Federal Court of Appeal | Cour d'appel fédérale

Date: 20221122

Dockets: A-18-22
A-22-22

Citation: 2022 FCA 201

CORAM: **LOCKE J.A.**
MACTAVISH J.A.
MONAGHAN J.A.

Docket: A-18-22

BETWEEN:

KEVIN KOCH and DAMIAN DE LA GUARDIA

Appellants

and

JANET KATHLEEN BORGATTI, As Administrator of the Estate of the Deceased, RICHARD NEIL BORGATTI, DAVID KOCH, ANNA SKOTNICKA, ESTERA LAWRENCE, IRENEUSZ BRUDEK, CHARLES McCRIE and FOSTER MATTHEWS

Respondents

Docket: A-22-22

AND BETWEEN:

IRENEUSZ BRUDEK

Appellant

and

JANET KATHLEEN BORGATTI, As Administrator of the Estate of the Deceased, RICHARD NEIL BORGATTI, KEVIN KOCH, DAVID KOCH, ANNA SKOTNICKA, ESTERA LAWRENCE, CHARLES MCCRIE, DAMIAN DE LA GUARDIA AND FOSTER MATTHEWS

Respondents

Heard by online video conference hosted by the Registry on September 13, 2022.

Judgment delivered at Ottawa, Ontario, on November 22, 2022.

REASONS FOR JUDGMENT BY: MONAGHAN J.A.

CONCURRED IN BY: LOCKE J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

MONAGHAN J.A.

[1] These appeals concern three unreported speaking orders issued by the Federal Court (per St-Louis, J.) on January 6, 2022, dismissing motions for relief brought by Kevin Koch and Damien de la Guardia in Federal Court File T-558-21 and by Ireneusz Brudek in Federal Court Files T-558-21 and T-198-21.

[2] The circumstances giving rise to the motions and resulting orders are tragic. Two boats collided on Stoney Lake, in Ontario, on August 24, 2019. One was operated by the appellant, Kevin Koch, and the other by Richard Neil Borgatti. Regrettably, Mr. Borgatti and one of his passengers, Kristian Brudek, died as a result of the accident. Four others were injured, including Mr. Koch and Mr. de la Guardia, one of Mr. Koch’s passengers.

[3] Litigation in the Ontario Superior Court of Justice ensued against Mr. Borgatti's estate and against Mr. Koch and his father David Koch, owner of the boat Mr. Koch operated.

[4] Subsequently, the Kochs brought an action in the Federal Court (Court File T-198-21) seeking a declaration that their liability be limited to $1,000,000 pursuant to the *Marine Liability Act*, S.C. 2001, c. 6 (the Koch limitation action). The Kochs engaged a different lawyer for the Koch limitation action than the lawyer Mr. Koch had engaged for his action in the Ontario court. Janet Borgatti, Mr. Borgatti's mother and the administrator of his estate, similarly brought an action in the Federal Court (Court File T-558-21) seeking a declaration that the estate's liability be limited to $1,000,000 (the Borgatti limitation action).

[5] The Federal Court ordered that the limitation actions be case managed by the same case management judge and that motions, returnable on July 21, 2021, be brought for directions dealing with various aspects of the proceedings and the limitation funds. As directed, motions were brought in the two limitation actions. Neither was opposed and, on July 21, 2021, the Federal Court issued virtually identical orders in the two limitation actions adopting language suggested in a draft order included for its consideration in the Borgatti estate motion materials.

[6] The July 21, 2021 orders (the July orders) established certain deadlines for steps in the limitation actions. A notice to potential claimants was to be published before August 7, 2021 (paragraph 3 of the July orders); and, on or before August 24, 2021 (i) statements of defence were to be filed (paragraph 2), (ii) the plaintiff was required to file an affidavit confirming

compliance with the notice publication (paragraph 5), and (iii) notices of claim against the limitation fund and supporting affidavits could be filed (paragraph 6).

[7] Paragraph 7 of the July orders is particularly relevant to this appeal. It provides:

> 7. Any Defendant to this action who has not filed a defence and a Notice of Claim supported by an affidavit on or before August 24, 2021, and any claimant other than a Defendant, who has not filed a Notice of Claim supported by an affidavit on or before August 24, 2021, shall be forever barred from claiming against [the Plaintiff(s)] in respect of the Incident. For greater certainty, even if the limitation period established by statute in respect of a claim against [the Plaintiff(s)] has not yet expired, no claim shall be permitted and any right of action shall be extinguished as against [the Plaintiff(s)] in respect of the Incident.

[8] Unfortunately, none of Messrs. Brudek, Koch or de la Guardia filed a defence, notice of claim or supporting affidavit in the Borgatti limitation action on or before August 24, 2021. Mr. Brudek also failed to timely file the required materials in the Koch limitation action.

I. The Motions Giving Rise to this Appeal

[9] On discovering the missed deadlines, counsel for Mr. Brudek and counsel for Messrs. Koch and de la Guardia brought motions for relief to the Federal Court.

A. *Ireneusz Brudek*

[10] Mr. Brudek brought identical motions in both limitation actions, seeking an extension to the time specified in the July orders for delivery of his statement of defence and service and filing his notice of claim and supporting affidavits. Mr. Brudek relied on Rule 8 of the *Federal*

Court Rules, S.O.R./98-106 (the Rules), which permits the Court to extend or abridge a period provided in the Rules or fixed by an order

[11] In the alternative, Mr. Brudek sought an order varying the July orders to extend the time to satisfy the obligations, an order granting relief from forfeiture for imperfect compliance with the July orders, or an order extending the time for commencing an action under section 23 of the *Marine Liability Act*. Section 23 provides for a two-year limitation period for commencing an action against a ship in collision or its owners, but permits the Federal Court to extend that period in certain circumstances, to the extent and on the conditions it thinks fit.

[12] Mr. Brudek's motion materials included two affidavits. The first, sworn by Mr. Brudek's lawyer, explained that he had failed to serve and file the required documents on behalf of Mr. Brudek. The affidavit attributed the "inadvertent error" to failure to review the July orders in detail, lack of familiarity with the *Marine Liability Act* and a misunderstanding that the statement of claim filed in the Ontario Superior Court of Justice against the Koch brothers and the Borgatti estate, and served on them, was insufficient notice of Mr. Brudek's claims. In part, the lawyer attributed the error to working remotely, rather than in the office, during the COVID-19 pandemic.

[13] The second affidavit was Mr. Brudek's own affidavit attesting to his continuing intention to have the merits of his claims determined. His lawyer attested that his claim as set out in the statement of claim in the Ontario action had merit.

[14] Although other defendants filed affidavits objecting to Mr. Brudek's motions, none filed written submissions. Accordingly, their motion records were incomplete and so not considered by the Federal Court for purposes of Mr. Brudek's motions.

B. *Kevin Koch and Damien de la Guardia*

[15] Like Mr. Brudek, Messrs. Koch and de la Guardia brought a motion in the Borgatti limitation action.

[16] For the most part, Messrs. Koch and de la Guardia sought the same relief as Mr. Brudek, and relied on similar grounds. However, unlike Mr. Brudek, they did not expressly rely on Rule 8, but rather sought "an order to vary the [July Order] to extend the time" for them to serve and file the required documents, relying on Rule 399. Rule 399 permits the Court to set aside or vary an order in certain circumstances. Mr. Brudek adopted their submissions regarding variance of the July orders for purposes of his motions and Messrs. Koch and de la Guardia relied on Mr. Brudek's submissions concerning relief from forfeiture for purposes of their motion.

[17] The motion materials filed by Messrs. Koch and de la Guardia included an affidavit from their lawyer explaining that the firm of which he was a member failed to file and serve the required documents on behalf of Messrs. Koch and de la Guardia as set out in the July order. The lawyer attributed this to his absence from the office in a remote location with limited internet service when he received the July order, the failure by him and his clerk to read the July order in

detail and then diarize the date, vacation schedules, and altered work arrangements attributable to the COVID-19 pandemic.

[18] As in the Brudek motions, other defendants objected to the motion by Messrs. Koch and de la Guardia. However, Anna Skotnicka and Estera Lawrence, Kristian Brudek's mother and sister, respectively, filed written submissions and so completed their motion record. They submitted that they would suffer prejudice if an extension of time was granted to Messrs. Koch and de la Guardia because allowing them to file and serve documents after the deadline set in the July order for the Borgatti limitation action could potentially increase the combined value of all claims against the Borgatti limitation fund. This, they submitted, might reduce the *pro rata* amount recoverable by them against that fund.

II. Hearing of the Motions by the Federal Court.

[19] The Federal Court heard the motions together on November 15, 2021. At the hearing, counsel for Messrs. Koch and de la Guardia advised that they also sought to rely on Rule 8, submitting it was a stand-alone ground, but also was implicit in their argument concerning section 23 of the *Marine Liability Act*. Ms. Skotnicka and Ms. Lawrence (collectively the Responding Party) objected to the Rule 8 argument, asserting it was too late to make it and that it was prejudicial to raise it at the hearing. The Federal Court reserved its decision.

[20] Following the hearing, the Federal Court issued a direction in both limitation actions concerning "the motion for an extension of time filed by Ireneusz Brudek". Thus, it appears the

Federal Court did not seek submissions in the motion brought by Messrs. Koch and de la Guardia, including from the Responding Party. The direction sought submissions relating to Rule 8, including as to whether paragraph 7 of the July orders, quoted at paragraph 7 above, was peremptory, and, if so, whether the test for an extension of time from *Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846, 244 N.R. 399, (F.C.A.) [*Hennelly*] applied or a different test applied, given jurisprudence in the Federal Court. In particular, the direction quoted the following passage from *1395047 Ontario Inc. v. 1548951 Ontario Ltd.*, 2006 FC 339 [*1395047*] at para. 19:

> […] where the period of time is fixed by a peremptory order, the justification required to excuse the delay is set at a very high level and requires a clear demonstration that there was no intention to ignore the order and that the failure to obey was due to extraneous circumstances.

[21] Mr. Brudek made submissions, arguing paragraph 7 was not peremptory. While acknowledging that it incorporated strong language, he submitted it neither used the word "peremptory" nor were the July orders made in circumstances in which a peremptory order might be expected—for example, following prior failures to meet established requirements, rules or orders and the court being satisfied that sufficient time had already been allowed in the circumstances. Finally, he observed that none of the motion materials seeking the July orders suggested they were intended to be peremptory, and their text was suggested by the parties and adopted, rather than drafted, by the Court.

III. *Disposition of the Motions*

[22] The Federal Court dismissed the motions, issuing the speaking orders that are the subject of these appeals. The two orders issued in Mr. Brudek's motions are virtually identical. The order issued in the motion made by Messrs. Koch and de la Guardia is similar, but differs because their notice of motion and written submissions did not expressly refer to Rule 8.

[23] In all three orders, the Federal Court concluded that the July orders could not be varied pursuant to Rule 399. In all three, the Federal Court said that it had not been convinced that the doctrine of relief from forfeiture applies in the case of non-compliance with a time limit fixed by the Court in an order. And, in all three, the Federal Court determined that section 23 of the *Marine Liability Act* was inapplicable because the limitation actions were not governed by that provision.

[24] This left the Federal Court to consider whether Messrs. Brudek and de la Guardia should be entitled to rely on Rule 8 and whether an extension of time should be granted to any of Messrs. Brudek, Koch and de la Guardia.

A. *Brudek Motions: Status of July Orders as Peremptory*

[25] The Federal Court did not agree with Mr. Brudek's submission that paragraph 7 of the July orders was not peremptory. Accordingly, although "satisfied that Mr. Brudek demonstrated a continued intention to pursue his application, that his claim has merit and there is no evidence of prejudice to the plaintiffs", the Federal Court concluded that the *Hennelly* test for an extension of time did not apply.

[26] Rather, said the Federal Court, because the order was peremptory, the elevated test stated in *1395047* applied, and Mr. Brudek had to show that he had no intention to ignore or flout the July orders and that the failure to comply was due to extraneous circumstances beyond his control, citing *Angloflora Ltd. v. Canada Maritime Ltd.*, 2002 FCT 1230; *1395047*; and *Sarasin consultadoria E. servicos LDA v. Roox's Inc.*, 2003 FC 959, aff'd 2003 FC 1010 [*Sarasin*].

[27] Although not commenting on the intention element of this test, the Federal Court concluded that "the failure to obey was not due to extraneous circumstances, beyond the control of the party"—in other words, the lawyer's errors were not extraneous circumstances beyond Mr. Brudek's control.

[28] Both *1395047* and *Sarasin* also dealt with failures of counsel, and applications for extensions of time. However, the Federal Court distinguished them. It found the oversight by Mr. Brudek's lawyer as of a different nature than the lawyer's "administrative oversight" in *1395047*, and observed that in *Sarasin* the late filing was under a part of the order that was not peremptory.

[29] Considering that the "language of [paragraph 7 of the July orders] explicitly warns" of the consequences of not meeting the deadlines, and "the reasons advanced to seek the extension", the Federal Court "was convinced that it is not in the interest of justice to grant the motion" but rather it was "in the interest of justice to protect the stability and finality of decisions".

[30] Thus, the Federal Court dismissed Mr. Brudek's motions in the two limitation actions.

B. *Koch Motions: Availability of Rule 8 Argument*

[31] In dismissing the motion by Messrs. Koch and de la Guardia, the Federal Court said it would not consider their "new Rule 8 argument" because it agreed with the position advanced by the Responding Party:

> "unless the situation is exceptional, new arguments not presented in a party's memorandum of fact and law, or written representations, should not be entertained as to do so would prejudice the opposing party and could leave the Court unable to fully assess the merits of the new argument".

[32] Nonetheless, the Federal Court went on to say that "Rule 8 as a stand-alone argument … as outlined in the other orders in this proceeding and the parallel T-198-21 file [i.e. the orders in the Brudek motions], cannot succeed." In other words, had it agreed to entertain the Rule 8 argument, the Federal Court would have concluded that the extension of time should not be granted to Messrs. Koch and de la Guardia for the same reasons provided to Mr. Brudek.

[33] Thus, the Federal Court also dismissed the motion by Messrs. Koch and de la Guardia.

IV. The Appeal

[34] Messrs. Brudek, Koch and de la Guardia appeal the orders dismissing their applications for extensions of time. The Responding Party, respondents to the appeal by Messrs. Koch and de la Guardia, submit that their appeal should be dismissed but take no position on Mr. Brudek's appeal.

[35] The three appellants raise the following common grounds of appeal:

1. The Federal Court erred in characterizing paragraph 7 as peremptory and therefore applied the incorrect test for an extension of time;

2. The Federal Court erred in concluding that relief from forfeiture was not available in these circumstances; and

3. The Federal Court erred in concluding that Rule 399(2)(a) did not apply to permit the July orders to be varied to extend the time.

[36] Messrs. Koch and de la Guardia also assert that the Federal Court erred in failing to consider their Rule 8 argument, and in doing so, denied them procedural fairness.

[37] I agree that the appeals should be allowed. In my view, the Federal Court erred when it determined that paragraph 7 of the July orders is peremptory. This error led the Federal Court to apply the wrong legal test when it considered whether to grant the extension of time to Mr. Brudek. Moreover, I agree with Messrs. Koch and de la Guardia that the Federal Court erred in declining to address their motion on the basis of Rule 8.

[38] Before I explain why I have come to those conclusions, I will briefly address the standard of review.

[39] Whether to grant an extension of time is a discretionary decision. Discretionary decisions of the Federal Court are reviewable by this Court under the appellate standard of review: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, at para. 79. Therefore, factual findings and matters of mixed fact and law (excluding an extricable legal question) are reviewed for palpable (obvious) and overriding error, and questions of law for correctness: *Housen v. Nikolaisen*, 2002 SCC 33.

[40] Questions of procedural fairness are legal questions; the Court must be satisfied the duty of procedural fairness is met: *Lipskaia v. Canada (Attorney General)*, 2019 FCA 267, at para. 14. The focus is on whether a fair and just process was followed having regard to all the circumstances*: Canadian Pacific Railway v. Canada (Attorney General)*, 2018 FCA 69, at para. 54.

A. *Was paragraph 7 of the July 2021 Orders Peremptory?*

[41] In my view, the Federal Court erred when it determined that paragraph 7 of the July orders is peremptory.

[42] In asking itself whether paragraph 7 was peremptory, the Federal Court focussed only on the language of paragraph 7 and, in particular, the consequence of missing the deadline—a party who fails to make the filing on time “shall be forever barred from claiming” and “any right of action shall be extinguished”. Nothing in its speaking orders suggests the Federal Court

considered the circumstances in which the July orders were issued or the language of the July orders as a whole. This was an error of law.

[43] While there is no definition *per se* of a peremptory order, the jurisprudence teaches that a peremptory order is an order of last resort. As explained in *Inmates of Mountain Prison v. R.*, [1998] F.C.J. No. 1064, 81 A.C.W.S. (3d) 765 [*Inmates*] at para. 4:

> Peremptory or "unless" orders are generally only made when a party has already failed to comply with a requirement, rule or order and the court is satisfied that the time already allowed is sufficient in the circumstances.

[44] Consistent with this jurisprudence in the Federal Court and in this Court peremptory orders are typically made only after repeated failures to meet deadlines established by the Court or the Rules. See, for example, *Woo v. Canada (National Parole Board)*, [1998] F.C.J. No. 1248, 153 F.T.R. 147; *Symbol Yachts Ltd. v. Pearson*, [1996] 2 FC 391, 107 FTR 295; *LS Entertainment Group Inc. v. Kalos Vision Ltd. and Kalos Ltd.*, 2001 FCT 1000; *Canadian National Railway Co. v Norango (The)*, [1976] 2 F.C. 264, 1976 CanLII 2384 (FCA); *Commercial Union Assurance Co. plc. v. M. T. Fishing Co.*, [1999] F.C.J. No. 1405, 91 A.C.W.S. (3d) 511; *Lewis v. Canada (Correctional Service)*, 2015 FC 118; *Canada (Attorney General) v. Fabrikant*, 2019 FCA 174; and *Smithkline Beecham Corporation v. Pierre Fabre Médicament*, 2004 FCA 441.

[45] Thus, the context in which the deadlines in the July orders were established and in which the orders were issued is relevant. This is not to say that the language used in the orders is not relevant, but the language used must be considered in the broader circumstances.

[46] So what were the circumstances surrounding the issuance of the July orders? They were issued after the Federal Court issued a direction that motions be brought to establish timelines and procedures. They were the first orders establishing the timelines; they did not follow a series of failures to meet deadlines or other Court orders—the motions seeking them were timely brought, and followed discussions between counsel for the Borgatti estate and counsel for Messrs. Koch and de la Guardia. The July orders adopted language suggested by the parties and were brought on consent. They were not presented to the Federal Court on the basis they should be peremptory.

[47] Thus, nothing in the circumstances surrounding the issuance of the July orders would suggest that the parties understood or intended them to be peremptory. Consistent with that understanding, on the motions before the Federal Court to extend the time giving rise to these appeals, no one, including the Responding Party, suggested that the dates in the July orders were peremptory.

[48] While it is true that paragraph 7 describes the consequences of failing to meet the August 24, 2021 date in clear terms, nothing on the face of the July orders warned the parties that the dates set in any of the paragraphs were set on a peremptory basis. Nowhere in the July orders is the word “peremptory” used. Although that word is not required, peremptory orders issued by the Federal Court and this Court often use it so there is no doubt about the meaning. In my view, where nothing in the circumstances suggests that an order is being made on that basis, the absence of the word “peremptory” in the order is a strong indication that the order is not peremptory.

[49] Moreover, the date in paragraph 7 of the July orders also appears in paragraphs 2, 5 and 6 of the same orders. Paragraph 2 provides that statements of defence are to be delivered by August 24, 2021. Paragraph 5 establishes that date as the deadline for the plaintiff in the limitation action to file an affidavit confirming compliance with the publication of the notice requirements in paragraph 3. Paragraph 6 provides that defendants and others "*may* serve and file" [my emphasis] a notice of claim against the limitation fund, supported by an affidavit, on or before that date. Nothing in those paragraphs suggests those dates, or the date for publication of the notice provided in paragraph 3 of the July orders, is peremptory.

[50] Paragraph 7 adopts the requirements and dates from paragraphs 2 and 6. Thus, if paragraph 7 is peremptory, the dates in paragraphs 2 and 6 must also be peremptory. It is inconceivable that those dates—for filing a statement of defence and notice of claim and supporting affidavits—could be changed and corresponding changes not made to paragraph 7 which repeats those requirements. Yet, as observed, there is no indication in paragraphs 2 or 6 those dates are peremptory.

[51] Moreover, it is clear that the purpose of paragraph 7 of the July orders, as reflected in the language suggested by counsel to the Borgatti estate (and adopted by the Federal Court in the July orders), is to address matters contemplated by section 33 of the *Maritime Liability Act*. Section 33 does not establish a time limit for making claims against a limitation fund but rather empowers the Federal Court to do so. Paragraph 7 of the July orders does that—it establishes August 24, 2021 as that time limit, coincidental with the time limits in paragraphs 2, 5 and 6 of the same orders, and coincidental with the two year limitation period for commencing actions

found in section 23 of the *Maritime Liability Act*. In my view, looking at the July orders holistically, and with regard to the surrounding circumstances, August 24, 2021 cannot be viewed as an inflexible date incapable of being changed. Thus, I agree with the appellants that the Federal Court erred in characterizing paragraph 7 of the July orders as peremptory.

B. *Given that conclusion, what is the correct test for an extension of time?*

[52] Because the Federal Court incorrectly concluded that the July orders were peremptory, it did not apply the correct test to determine whether it should exercise its discretion to extend the time.

[53] The factors to consider in exercising a discretion to extend time are well known and are derived from *Hennelly*. The four questions to ask are (i) whether there is a continuing intention to pursue the matter, (ii) whether there is some merit to the underlying claim, (iii) whether there is prejudice arising from the delay, and (iv) whether there is a reasonable explanation for the delay. However, all four factors need not favour an extension of time and the importance of any particular factor depends on the circumstances: *Gambler First Nation v. Ledoux*, 2020 FCA 204 at para. 6.

[54] As explained by this Court in *Alberta v. Canada*, 2018 FCA 83 at para. 45:

> These [*Hennelly*] questions are helpful to determine whether the granting of an extension is in the interest of justice, because the overriding consideration or the real test is ultimately that justice be done between the parties (*Grewal v. Minister of Employment and Immigration*, [1985] 2 F.C.R. 263 at 277-279 (F.C.A.)). Thus, *Hennelly* does not provide an extensive list of questions or factors that may be relevant in any given case, nor is the failure to give a positive response to one of

> the four questions referred to above necessarily determinative (*Canada (Attorney General) v. Larkman*, 2012 FCA 204, at para. 62).

C. *Should Mr. Brudek have been granted an extension of time?*

[55] The Federal Court was "satisfied that Mr. Brudek demonstrated a continued intention to pursue his application, that his claim has merit and that there is no evidence of prejudice to the Plaintiffs" in the two limitation actions. Thus, three of the four *Hennelly* factors favoured granting him an extension of time. However, because it incorrectly characterized the July orders as peremptory, the Federal Court did not determine whether there was a reasonable explanation for the delay, focussing instead on whether the delay was due to an extraneous circumstance beyond Mr. Brudek's control.

[56] As noted, Mr. Brudek's lawyer has acknowledged that the source of delay was failures by him and his colleagues. While an error by counsel will not necessarily constitute a reasonable explanation for the delay, there is no doubt that it can be seen as one, as in *Sarasin, 1395047, Medawatte v. Canada (Minister for Public Safety and Emergency Preparedness)*, 2005 FC 1374, and *O'Leary v. Ragone*, 2022 FC 749, a case that bears many similarities to these appeals.

[57] The July orders were sent to Mr. Brudek's counsel. Mr. Brudek undoubtedly relied on his lawyer to review them with appropriate diligence and to meet deadlines established in them. On realizing that the deadlines were missed, prompt action was taken to seek the extension of time. In these circumstances, I would be prepared to conclude that, from Mr. Brudek's perspective, there was a reasonably explanation for the delay.

[58] However, even absent a reasonable explanation for the delay, Mr. Brudek nonetheless may succeed because no *Hennelly* factor is determinative and the overarching consideration and real test is whether justice will be done between the parties if the extension is not granted.

[59] This requires the interests of the parties to be balanced, something the Federal Court failed to do, notwithstanding that this principle applies equally to peremptory orders: *Jourdain v. Ontario* (2008), 91 O.R. (3d) 465, 167 A.C.W.S. (3d) 498 (ONSC), citing *Hytec Information Systems Ltd. v. Coventry City Council*, [1996] E.W.J. No. 3603 (C.A. (Civ. Div.); *Conway (Re)* 2016 ONCA 918. Rather, while finding no prejudice, and expressing sympathy for Mr. Brudek, the Federal Court concluded that it was "not in the interest of justice to grant" the motions but rather, "given the clear language" of the July orders, "it was in the interest of justice to protect the stability and finality of decisions".

[60] Thus, for the Federal Court the determinative factor appears not to have been justice between the parties, but rather the stability and finality of court decisions. While that is obviously an important principle, in the context of a timetable order that is not peremptory, and in the face of Rule 8 which expressly contemplates extensions of time, it cannot be determinative.

[61] No one effectively objected to Mr. Brudek's motions and the Federal Court found no prejudice to the plaintiffs. Yet, if an extension of time is refused, the consequences to Mr. Brudek are highly prejudicial. Without it, he will have no opportunity to pursue a claim for

the death of his son, a claim that the Federal Court was satisfied had merit. All of this favours granting Mr. Brudek's motion.

[62] In my view, the *Hennelly* factors and the overarching principle that justice be done between the parties support no other conclusion than that Mr. Brudek should have been granted an extension of time. It is the only way that his claims can be heard and determined on the merits, so that justice is done between the parties.

D. *Should the Federal Court have refused to hear the Rule 8 argument advanced by Messrs. Koch and de la Guardia?*

[63] The motion by Messrs. Koch and de la Guardia differs from Mr. Brudek's motions in two respects. First, because Rule 8 was not explicitly asserted in the motion record, the Federal Court refused to consider their submissions on Rule 8. Therefore, we do not have the benefit of the Federal Court's assessment of the *Hennelly* factors as they relate to their motion. Second, the Responding Party opposed the motions, claiming prejudice in the form of more potential claims against the Borgatti limitation fund.

[64] I will first address the Federal Court's refusal to consider Rule 8.

[65] Messrs. Koch and de la Guardia assert that the Federal Court erred in not considering their Rule 8 argument, and by doing so denied them procedural fairness. They assert the Federal Court relied on a line of cases where new arguments were not entertained because there was

prejudice and the court was unable to fully assess the merits of the argument. Those circumstances were not, say Messrs. Koch and de la Guardia, present in the motions they brought before the Federal Court.

[66] I agree with Messrs. Koch and de la Guardia that the Federal Court erred in not considering Rule 8.

[67] While I am far from convinced that Rule 8 was a new argument, even if it were, that would not end the matter. Even on appeal, a new argument may be entertained if the interests of justice require it and the Court has a sufficient evidentiary record or findings of fact to do so: *Quan v. Cusson*, 2009 SCC 62 at paras. 36-37 and *Eli Lilly Canada Inc. v. Teva Canada Limited*, 2018 FCA 53 at para. 45, leave to appeal to SCC refused, 38077 (8 November 2018).

[68] Moreover, Rule 3 instructs us that we are to focus on the substance of matters and decide them on their merits. Rule 56 buttresses this principle by instructing us to overlook technical deficiencies in pleadings and other court documents. Other rules are to similar effect: Rule 59 permits the Court to address irregularities, including by allowing amendments. Rule 60 permits the Court to point out non-compliance with the Rules and permit the party to take remedial action on such conditions as the Court considers just. Rule 75 contemplates that a document may be amended during a hearing, on such terms as will protect the rights of all parties, where the purpose of the amendment is to make the document accord with the issues.

[69] The Federal Court was obligated to look beyond the failure to expressly refer to Rule 8 in the notice of motion and to "discern the application's 'real essence' and 'essential character'": *Leahy v. Canada (Citizenship and Immigration)*, 2020 FCA 145 at para. 4, citing *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc*., 2013 FCA 250 [*JP Morgan*] at paras. 49-50. As this Court said in *JP Morgan*, the Court must "gain 'a realistic appreciation' of the [motion's] 'essential character' by reading it holistically and practically without fastening onto matters of form."

[70] Here, there is no doubt about what Messrs. Koch and de la Guardia were seeking: an extension of time. Their notice of motion used the phrase "to extend the time". The focus of all of the arguments was achieving that end. There is also no doubt that Rule 8 governs. It is the Rule that expressly permits the Court to extend the time set in the Rules and in Court orders.

[71] Although Messrs. Koch and de la Guardia relied on the wrong Rule, the Federal Court should have dealt with the substance of their request. This is nothing new: see, for example, *Groupe Westco Inc. v. Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited*, 2011 FCA 13 at paras. 10-11; and *Sport Maska Inc. v. Bauer Hockey Ltd.*, 2019 FCA 204 at paras. 28-30.

[72] The only objection the Responding Party raised before Federal Court to any of the grounds advanced by Messrs. Koch and de la Guardia for the extension of time was prejudice because, if granted, there would be more claims against the Borgatti limitation fund. Thus, the Federal Court had the benefit of the Responding Party's submissions on that issue.

[73] Moreover, the Federal Court should have asked itself whether any objection to the "new argument" on Rule 8 could have been addressed by providing the Responding Party with an opportunity to make submissions after the motions were heard. The Federal Court itself employed this very procedure in seeking submissions from Mr. Brudek on issues it identified after hearing the motions.

[74] In support of their position that the appeal should be dismissed, the Responding Party reiterates the same prejudice before us, as well as the unfairness of being unprepared to address Rule 8 at the hearing before the Federal Court. In response to the appellants' assertion that the Federal Court erred in refusing to consider Rule 8, the Responding Party advances nothing new in their memorandum of fact and law. When asked, counsel was unable to identify for us any submissions, other than the prejudice, that the Responding Party would have advanced had they had express notice of Rule 8 as a ground for the extension of time.

[75] While I will address the prejudice asserted by the Responding Party below, in my view the Federal Court erred in refusing to consider Rule 8. Thus, the Federal Court should have applied the *Hennelly* factors and the overarching principle of justice between the parties in assessing whether Messrs. Koch and de la Guardia should be granted an extension of time.

E. *Should Messrs. Koch and de la Guardia be granted an extension of time?*

[76] Presumably, because it was unwilling to consider Rule 8, the Federal Court made no findings regarding the *Hennelly* factors in the context of the motion by Messrs. Koch and de la Guardia.

[77] Since the record before us contains the evidence that was before the Federal Court, in the interests of not prolonging this matter further, in my view this Court should decide on the merits of their motion.

[78] Unlike Mr. Brudek, neither Mr. Koch nor Mr. de la Guardia filed an affidavit. However, in his affidavit, their lawyer affirms that at all material times Messrs. Koch and de la Guardia intended to make claims against the Borgatti estate for damages and that, as set out in their statements of claim filed in the Ontario Superior Court of Justice, they have reasonable claims. The record also shows that on realizing their failure to meet the deadlines, they promptly took steps to seek the extension of time. These facts address two of the *Hennelly* factors.

[79] As noted previously, the Responding Party asserts that they would suffer prejudice if the extensions of time were granted. The only prejudice alleged is a *pro rata* reduction in the share of the Borgatti limitation fund they might receive. However, that is not a prejudice attributable to the delay. Rather, the delay provided the Responding Party with a potential benefit they would not otherwise have enjoyed. If the extension of time is granted, the Responding Party will be in exactly the same position with respect to the limitation fund as they would have been in had

Messrs. Koch and de la Guardia met the deadline. Thus, there is no evidence of prejudice attributable to the delay.

[80] This leaves only the fourth factor, reasonable explanation for the delay, and the overarching principle. I need not repeat my comments from paragraphs 56 to 62 above but, with the exception that there was an objection, they are equally applicable to the motion by Messrs. Koch and de la Guardia.

[81] Thus, I would grant the motion for extension of time made by Messrs. Koch and de la Guardia.

V. Other Grounds of Appeal

[82] In view of this conclusion, it is not necessary to address whether the Federal Court erred in concluding that the equitable principle of relief from forfeiture was not available or that Rule 399(2)(a) did not apply to permit the July orders to be varied to extend the time. However, my decision to not address those issues should not be interpreted as endorsing the Federal Court's analysis or conclusions with respect to those issues.

VI. Costs

[83] Mr. Brudek's motions were not opposed in the Federal Court, and no costs were awarded. Similarly, Mr. Brudek's appeal was not opposed and so he neither seeks, nor should he be awarded any costs.

[84] While the appellants, Mr. Koch and Mr. de la Guardia, did not seek costs in this Court, they seek a reversal of the costs award made in favour of the Responding Party in the Federal Court. The Responding Party seeks costs in this Court as well as the Court below.

[85] In view of my conclusion on the merits of their appeal, I exercise my discretion to award no costs in this Court, to reverse the costs award in the Federal Court, and to order that each party bear their own costs before this Court and in the Federal Court.

VII. Conclusion

[86] For the foregoing reasons, I would allow the appeals and set aside the two orders of the Federal Court dated January 6, 2022 in Federal Court File T-558-21 and the order of the Federal Court dated January 6, 2022 in Federal Court File T-198-21 and, giving the orders the Federal Court should have given:

(i) grant the motions and extend the time in the July 21, 2021 Order, in Federal Court File T-558-21, for Kevin Koch, Damien de la Guardia and Ireneusz Brudek to file

their statements of defence, notices of claim and supporting affidavits from August 24, 2021 to December 23, 2022, without costs; and

(ii) grant the motion and extend the time in the July 21, 2021 Order, in Federal Court File T-198-21, for Ireneusz Brudek to file his statement of defence, notice of claim and supporting affidavits from August 24, 2021 to December 23, 2022, without costs.

"K.A. Siobhan Monaghan"
J.A.

“I agree
George R. Locke J.A.”

“I agree
Anne L. Mactavish J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-18-22 AND A-22-22

APPEALS FROM SPEAKING ORDERS OF THE HONOURABLE MADAM JUSTICE ST-LOUIS DATED JANUARY 6, 2022, NO. T-558-21 (A-18-22) AND NOS. T-558-21 and T-198-21 (A-22-22)

DOCKET:	A-18-22
STYLE OF CAUSE:	KEVIN KOCH and DAMIAN DE LA GUARDIA v. JANET KATHLEEN BORGATTI, As Administrator of the Estate of the Deceased, RICHARD NEIL BORGATTI, DAVID KOCH, ANNA SKOTNICKA, ESTERA LAWRENCE, IRENEUSZ BRUDEK, CHARLES McCRIE and FOSTER MATTHEWS
AND DOCKET:	A-22-22
STYLE OF CAUSE:	IRENEUSZ BRUDEK v. JANET KATHLEEN BORGATTI, As Administrator of the Estate of the Deceased, RICHARD NEIL BORGATTI, KEVIN KOCH, DAVID KOCH, ANNA SKOTNICKA, ESTERA LAWRENCE, CHARLES McCRIE, DAMIAN DE LA GUARDIA and FOSTER MATTHEWS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 13, 2022
REASONS FOR JUDGMENT BY:	MONAGHAN J.A.
CONCURRED IN BY:	LOCKE J.A. MACTAVISH J.A.

DATED: NOVEMBER 22, 2022

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