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Motions for Partial Summary Judgment: Further Commentary from the Court of Appeal after *Butera*

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In its 2017 decision in *Butera v. Chown, Cairns LLP*,[1] the Ontario Court of Appeal discussed the problems associated with partial summary judgment motions.[2] Specifically, the Court cautioned that partial summary judgment motions:

- delay the resolution of the main action;
- may be very expensive;
- may be a waste of judicial resources; and
- carry a high risk of inconsistent findings.

Since *Butera*, the Court of Appeal has issued decisions on partial summary judgment that apply these principles and provide further commentary.

Claims Against a Co-Defendant are Not Easily Bifurcated

In *Mason v. Perras Mongenais et al*,[3] the Court of Appeal set aside summary judgment that was granted in favour of only one of the defendants. The plaintiff retained the defendant family lawyer to act for him in a divorce matter and retained the defendant tax lawyer to provide tax advice on any terms of settlement. After the tax lawyer provided advice, the parties settled the equalization issue. The approach taken in the settlement was not the approach recommended by the tax lawyer and the plaintiff incurred a tax liability of $1.3 million. The plaintiff sued the defendants for professional negligence. The tax lawyer moved for summary judgment of the claims against him. The motion was granted and the motion judge's decision was overturned on the plaintiff's appeal.

The Court of Appeal commented that the motion judge failed to consider the advice given by the Court regarding the risks associated with partial summary judgment. Among other things, the Court stated that the potential liability of the tax lawyer could not be readily bifurcated from the claims against the family lawyer and that "[o]ne simply cannot separate those dealings into discrete compartments and pretend that a determination of one does not have any impact on the others."[4]

The Court also took issue with the motion judge's apparent adoption of the view that trials are an option of last resort and are not the preferred method for the resolution of claims. In response, the Court stated:

With respect, the culture shift referenced in *Hryniak* is not as dramatic or as radical as the motion judge would have it. The shift recommended by *Hryniak* was away from the very restrictive use of summary judgment, that had developed, to a more expansive application of the summary judgment procedure. However, nothing in *Hryniak* detracts from the overriding principle that summary judgment is only appropriate where it leads to "a fair process and just adjudication": *Hryniak* at para. 33. Certainly there is nothing in *Hryniak* that suggests that trials are now to be viewed as the resolution option of last resort. Put simply, summary judgment remains the exception, not the rule.[5]

Expedited Trials are a Recommended Option

In *Brown v. Laurie*,[6] the Court of Appeal upheld a partial summary judgment, but took the opportunity to comment further on the delay created by such motions. The Court also suggested that lawyers should "consider faster and cheaper alternatives for conducting final adjudication on the merits of the claim". Specifically, the Court stated:

…we would observe that the summary judgment motion was argued one year ago, with judgment rendered eight months ago. The appellants were entitled to appeal the judgment, which they did. In the meantime, the trial of the promissory note claim is on hold. When the scheduling dust settles, it may well be that the trial of the promissory note claim does not take place until almost two years after the summary judgment motion was argued. That is a most unfortunate delay for an action involving a claim of only about $300,000. Before scheduling a summary judgment motion for a claim of that size, we would encourage both counsel and the motions Bench to consider faster and cheaper alternatives for conducting a final adjudication on the merits of the claim. This action required no more than three days for trial. Had that trial taken place a year ago, the parties would not be facing the prospect of further litigation costs following this decision.[7]

The Delay Involved Can Be Substantial

Most recently, in *Service Mold + Aerospace Inc. v. Khalaf*,[8] the Court of Appeal found that a motion judge had committed palpable and overriding errors in granting partial summary judgment. The Court stated that it was not sufficient for the motion judge to consider whether overlap had been demonstrated by the parties. Rather, it was incumbent on the motion judge to satisfy herself that the issues could readily be bifurcated without causing overlap. The Court of Appeal found that the motion judge erred in principle when evaluating the risk of overlap in the evidence. Among other things, the motion judge failed to recognize that the defence on the claim at issue was also pleaded in response to the other claim, and she gave undue weight to the fact that she had not heard evidence about the other claim during the partial summary judgment motion.[9]

The Court also highlighted the delay occasioned by the partial summary judgment motion:

This case is also illustrative of the delay that partial summary judgment entails. Through no fault of anyone, the summary judgment motion has delayed the trial by close to two years, leaving aside the seven months it has taken to hear the appeal. The motion judge spent over 12 months deliberating in order to write two decisions, a significant expenditure of judicial resources. The delay was predictable and, in my view, not given adequate consideration, particularly when the motion judge came to appreciate after the April 25, 2017 hearing that the summary judgment motion would require the scheduling, conduct and determination of a mini-trial before the trial itself would move forward.[10]

In Practice

As any lawyer who has attended Civil Practice Court in Toronto to schedule a summary judgment motion has likely seen, the Toronto court has been promoting expedited short trials in favour of summary judgment motions – whether partial or full – in an effort to deal with matters efficiently and on a full record. Despite the expansion to a judge's powers on a summary judgment motion over the last decade, the Court of Appeal has ensured that summary judgment is very much the exception, and partial summary judgment is a rare occurrence.

[1] 2017 ONCA 783.

[2] For a discussion of this decision, see Lia Boritz's article *Motions for Partial Summary Judgment: Proceed with Caution*:

https://www.weirfoulds.com/motions-for-partial-summary-judgment-proceed-with-caution

[3] 2018 ONCA 978.

[4] *Ibid* at para 38.

[5] *Ibid* at para 44.

[6] 2019 ONCA 175.

[7] *Ibid* at para 25.

[8] 2019 ONCA 369.

[9] *Ibid* at paras 18-21.

[10] *Ibid* at para 23.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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