attorneys' fees, expert and witness fees, court costs, accountant fees and forum fees as available under law;

g) Interest pursuant to the Court Order Interest Act;

h) Awarding any other relief as this Court may deem just and proper.

(Appeal Book, p. 44-45).

[9] In support of the relief which he seeks, the appellant alleges, in his Statement of Claim, that the respondent and its representatives committed various torts, namely:

i. Intentional discrimination and intentional negligence in that the respondent and its representatives failed to recognize his son's mental illness (schizophrenia), failed to follow standard procedures for persons with mental illness, failed to take adequate steps to insure his son's safety and failed to takes steps to relieve the deceased's parents, the appellant and his wife, of emotional distress following their son's suicide;

ii. Intentional violation of his son's rights under sections 7, 12 and subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the Charter) , in that the

respondent and its representatives intentionally or recklessly failed to consider his son's mental illness and failed to take any steps to ensure his safety following the Board's finding of inadmissibility to Canada; and

iii. Breaches of a number of duties under the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (the IRPA) in failing to create policies and standards of conduct to protect persons with mental illness, in failing to act diligently so as to protect such persons following findings of inadmissibility to Canada and in failing to relieve the suffering of such persons and their relatives following the issuance of deportation orders.

[10] The Judge allowed the respondent's motion to strike because in his view the action commenced by the appellant on September 27, 2017, was time-barred as that it ought to have been commenced no later than November 22, 2007, *i.e.* within two years of the appellant's son's death. In so concluding, the Judge relied on section 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 and on subsection 6(1) of the *Limitation Act*, S.B.C. 2012, c. 13.

[11] The Judge also held that, irrespective of the limitation issue, certain paragraphs of the Statement of Claim ought to be struck because the relief sought at paragraphs 30 (a) (b) (c) and (d) of the Statement of Claim were clearly relief that could not be granted by the Federal Court.

[12] The Judge further held that the Statement of Claim did not disclose cognizable torts for which the respondent could be held liable. Specifically, he found that the appellant had "not established the necessary elements to ground a cause of action in negligence against the

[respondent], including the existence of a duty of care, the details of a breach of such a duty, a causal connection between such a breach and any injury, and the actual resulting loss." (Reasons at paragraph 29).

[13] The Judge was also of the opinion that there did not exist any tort of "intentional discrimiation", "intentional negligence" or "intentional abuse of authority". Nor is there a tort for "breach of duty of health care".

[14] The Judge also expressed the view that, with respect to the alleged breaches of the appellant's Charter rights, the law was clear that breaches of rights under sections 7, 12 and 15 of the Charter died with the individual. This led him to say, at paragraph 31 of his Reasons, that:

> … In any event, because the [appellant] has not pleaded anything resembling the tests for infringement of these rights, the *Charter* claims have no reasonable chance of success. Even if the [appellant] could allege that Mr. Deng's *Charter* rights were violated, I agree with the [respondent] that the tests for establishing a breach of section 7, 12, or 15 have not been met or adequately pleaded in the Statement of Claim.

[15] Because I conclude that the Judge made no reviewable error in respect of the limitation issue, I need not address his additional grounds for striking the appellant's Statement of Claim.

[16] In determining the merits of the respondent's motion to strike, the Judge no doubt understood and applied the correct test. At paragraphs 12 to 14 of his Reasons, he referred to the more recent decisions of the Supreme Court of Canada on the test applicable to motions to strike, namely: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 and *R. v. Imperial*

Tobacco Canada Ltd, 2011 SCC 42, [2011] 3 S.C.R. 45, where, in both cases, the Court adopted the reasons given by Wilson J. for the Court in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at page 980 [*Hunt*]:

> … assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect … should the relevant portions of a plaintiff's statement of claim be struck out …
>
> The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[17] As Wilson J. writes in *Hunt*, the applicable test is a difficult one to meet in that an action will only be struck where it is certain, *i.e.* that it is "plain and obvious", that it cannot succeed.

[18] At paragraph 15 of his Reasons, the Judge explained why, in his view, the test to strike the appellant's Statement of Claim was met in the present matter:

> Assuming that the facts as alleged in the present Statement of Claim are true, in my view it is plain and obvious that the Claim should be struck in its entirety, without leave to amend, for a number of reasons, not the least of which is that it is clearly and obviously out of time and amounts to an abuse of process given the essential elements alleged in the first action and those in this action. In my reading of the *Limitation Act*, the ultimate 15-year limitation period in section 21

> does not apply in this case. By virtue of section 32 of the *Crown Liability and Proceedings Act* and subsection 6(1) of the *Limitation Act*, the limitation period within which a court proceeding could have been commenced was no more than two years on and from the date of Mr. Deng's admissibility hearing; that is, on or before November 22, 2007. It is true that the first Action was commenced within the applicable two-year limitation period. However, the present action cannot be a continuation of the first Action because that action was discontinued and the Plaintiff has filed a new Statement of Claim initiating the current proceeding.

[19] Thus, the question which the Judge had to answer was whether it was "plain and obvious" that the appellant's Statement of Claim disclosed no reasonable cause of action and hence that it could not succeed. Because of his view that the appellant's action was time-barred, the Judge had no difficulty answering the question in the affirmative.

[20] I now turn to the standard of review which this Court must apply in reviewing the Judge's decision. The respondent says that the motion before us is a discretionary decision which should be afforded deference unless the Judge gave insufficient weight to relevant factors, proceeded on a wrong principle of law, seriously misapprehended the facts, or where an obvious injustice would otherwise result. In support of that proposition, the respondent relies on this Court's decisions in *Apotex Inc. v. Canada (Governor in Council)*, 2007 FCA 374, 370 N.R. 336; *Collins v. Canada*, 2011 FCA 140, 418 N.R. 23 at paragraphs 12 and 13; and *Sing v. Canada (Border Services Agency)*, 2012 FCA 305, [2012] A.C.F. no 150 at paragraph 6.

[21] In my view, the test put forward by the respondent is no longer the correct test before this Court. In *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331, we held that the standards applicable to discretionary decisions of prothonotaries and judges were the standards enunciated by the Supreme Court in *Housen v.*

Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235. Consequently, questions of law are to be reviewed on the standard of correctness while questions of fact and questions of mixed fact and law are to be reviewed on the palpable and overriding error standard. As to mixed questions, where there exists an extricable question of law, they will be subject to the correctness standard.

[22] For the reasons that follow, I am satisfied that in concluding that the respondent's motion had to succeed because the appellant's action was time-barred, the Judge made no error of law nor did he make a palpable and overriding error in regard to the factual matters before him.

[23] There was evidence before the Judge that the appellant had commenced an earlier action against the respondent on November 22, 2007, in which he alleged, *inter alia*, that his son's death resulted from the conduct of Canadian immigration officials. As a result, the appellant sought damages for negligence, abuse of power and breach of statutory duty (Federal Court file T-2041-07). That action was discontinued by the appellant on September 29, 2010, upon the filing of a Notice of Discontinuance.

[24] Because, as I will shortly explain, the appellant relies on Rules 165 and 222(1)(e) of the Rules for his arguments, I will now reproduce them:

165 A party may discontinue all or part of a proceeding by serving and filing a notice of discontinuance.	**165** Une partie peut se désister, en tout ou en partie, de l'instance en signifiant et en déposant un avis de désistement.
221(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221(1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

…	[…]
(e) constitutes a departure from a previous pleading, or	e) qu'il diverge d'un acte de procédure antérieur;

[25] Pursuant to his understanding of Rules 165 and 221(1)(e), the appellant argued before the Judge, and now argues before us, that the action now before the Court constitutes the resurrection and continuance of his earlier action. In the appellant's words "[t]his means a new proceeding of the discontinued pleading can be commence if consistent with a previous pleading." (Appellant's memorandum of fact and law at paragraph 18). In other words, the appellant's position is that his second action, because it is the resurrection and continuance of his first action, is not time-barred.

[26] In making this argument, the appellant makes a distinction between a statement of claim which has been discontinued prior to trial and a statement of claim which has been dismissed on the merits after a trial. In my respectful view, such a distinction may well have consequences in regard to whether or not the doctrine of *res judicata* finds application but it cannot, other than in the case of exceptional circumstances, have any consequences in regard to the issue of whether or not an action is time-barred.

[27] In concluding that the appellant's action was time-barred and that it did not constitute the resurrection and continuance of his first action, the Judge relied on this Court's decision in *Philipos v. Canada (Attorney General)*, 2016 FCA 79, 493 N.R. 328 [*Philipos*]. More particularly, the Judge referred to paragraphs 8 to 10 and 14 to 21 of that decision. In my view, paragraphs 15 and 20 thereof are particularly relevant to this appeal and I will reproduce them:

> [15] One difference, mentioned above, is the theoretical possibility that after discontinuance a new proceeding can be brought concerning the subject-matter of the discontinued proceeding. But that is not so realistic a possibility. An attempt to start a new proceeding may be met with, for example, a motion to strike based on the expiration of a statutory limitation period or an abuse of process (see, *e.g.*, *Lifeview Emergency Services Ltd. v. Alberta Ambulance Operators' Association* (1995), 101 F.T.R. 43 at para. 13), or the unavailability of an order granting an extension of time when an extension is needed, as in the case of applications for judicial review.
>
> [20] Only some fundamental event that strikes at the root of the decision to discontinue can warrant the resurrection and continuation of a discontinued proceeding. Examples include the procurement of discontinuance by fraud, mental incapacity of the party at the time of discontinuance, or repudiation of a settlement agreement that required a proceeding to be discontinued.

[28] As Stratas J.A., who wrote the Court's reasons in *Philipos*, explains at paragraph 15 above, a new action, following the discontinuance of a prior proceeding, will have to survive a defence based on a statutory limitation period. As he also explains, at paragraph 20 of his reasons, only exceptional circumstances will allow a second action to resurrect and continue an earlier discontinued proceeding and hence not be subject to a time-bar defence. As an example of such exceptional circumstances, Stratas J.A. mentions, *inter alia*, fraud and mental incapacity of the party at the time of discontinuance.

[29] Before the Judge, the appellant argued that he had not been made aware by his former counsel that his earlier action had been discontinued and that he felt uncomfortable in making inquiries regarding the discontinuance. On that basis, he argued that these circumstances justified the resurrection and continuance of the first action. The Judge dealt with that argument as follows, at paragraph 18 of his Reasons:

> It may be that a lawyer who discontinues his client's action unilaterally and without proper instruction raises the sort of exceptional circumstance which might strike at the root of a notice of discontinuance. However, that question does not need to be - and indeed cannot be - answered in the context of the present motion given the absence of any facts whatsoever as to the circumstances leading to filing of the notice of discontinuance. Moreover, it is unclear as to why the Plaintiff has waited more than seven years since filing of the notice of discontinuance for the first Action to initiate the present proceeding. Any alleged discomfort on the Plaintiff's part to speak with his former counsel is insufficient to justify such a lengthy delay.

[30] I would add to the Judge's above comments that the appellant has made no attempt to have the Notice of Discontinuance filed on September 29, 2010 set aside. Thus, there are no exceptional circumstances which could warrant or justify the resurrection and continuance of the appellant's first action. Consequently, although the appellant was entitled to institute a second action, that action was subject to the applicable statute of limitations. In my view, the Judge correctly held that the time to commence an action against the respondent in respect of the appellant's son's death expired on November 22, 2007.

[31] I therefore conclude that by reason of his finding that the appellant's action had to be commenced no later than November 22, 2007, the Judge was correct in striking the appellant's Statement of Claim on the ground that it could not possibly succeed.

[32] For these reasons, I would dismiss the appeal with costs in favor of the respondent.

"M. Nadon"

J.A.

“I agree.
Donald J. Rennie J.A.”

“I agree.
Marianne Rivoalen J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-142-18
STYLE OF CAUSE:	QIANHUI DENG, ADMINISTRATOR ON BEHALF OF SHIMING DENG (DECEASED) v. HER MAJESTY THE QUEEN

APPEAL DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	NADON J.A.
CONCURRED IN BY:	RENNIE J.A. RIVOALEN J.A.
DATED:	DECEMBER 13, 2019

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