



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Thorne v. College of the North Atlantic*,
2022 NLCA 31

Date: May 17, 2022

Docket Number: 202101H0037

BETWEEN:

DEBORAH THORNE

FIRST APPELLANT

AND:

ALAN LUYT

SECOND APPELLANT

AND:

COLLEGE OF THE NORTH
ATLANTIC

RESPONDENT

Coram: Welsh, O'Brien and Goodridge JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 201306G0131
(2021 NLSC 74)

Appeal Heard: February 14, 2022

Judgment Rendered: May 17, 2022

Reasons for Judgment by: Goodridge J.A.

Concurred in by: Welsh and O'Brien JJ.A.

Counsel for the Appellants: Philip C.W. Whalen
Counsel for the Respondent: J. David B. Eaton Q.C.

Authorities Cited:

CASES CITED: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *RPC Limited Partnership v. SNC-Lavalin ATP Inc*, 2018 ABCA 423; *Thorne v. College of the North Atlantic*, 2018 NLCA 33, 3 C.A.N.L.R. 1; *Butler v. Kloster Cruise Ltd.* (1992), 98 Nfld. & P.E.I.R. 138 (Nfld. S.C.(T.D.)); *Petten v. E.Y.E. Marine Consultants* (1994), 120 Nfld. & P.E.I.R. 313 (Nfld. S.C.(T.D.)); *Holt v. Telford*, [1987] 2 S.C.R. 193; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. et al.* (1985), 65 B.C.L.R. 31, 20 D.L.R. (4th) 689 (B.C.C.A.); *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629.

STATUTES CONSIDERED: *Class Actions Act*, SNL 2001, c. C-18.1, section 37(2).

RULES CONSIDERED: *Rules of the Supreme Court*, 1986, SNL 1986, c. 42, Schedule D, rules 14.03, 14.19, 15.02(1)(c), 15.05(1)(a).

Goodridge J.A.:

[1] This appeal challenges an interlocutory order granting the respondent leave to file an amended statement of defence.

Background

[2] Deborah Thorne and Alan Luyt (the “appellants”) are representative plaintiffs in a class action seeking damages for wages and benefits allegedly due under the terms of employment contracts with the College of the North Atlantic (the “respondent”). Liability for the claimed damages is denied.

[3] The proceedings are not yet at trial readiness. Document production has not been completed; witness discovery has not begun; trial dates have not been requested.

[4] On March 5, 2020, the appellants filed an amended statement of claim that raised, as a new basis for the claimed damages, an agreement (referred to as

the “comprehensive agreement”) between the respondent and the State of Qatar. The relevant paragraph of the amended statement of claim provides:

6(a). ... By virtue of this comprehensive agreement ... the [appellants] assert that the [respondent] secured and/or received funds [from the State of Qatar], and had an obligation to provide these funds to the benefit of employees including the [appellants]
...

[5] On May 27, 2021, the applications judge granted the respondent leave to file an amended statement of defence, responding to the amended statement of claim.

[6] The appellants submit that the applications judge erred in granting leave, in particular with respect to the part of the amended statement of defence that raises a set-off defence. That defence arises because the respondent maintains that the appellants were paid wages and benefits that exceeded the salary caps specified in the comprehensive agreement, and argues that these overpayments should be set-off against any other damages payable to the appellants under that agreement. The relevant paragraphs of the amended statement of defence provide:

13. To the extent, if at all, that, the First Plaintiff and Class Members are relying on the comprehensive agreement as creating an entitlement, the compensation calculation contemplated therein and the salary cap provided must be applied. Any Class Member who relies on the [comprehensive agreement] or the Budget amount must also be governed by the appropriate compensation calculation and applicable limits contemplated by the Budget and [comprehensive agreement].

...

15. ... [B]ased on equitable principles, any amount received by the [appellants] or any Class Member in excess of the salary cap must be set-off against any amount that it is determined that the Class Member would otherwise be entitled to receive.

Issues

[7] The errors alleged by the appellants give rise to the following questions for consideration:

1. Did the applications judge err in allowing an amendment to the statement of defence that lacked sufficient particularity?

2. Did the applications judge err in allowing an amendment to the statement of defence that added a defence of set-off based on equitable principles?

Standard of review

[8] Identification of the legal test applicable to amendments to pleadings is a question of law reviewable on a correctness standard. In this matter, the parties agree that the applications judge was correct in identification of the legal test. Consideration of whether the evidence tendered can satisfy the test is a question of mixed fact and law and is entitled to deference absent palpable and overriding error or an extricable error of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36). The decision to allow an amendment to pleadings is discretionary and as such, absent legal error, is entitled to deference on appeal (*RPC Limited Partnership v. SNC–Lavalin ATP Inc*, 2018 ABCA 423, at para. 20).

Relevant procedural rules

[9] Several of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, are relevant to consideration of this application.

[10] Under rule 14.03, “Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for a claim or defence, but not the evidence by which the facts are to be proved, and the statement shall be as brief as the nature of the case admits.”

[11] Under rule 14.19, “Where a claim by a party to a sum of money, whether the amount is ascertained or not, is relied on as defence to the whole or part of a claim made by an opposing party, it may be included in a defence and set-off against the claim, whether or not it is also added as a counterclaim.”

[12] Under rule 15.02(1)(c), “If an amendment does not include the addition, deletion, substitution or correction of the name of a party to a proceeding, a party may amend a pleading filed by that party other than an order: ... (c) at any time with leave of the Court on such terms as it thinks just.”

[13] Under rule 15.05(1)(a), “Where an amended statement of claim ... is served on an opposing party, (a) the opposing party, if the opposing party has already served a defence, may amend the defence ...”.

[14] In this Court's decision of *Thorne v. College of the North Atlantic*, 2018 NLCA 33, 3 C.A.N.L.R. 1, involving the same class action and the same parties, Hoegg J.A. discussed rule 14.19 in the context of set-off as an equitable defence:

[35] A counterclaim is distinctly different from a set-off. A set-off is part of a defence pleaded by a defendant against a plaintiff in defence to the whole or part of a claim made by the plaintiff. Set-off is provided for in rule 14.19 ...

[36] In *Home Hardware*, [2015 BCCA 500] Justice Newbury described the defence of set-off as an equitable defence that goes directly to impeach the plaintiff's demands ... If proved, the amount of the set-off may be subtracted from any amount awarded to the plaintiff to the extent of the plaintiff's award, potentially reducing the plaintiff's award to zero.

[15] This earlier *Thorne* decision addressed the appeal of a court order certifying a counterclaim. A counterclaim is an independent action where damages awarded can exceed the plaintiff's awarded damages. A set-off defence is not like a counterclaim; it is not an independent action; it is purely a defence. If proven, the set-off is subtracted from any damages awarded to the plaintiff, potentially reducing the award to zero and resulting in dismissal of the plaintiff's action.

Analysis

[16] Both counsel agree that the legal test applicable for amendments to pleadings is set out in *Butler v. Kloster Cruise Ltd.* (1992), 98 Nfld. & P.E.I.R. 138 (Nfld. S.C.(T.D.)):

[12] The power to amend is discretionary and a number of authorities have referred to four principles to be applied when determining whether to allow an amendment. To be allowed, an amendment (1) must not cause injustice to the other side, (2) must raise a triable issue, (3) must not be embarrassing, and (4) must be pleaded with particularity. ...

Issue 1: Did the applications judge err in allowing an amendment to the statement of defence that lacked sufficient particularity?

[17] The appellants argue that the applications judge erred when she failed to require the respondent to meet the fourth principle from *Butler* – the amendment must be pleaded with particularity. This fourth principle is encapsulated within rule 14.03 as reproduced above in paragraph 10.

[18] In her reasons, the applications judge addressed this fourth principle by discussing the particularity that was included within the proposed amended defence (paras. 45-47). She concluded, “I am satisfied that there is sufficient particularity for the [appellants] to understand the basis for [the respondent’s] defence and to be able to respond to it” (para. 51).

[19] The sufficient particularity of the amended defence included reference to the comprehensive agreement (paras. 5, 10 and 13 of the amended defence), the salary cap provided in the comprehensive agreement (paras. 10 and 13-16), the fact that payments were made above the salary cap (paras. 10 and 14-16), and the fact that the set-off defence was based upon equitable principles (para. 15). The proposed amended statement of defence concludes, “[B]ased on equitable principles, any amount received by the [appellants] or any Class Member in excess of the salary cap must be set-off against any amount that it is determined that the Class Member would otherwise be entitled to receive” (para. 15).

[20] These proposed amended pleadings identify the material facts relied on to support the set-off defence; there is no risk of trial delay arising from the amendment; and there is no prejudice in the sense of inadequate time to address the amendment. The expectation flowing from this fourth principle – that the amendment must be pleaded with particularity – is that the opposing side is not left to speculate or guess the particulars of the defence pleaded or the remedy sought (*Petten v. E.Y.E. Marine Consultants* (1994), 120 Nfld. & P.E.I.R. 313, at paras. 94-95 (Nfld. S.C.(T.D.))). In this matter, the appellants know what this set-off defence was based upon and are not left to speculate or guess.

[21] There was no error by the applications judge in her conclusion that the proposed amended statement of defence included sufficient particularity.

Issue 2: Did the applications judge err in allowing an amendment to the statement of defence that added a defence of set-off based on equitable principles?

[22] The appellants submit that the applications judge erred by disregarding three legal requirements for equitable set-off as a defence, in particular that she:

- Ignored the legal requirement that the respondent establish at the time of pleading the claimed debt it seeks to set-off;
- Ignored the legal requirement for privity of contract, that the respondent cannot subject the appellants to a contractual claim based on its comprehensive agreement with Qatar; and,

- Ignored the legal requirement, where an equitable defence relies on unjust enrichment, that there be an absence of a juristic reason for the enrichment.

[23] These three alleged legal requirements are not among the legal principles referenced in *Holt v. Telford*, [1987] 2 S.C.R. 193, for assessing entitlement to equitable set-off. However, even if these are legal requirements, on an application for leave to amend pleadings, a judge assesses only whether there is *prima facie* a meritorious defence disclosed in the amended pleading. A judge does not make an in-depth assessment of the merits of the defence. The judge may refuse leave to amend pleadings only where the amendment discloses no reasonable defence; it must be plain and obvious that the amendment discloses no reasonable defence. Any doubt on the facts or the law should be resolved in favour of allowing the amendment and permitting the matter to proceed for determination at trial. This low threshold test for granting leave to amend pleadings was discussed by Green J. in *Petten*:

[98] ... The threshold test is a low one. ... That test, simply stated, is that it must be "plain and obvious" that the proposed pleading discloses no reasonable claim [or in this case, no reasonable defence] and that it is certain to fail ... (citations omitted) or to borrow from the words of Goodridge, C.J.N. in *Bond Architects and Engineers Ltd. v. McNamara Corp. of Newfoundland* (1988), 69 Nfld. & P.E.I.R. 229; 211 A.P.R. 229 (Nfld. C.A.), at p. 231, a proposed amendment ought not to be refused on this basis unless the court is satisfied, not that it may not succeed, but that it "*cannot succeed*". ...

[24] In the current matter, the applications judge discussed the low threshold of the plain and obvious test (para. 38) and noted that the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, stressed the importance of taking a generous approach and erring on the side of permitting a novel but arguable claim, or in this case arguable defence, to proceed. The applications judge reviewed the legal principles to be applied in determining whether a party is entitled to equitable set-off and concluded that the proposed pleadings met the low threshold:

[47] Having considered the above, recognizing that the threshold is low and taking a generous approach, I cannot find that it is "plain and obvious" that [the respondent's] defence of equitable set-off cannot succeed. ...

[25] The legal principles to be applied in determining whether a party is entitled to an equitable set-off are set out in *Coba Industries Ltd. v. Millie's*

Holdings (Canada) Ltd. et al. (1985), 65 B.C.L.R. 31, 20 D.L.R. (4th) 689, at 696-697 (B.C.C.A.):

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
4. The plaintiff's claim and the cross-claim need not arise out of the same contract.
5. Unliquidated claims are on the same footing as liquidated claims.

(Citations omitted.)

[26] These legal principles were referred to in *Holt* where Wilson J., for the Court, found equitable set-off in a context arising out of interrelated contracts in a complex real-estate transaction. The three legal principles that the appellants claim the applications judge disregarded are not included, at least not directly, among the principles referred to in *Holt*. In any case, as noted above, these are not principles that require scrutiny on an application to amend pleadings where the judge only assesses whether there is *prima facie* a defence disclosed.

[27] The first legal principle the appellants advanced as an error of omission – establishing the claimed debt – is a matter for trial and is not for determination at the pleadings stage.

[28] The second legal principle advanced as an error of omission – establishing privity – in the current context is also a matter for trial. The appellants' amended statement of claim pleads the comprehensive agreement and advances a claim for damages under that agreement, or in partial reliance on that agreement, even though they are not parties to it. The respondent's amended statement of defence pleads that, if the appellants are entitled to damages because of something in the comprehensive agreement, then the salary caps in that same agreement should be applied by way of set-off. It is hardly reasonable for the appellants to protest the respondent pleading in reply the same agreement that the appellants rely upon in their amended statement of claim.

[29] The third legal principle advanced as an error of omission – proving the absence of a juristic reason – is also a matter for trial. The absence of juristic reasons (no reason in law or justice for the appellants’ retention of the alleged overpayment) may be an element that the respondent needs to prove at trial to succeed in this defence of equitable set-off; it is not an element that the respondent needs to prove to succeed on an application for leave to amend pleadings. The appellants relied on *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, in arguing that the absence of a juristic reason must be proven before a pleading of equitable set-off (based on unjust enrichment) is permitted. *Garland* involved an application for summary judgment where the merits of the unjust enrichment had to be assessed and determined. *Garland* does not have relevance to an application for leave to amend pleadings where the applicant need only meet the low threshold of the plain and obvious test. *Garland* does not support the appellants’ arguments.

[30] There was no error by the judge in her application of the law dealing with pleading amendments, and in particular, in granting leave to allow the respondent to plead equitable set-off as a defence.

Costs

[31] Under section 37(2) of the *Class Actions Act*, SNL 2001, c. C-18.1, this Court may award costs in respect of an appeal from a class action application only in limited circumstances, including:

- a) vexatious, frivolous or abusive conduct by a party;
- b) improper or unnecessary application; or
- c) exceptional circumstances that make it unjust to deprive the successful party of costs.

[32] In this matter, I would make no order as to costs.

Summary and Disposition

[33] The appellants have not established that the applications judge made any errors in granting the respondent leave to file the amended statement of defence. I would dismiss the appeal, with no order as to costs.

Goodridge J.A.

I concur: _____
Welsh J.A.

I concur: _____
O'Brien J.A.