CITATION: Attis v. Ontario, 2011 ONCA 675
DATE: 20111031
DOCKET: C52776

COURT OF APPEAL FOR ONTARIO

Sharpe, Epstein JJ.A. and Cunningham A.C.J. (*ad hoc*)

BETWEEN

S. Joyce Attis and A. Tesluk

Appellants

and

Her Majesty the Queen in Right of Ontario, as Represented by the Minister of Health, the Attorney General for Canada *et al.*

Defendants (Respondent)

Samuel S. Marr, for the appellant, Attis

A. Tesluk, appearing in person

J. Brian Casey and David Gadsden, for the appellants, Legge and Legge & Legge

Paul J. Evraire, Q.C., Shain Widdifield and James Soldatich, for the respondent, Attorney General for Canada

Heard: September 26, 2011

On appeal from the order of Justice Cullity of the Superior Court of Justice dated September 10, 2010.

Cunningham A.C.J. (*ad hoc*):

[1] This is an appeal by John B.J. Legge & Legge, Barristers and Solicitors ("the firm") from the order of Cullity J. dated September 10, 2010 ("the order"). Cullity J. ordered the appellant to indemnify the plaintiffs for costs awards previously made in this action, including costs awarded to the Attorney General for Canada ("the AG") in a previous appeal to this court as well as costs of an unsuccessful application for leave to the Supreme Court of Canada. The basis of the decision was that the plaintiffs had not given the appellants authority to bring the action because they had not properly advised the plaintiffs of their potential exposure to costs. Simply put, Cullity J. found that:

1) the plaintiffs had not been properly advised of their potential exposure to costs in the event of the dismissal of the class proceeding (as it was);
2) uninformed consent or authority to proceed is not consent or authority; and
3) when a solicitor commences an action without consent or authority from a client, the solicitor should be personally liable for costs.

[2] In arriving at his conclusion, Cullity J. relied upon Rules 15.02(4), and 57.07(1)(c) of the *Rules of Civil Procedure*, O. Reg. 575/07, s. 6(1). As well, the motions judge relied upon the courts inherent jurisdiction with respect to the conduct of counsel.

[3] By way of background, the plaintiffs' certification motion in the underlying action was dismissed by Winkler J. (as he then was) on May 3, 2007. Costs were awarded to the AG against the plaintiffs in the amount of $125,000.

[4] Following the dismissal of the certification motion, the plaintiffs appealed to the Court of Appeal which, on September 30, 2008 dismissed the appeal, awarding costs to the AG in the sum of $40,000. It should be noted that the AG at no time requested that these costs should be borne by the appellants. Nor was any criticism of plaintiffs' counsel registered.

[5] An application for leave to appeal to the Supreme Court of Canada was dismissed on April 23, 2009 with costs of $1,086.10 being awarded to the AG.

[6] In June 2009, the AG was informed by appellants' counsel that the plaintiffs were impecunious. Then in July 2009, the plaintiff Attis commenced proceedings against the appellants alleging negligence for not advising her of the potential of personal liability for costs. This action was defended and is currently in limbo.

[7] The next event occurred in November 2009 when the AG brought a motion before Cullity J. seeking to reopen the issue of costs and requesting that the costs awarded to the AG throughout become the responsibility of the appellants. In this motion for directions, the AG relied upon s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 12 of the *Class Proceedings Act*, S.O. 1992, c.6 and Rule 59.06(2)(c).

[8] After hearing argument, Cullity J. agreed with the appellants' contention that he lacked jurisdiction. Nevertheless, rather than simply dismissing the motion, Cullity J. offered suggestions as to what steps the AG might take, including amending the motion in order to proceed under Rule 15.02(a). Accordingly, the motions judge adjourned the motion *sine die* in order to give the AG an opportunity to consider its position with respect to the issue of informed consent.

[9] At a case conference on March 16, 2010, Cullity J. permitted the AG to amend its motion with a proviso that the appellants were not to be precluded from challenging jurisdiction. For procedural purposes, the motions judge directed that affidavit evidence would become examination-in-chief and that the deponents could be cross-examined in open court. Production of all relevant documentation was to be made beforehand. Two further case conferences were held in June and July, 2010 and on both occasions the appellants requested the matter be stayed to permit them to appeal these procedural directions. These requests were denied and the motion proceeded over four days commencing July 12, 2010.

[10] Five issues are raised by the appellants:

1) Did the motions judge err in finding he had jurisdiction under the court's inherent jurisdiction or under Rule 15 to award costs for "want of authority" on the respondent's motion?

2) Does Rule 57 have any application?

3) Did the motions judge err in his application of breach of warranty of authority?

4) Was there procedural unfairness in this summary proceeding; and

5) Did the motions judge create a reasonable application of bias?

[11] We shall only deal with the first four grounds as we see no merit in the fifth. As all of the four issues with which we shall deal engage questions of law, the standard is correctness.

Was there a misapplication of inherent jurisdiction and Rules 15.02(4), 57.07(1)(c) and 59.06(2)(a)?

[12] In urging us to find that the motions judge had jurisdiction, the AG submits that the solicitor-client relationship is inherently one of dependency in which counsel has a duty to warn clients so they fully understand potential risks before steps are taken. When it appears a wrong has been committed, the court's inherent jurisdiction provides a mechanism by which a remedy may be fashioned. Indeed, the AG argues, the court on its own motion could have instituted this procedure as a means of controlling its process. This, they say, goes to the core jurisdiction of a Superior Court.

[13] With respect to Rule 15.02(4), it is the AG's position that any consent the plaintiffs might have given the appellants to proceed was not informed and, therefore, they were not "authorized" to commence the proceeding. Accordingly, pursuant to this Rule, they should be liable to pay the costs of the proceeding.

[14] Not surprisingly, the appellants have a different view of the issue. While they appreciate the court's inherent jurisdiction and the ability to craft procedures and to control its process, there can be no unfettered jurisdiction to correct all wrongs. There must be a legal right involved. A defendant has no right to inquire into the legal advice given to the plaintiff by the plaintiff's lawyer. That is purely a matter between solicitor and client. We agree.

[15] Rule 15 is designed to terminate proceedings where a named plaintiff has not authorized commencement. The proceedings here, without question, were commenced with the plaintiffs' authority. Even if the plaintiffs did not understand the costs implications of initiating proceedings, that could not invalidate or nullify the authority they conferred upon their counsel to commence the proceedings. If there is any question concerning the legal advice the plaintiff received before conferring that authority, it is a matter between the solicitor and the clients. It is for an aggrieved party to take steps and, as it turns out, that is exactly what the plaintiff Attis did. On July 13, 2009, she commenced proceedings in negligence against John B. J. Legge and Legge & Legge seeking damages of $250,000.

Does Rule 57 have any application?

[16] With respect to Rule 57.07(1)(c), we agree with the appellants that this Rule is to be used only in exceptional circumstances and has no application here. The motions

judge acknowledged that the conduct of Mr. Legge was without reproach throughout and there was no issue raised in this regard before Winkler J., the certification judge.

Did the motions judge err in his application of breach of warranty of authority?

[17] As to whether the learned motions judge misapplied the law of breach of warranty of authority, we agree with the appellants' position. Cullity J. ordered the appellants to pay the respondent's costs for "breach of their implied warranty of authority". Without question an agent is deemed to have his principal's authority when he purports to act or make any contract on behalf of the principal.

[18] A breach of warranty occurs when one creates an impression of agency when none exists. Thus an agent who enters into a contract with a third party on behalf of a principal, by implication, warrants that he or she has authority. If it turns out that the agent did not have the requisite authority, the agent may be liable to the third party.

[19] The following discussion of a passage from the Waddams' text on the Law of Damages referred to in *Royal Bank v. Starr (c.o.b. as Ettmor Ltd.)*, [1985] O.J. 1763 is useful:

> The imposition of liability on an agent for breach of warranty of authority is on the borderline between contract and tort and has sometimes been said to be an instance of strict liability for innocent misrepresentation.
>
> But if the juridical basis of the action were tortuous, one would expect damages to be measured by the loss to the plaintiff, if any, rather than by the gain he would have made if

> the agent really had had authority. It is the latter measure that has been universally adopted.
>
> Professor Waddams in his text at p. 327 para. 571 states:
>
> > ***The damages against the purported agent are measured by what the plaintiff would in fact have gained had the defendant actually had authority.*** It has often been stressed that this is not always the same as the damages that would have been recovered in an action against the alleged principal. [Emphasis added]

[20] Assuming without deciding that breach of warranty of authority would apply, in the present case, such a breach could not have provided the respondent with recoverable damages. Because the late Ms. Attis and Ms. Tesluk were impecunious, even if they had provided authority to Mr. Legge and lost, the AG would not have recovered costs from them. To award the AG costs now would be to put the AG in a better position than if the action had proceeded with authority and failed. As was stated in *Skylight Maritime SA v. Ascot Underwriting et al.*, [2005] EWHC 15 (Comm) at para. 20:

> [A] claim for breach of warranty of authority cannot be deployed to put the promisee in a better position than if the warranty had been true. Thus, if a supposed client is insolvent, substantial damages for breach of a solicitor warranty of authority will not normally be recoverable because the promisee would not have been able to recover costs against the client even if the solicitor had authority to act.

[21] We agree with this assertion.

Was there procedural unfairness?

[22] The appellants also urge us to find that the procedure adopted by Cullity J. was unfair. Because of our conclusions with respect to the first three issues, it is not be necessary to deal extensively with this issue. However, some comment is needed.

[23] Given that one of the original class plaintiffs, the late Ms. Attis, had commenced proceedings against Mr. Legge and his firm before the AG's November 2009 motion, it is argued that by proceeding as he did, Cullity J. created an unnecessary multiplicity of proceedings. We strive in Ontario to avoid multiplicity. Indeed, s. 138 of the *Courts of Justice Act* states:

> As far as possible, multiplicity of legal proceedings shall be avoided.

[24] The motions judge, being aware of the late Ms. Attis' civil proceeding and given the almost identical relief sought, should have directed the action to proceed which would have engaged all the usual pre-trial mechanisms. The rather unconventional approach taken by the motions judge, in the face of an existing civil action, was one that ought to have been avoided. While perhaps not unfair, it would at the very least have been preferable, given the seriously conflicting positions, to direct a trial of the issue pursuant to Rule 37.13. This could easily have taken place at the same time as the trial of the Attis action. While appellants' counsel may not have explicitly requested a trial of the issue,

she did strongly argue throughout that the procedure proposed by Cullity J. was inappropriate.

[25] As earlier noted, we see no merit in the suggestion that Cullity J. created a reasonable apprehension of bias.

[26] For the reasons given above, we allow the appeal and set aside the order of Cullity J. The appellants shall have their costs which by agreement we fix at $35,000, all inclusive. Counsel for Ms. Attis shall have his costs which we fix at $2,500, all inclusive.

RELEASED: "RJS" "OCT 31 2011"

"Cunningham A.CJ. *ad hoc*"
"I agree Robert J. Sharpe J.A."
"I agree G.J. Epstein J.A."