

COURT OF APPEAL FOR ONTARIO

CITATION: Dee Ferraro Limited v. Pellizzari, 2012 ONCA 55

DATE: 20120131

DOCKET: C54008

Cronk and Blair JJ.A. and Strathy J. (*Ad Hoc*)

BETWEEN

Dee Ferraro Limited, Sherwood Forest Investments (Guelph) Ltd., John Ferraro,  
Executor and Trustee of the Estate of the Late Dominic "Dee" Frank Ferraro,  
Deceased and John Ferraro

Plaintiffs (Appellants)

and

Joseph M. Pellizzari and 20 Douglas Street (Guelph) Limited

Defendants (Respondents)

P.A. Neena Gupta, for the appellants

James H. Bennett, for the respondents

Heard: January 24, 2012

On appeal from the order of Justice J.W. Sloan of the Superior Court of Justice,  
dated June 24, 2011.

**Strathy J. (*ad hoc*):**

[1] The appellants appeal an order dismissing their motion for leave to amend the statement of claim.

[2] After pointing out that Rule 26.01 of the *Rules of Civil Procedure* provides that the court shall grant leave to amend a pleading unless prejudice will result that cannot be compensated for by costs or an adjournment, the motion judge

found that the appellants were attempting to plead new facts and new causes of action and that the expiry of an intervening limitation period gave rise to a presumption of prejudice. Referring to *Frohlick v. Pinkerton Canada Limited*, 2008 ONCA 3, he noted this court's observation, at para. 24, that Rule 26.01 "does not contemplate the addition of unrelated statute barred claims by way of amendment to an existing statement of claim" (emphasis added).

[3] The motion judge also found that permitting the proposed amendments would delay the trial, which would be unfair to the respondent Pellizzari, a practising lawyer, who had had the proceeding hanging over his head since January 2008, when the action was commenced, if not since 2005 when some of the facts at issue occurred.

[4] In my respectful view, the motion judge erred in concluding that the proposed amendments added new causes of action. The original pleading, while far from elegant and orderly, contains all the facts necessary to support the amendments. The amendments simply claim additional forms of relief, or clarify the relief sought, based on the same facts as originally pleaded.

[5] The distinction between pleading a new cause of action and pleading new or alternative remedies based on the same facts is set out in one of the seminal cases, *Canadian Industries Ltd. v. Canadian National Railway Co.*, [1940] O.J. No. 266 (C.A.), affd. [1941] S.C.R. 591. The plaintiff sued for damages following

the destruction of a cargo of sodium cyanide due to a derailment on the defendant's railway line. He pleaded that the defendant was a common carrier and that the goods had been damaged. The trial judge allowed an amendment, at trial, to plead negligence. Middleton J.A., writing for the court, held at para. 18 that the amendment was properly allowed – it was not the institution of a new cause of action, but simply an alternative claim with respect to the same cause of action: “The amendment relates to the remedy sought upon facts already pleaded.”

[6] Counsel for the respondents relies on *Frohlick* to resist the proposed amendments. That case illustrates the difference between an amendment that pleads a new cause of action and one that simply pleads a different remedy. The plaintiff's amendment to plead constructive dismissal set up a new cause of action relating to events more than a year before the events put at issue in the original pleading. This court found that the amendments were out of time and, the limitation period having expired, there was a presumption of prejudice that had not been rebutted.

[7] Here, the original statement of claim contained broad allegations against Pellizzari, including:

- breach of contract (para. 1(a));
- breaches of duty as a solicitor (paras. 12, 35, 43, 64, 102);

- breaches of duty as a trustee (paras. 12, 64, 102);
- breaches of duty as an employee (paras. 12, 41, 43, 50, 102);
- breach of fiduciary duties (paras. 1(a), 31);
- theft (paras. 38, 67-101);
- fraud (paras. 1(a), 38, 41, 50, 51, 103);
- negligence (paras. 1(a), 38, 41, 50); and
- conversion (paras. 12, 67-101).

[8] The statement of claim also claimed a constructive trust over certain profits allegedly acquired by Pellizzari (para. 65), deprivation of the appellants and enrichment of the respondents (para. 64), an accounting (para. 1(b)), disgorgement (paras. 1(b), 104) and punitive damages (paras. 1(c), 105).

[9] In my view, apart from tidying up the claim for relief, and extending the relief sought, the proposed amendments do not add any material facts to those already pleaded. In some cases, the claims sought to be added are already found in the existing pleading. In the other cases, the claims are simply alternative forms of relief based on the facts already pleaded.

[10] The most contentious amendments pertain to the claims in the proposed amended pleading for a mandatory order requiring Pellizzari to transfer his one-third shareholding in Sherwood Forest Investments (Guelph) Ltd. (SFI) to Dee Ferraro Ltd. and for the declaration of a constructive trust over “all proceeds, profits and financial benefits received by Joseph Pellizzari as a result of his breach of contract” insofar as this claim relates to Pellizzari’s one-third shareholding interest. In this regard, in the appellants’ reply and defence to

Pellizzari's counterclaim, Pellizzari's claim for remedies under the *Ontario Business Corporations Act*, R.S.O. 1990, c. B-16, in relation to SFI was defended on the basis that his shares were held in trust for Mr. Ferraro Sr.

[11] The respondents argue that the appellants admitted Pellizzari's personal ownership of the shares in question in the original statement of claim. They contend that the effect of the proposed amendments is to put Pellizzari's share ownership at risk, for the first time. This, they say, fundamentally alters the nature of the claims against the respondents and, therefore, the case they had to meet based on the appellants' original pleading. I disagree.

[12] In their original statement of claim, the appellants acknowledged that Pellizzari held shares in SFI. However, they did not admit that he held these shares for his own benefit or that he was the legal or beneficial owner of the shares. Instead, they pleaded that his entitlement to these shares was conditional on his management services. Throughout their pleading, they dispute that this condition was properly satisfied, by alleging various forms of wrongful conduct by Pellizzari in his management capacity. In these circumstances, fairly read, Pellizzari's entitlement to the shares was put in play in the original claim. If there were any doubt about this matter, it was laid to rest in the appellants' reply and defence to counterclaim, where the remedy of a constructive trust was expressly invoked in respect of the shares.

[13] The claims in the amended statement of claim for a mandatory order and a declaration of constructive trust in relation to Pellizzari's shares are simply additional remedies flowing from the facts originally pleaded.

[14] This is not a case in which new and unrelated causes of action are being asserted based on new facts. The claims flow directly from the facts previously pleaded. I therefore conclude that the claims were not statute-barred and the amendments should have been permitted, in the absence of evidence of non-compensable prejudice.

[15] During oral argument, counsel for the respondents properly acknowledged that, apart from the expiry of the applicable limitation period (which is relevant only if the proposed amendments effect the addition of new causes of action), there is no evidence in this case of non-compensable prejudice of the type envisaged by Rule 26.01 that would preclude the amendments. I agree. I note, for example, that any prejudice caused by the delay of the trial as a result of the amendments could be addressed in costs.

[16] The appeal is therefore allowed, with costs to the appellants in the agreed amount of \$7,500, inclusive of disbursements and applicable taxes.

Released: Jan. 31, 2012  
"EAC"

"G.R. Strathy J. (ad hoc)"  
"I agree E.A. Cronk J.A."  
"I agree R.A. Blair J.A."