Hyperbole – the danger of overstating a case

November 29 2016 | Contributed by Dentons

AUTHORS

Norm Emblem

Bethany McKoy

Introduction

The decision in *Royal Bank of Canada v Boussoulas*(1) as upheld by the Ontario Divisional Court(2) provides a valuable lesson to parties and their counsel who overstate or misstate their case in the context of seeking interlocutory equitable relief from a high volume court. In a case where the court indicated it was otherwise prepared to grant an interlocutory Mareva injunction, the court was persuaded by the responding parties that the relief should be declined as the moving party made numerous allegations of fraud that were not made out and not advanced in oral argument by the moving party. This tactical decision by the moving party cost it the interlocutory relief it was seeking.

Mareva injunction

The Royal Bank of Canada brought an action against a number of individuals and entities arising out of a loan to certain of these parties. Following the exchange of pleadings in the action, the bank moved for a Mareva injunction to enjoin the defendants from dissipating assets that would frustrate any judgment the bank might obtain in the action. The test on a Mareva injunction – an equitable remedy – has three components:

> *"The plaintiff must first show a strong prima facie case, coupled with a real risk the defendant will remove assets from the jurisdiction or dissipate those assets to avoid the possibility of a judgment. The balance of convenience must also favour the plaintiff."*(3)

The Mareva injunction came on for hearing following the exchange of affidavits, cross-examinations thereon and the filing of facta. The bank filed a factum, a supplementary factum and an amended factum. The parties booked a single day to argue the motion. The materials filled up three bankers' boxes. On the initial return date Justice Stinson, the motion judge, urged counsel that they would need more time to argue the motion based upon the extent of the material filed and adjourned the matter for three weeks and set aside two days for the hearing of the motion. In the end, the parties took a total of three days to argue the matter.

Dismissal

The judge observed that the bank used the word 'fraud' multiple times in its notice of motion, affidavit, initial factum and supplementary factum. However, the bank did not mention the word 'fraud' in its most current amended factum. The responding parties seized on this and the absence of any oral argument made by the bank based on fraud.

The judge dismissed the bank's motion notwithstanding that all three elements of the test for a Mareva injunction were made out relying upon the multiple references to fraud made in the bank's initial motion materials, which were not mentioned in the bank's most current amended factum or

advanced by the bank in oral argument, despite the responding party having specifically dealt with the allegations of fraud in its factum. In dismissing the motion, the judge made several important statements regarding the role of counsel which serve as important guidance for future cases.

Stinson referenced *The Law of Civil Procedure in Ontario* by Williston and Rolls, for the proposition that:

> "*A solicitor ought not to allege fraud unless there has been presented to him prima facie evidence which, if uncontradicted, would justify the allegation; it is an abuse of the process of the court to allege fraud without foundation*."

Stinson also quoted from *Lawyers Duties to the Court* by Justice Ipp:

> "*[I]t is the general duty of lawyers not to mislead the court by stating facts which are untrue, or mislead the judge as to the true facts, or conceal from the court facts which ought to be drawn to the judge's attention...*
>
> *As part of the duty to act with utmost honour and fairness, lawyers owe a duty to the court to exercise care when making allegations of misconduct about others. Otherwise the process of the court is susceptible to abuse.*"(4)

Stinson observed:

> "*As I have indicated previously, in my view, the conduct of [the Bank] in these proceedings has been such as to disentitle it to equitable relief. Misstatements and overstatements of evidence such as those mentioned above impair and impede the court in the performance of its function, and are to be strongly discouraged. It is no answer for a party to say: 'this motion was brought on notice – the defendant had every opportunity to respond with his side of the story.'* Whether a motion is or is not brought on notice does not affect a party's duty to be fair, accurate and candid with the court, in its notice of motion, affidavits and factum. At the same time as advocating his or her client's cause, counsel has a duty to assist the court in arriving at a just and proper result." (Emphasis added).

Stinson concluded:

> "*I therefore hold that, by reason of the plaintiff's conduct and shortcomings described above and despite my conclusion that the plaintiff would otherwise be entitled to injunctive relief, in the exercise of my discretion I decline to grant that remedy or the appointment of a receiver*."

Appeal

The bank appealed the dismissal of its motion for a Mareva injunction to the Divisional Court of Ontario. The divisional court noted that the bank's original and amended statements of claim "were gorged with allegations of fraud". In the result, the divisional court upheld the decision of Stinson and stated:

> "*After relying on allegations of fraud for the purposes of obtaining the interim interlocutory injunction and continuing to rely on allegations of fraud during the run up to the argument of the motion and until the delivery of the amended factum,* the [Bank] made its own unfettered tactical decision *not to rely on the allegations of fraud for the purposes of the Mareva injunction while at the same time not abandoning those allegations...*
>
> If in the eleventh hour, the Bank made a tactical decision not to rely on its allegations of fraud, in order to curry the favour of the Court – which I do not think [the Bank] did – then it was an unsolicited decision. *The [Bank] made its tactical decision because it apparently thought that there would be advantages and no adverse consequences. The Defendants, however, did not agree that there should be no adverse consequences, and as I will explain below, the motions judge made no error in visiting on the Bank the consequences of its tactical decision...*

Further, and in any event, the discretionary factors associated with equitable relief are always in play and this issue does not have to be pleaded. In other words, it would not have come as a surprise and it should not have come as a surprise that a Court with an equitable discretion will exercise its discretion in accordance with the historic principles of equity, which the motions judge set out in his reasons. The discretionary elements of equity's jurisdiction are inherent in equity's jurisdiction. Indeed, equity's in personam jurisdiction is its legal persona...

The [Bank] made a late in the day tactical decision not to rely on the allegations of fraud for the purposes of the Mareva injunction but at the same time did not abandon those allegations. In my opinion, in the circumstances of this case, without the concurrence of the Defendants, this tactical decision had consequences. Metaphorically speaking, if a litigant drops the gauntlet and insults another's integrity, then the litigant must complete the duel or genuinely withdraw the insult and apologize." (Emphasis added)

Comment

Counsel must be careful in drafting motion materials to fairly state the evidence in support of the relief sought and not to overstate or misstate. There is no place for unreasonable excess or misstatement. In particular, this applies in high volume courts where judges make themselves available on short notice to deal with pressing litigious matters.

For further information on this topic please contact Norm Emblem or Bethany McKoy at Dentons Canada LLP by telephone (+1 416 863 4511) or email (norm.emblem@dentons.com or bethany.mckoy@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2010 ONSC 4650.

(2) 2012 ONSC 2070.

(3) *Aetna Financial Services Ltd v Feigelman* [1985] 1 SCR 2 (SCC).

(4) *Law Quarterly Review* 114, 63 (1998).
