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CASE COMMENTS

"FULLY APPRECIATING" THE ONTARIO COURT OF APPEAL'S VIEWS ON THE SUMMARY JUDGMENT RULE: COMBINED AIR MECHANICAL SERVICES INC. V. FLESCH[1]

1. Single Sentence Summary

In dealing with five combined appeals, the Ontario Court of Appeal issued guidelines to first instance judges when faced with motions for summary judgment.

2. Legal Context

Rule 20 of the *Rules of Civil Procedure*[2] provides a summarial means for first instance judges to dispose of civil matters without a trial. The judicial, non-procedural aspects of the *Rules* are set out primarily in rule 20.04(2) through to (5) (reproduced below):

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) A judge may, for the purposes of exercising any of the powers set

1. *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (*Combined Air*).
2. R.R.O. 1990, Reg. 194 (*Rules*).

out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

3. Facts

Rule 20 has undergone a long transformation since its initial implementation in 1985. Before that time, the only mechanism for summary judgment in our civil *Rules* was strictly limited to simple claims for debt or liquidated demands.[3] With the implementation of Rule 20, a wider variety of claims were able to be addressed, although limited to an evaluation of a paper record consisting only of sworn affidavit evidence.

The 2007 report[4] of the former Associate Chief Justice, The Honourable Coulter Osborne, provided recommendations to the Province which addressed the concern that the earlier Rule 20 was not operating as intended. The test under the pre-2010 Rule 20 to grant summary judgment was whether there was "no genuine issue for trial".[5] The chief concern was that the motion judge's scope of authority on a Rule 20 motion was too narrow. As a result of the Coulter Osborne report, the language of "no genuine issue for trial" was changed to "no genuine issue *requiring* a trial" (emphasis added), effective January 1, 2010.[6]

Since the January 1, 2010 amendment, a body of conflicting case law has developed addressing the change.[7] As a result of the difficulty

3. *Combined Air, supra*, footnote 1, at para. 9.
4. Honourable Coulter Osborne, "Summary of Findings & Recommendations", Civil Justice Reform Project (November 2007), available online at: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>.
5. *Combined Air, supra*, footnote 1, at para. 8.
6. *Ibid.*, at para. 30.

in reconciling the conflicting jurisprudence, the Court of Appeal convened a five-judge panel to hear five appeals[8] of decisions under the new Rule, to clarify the proper approach. Known as the "Combined Air" decisions because of the style of cause, the five decisions below included a mixture of both motions granted and motions denied.

(1) Combined Air Mechanical v. Flesch, 2010 ONSC 1729[9]

This case was an appeal by Combined Air and related companies against an order dismissing their action against two individuals and related companies for breaches of restrictive covenants contained in an acquisition agreement. After the acquisition, the respondent, Flesch, provided consulting services to one company and also worked for a second. Combined Air alleged that these companies were engaged in business similar to Combined Air and that Flesch breached the restrictive covenants by rendering services to the competitors. The motion judge, Justice Belobaba, held that Combined Air failed to adduce any evidence to support its allegations.[10] He then directed the respondents to present oral evidence in relation to a specific document, pursuant to rule 20.04(2.2).[11] Ultimately Justice Belobaba found that the document supported the respondents' position that it was not in competition with Combined Air. The motion for summary judgment was, therefore, dismissed.

7. See *Healey v. Lakeridge Health Corp.* (2010), 72 C.C.L.T. (3d) 261, 185 A.C.W.S. (3d) 325, 2010 ONSC 725, affd 328 D.L.R. (4th) 248, 103 O.R. (3d) 401, 81 C.C.L.T. (3d) 67 (C.A.); *Cuthbert v. TD Canada Trust* (2010), 88 C.P.C. (6th) 359, 185 A.C.W.S. (3d) 768, 2010 ONSC 830 ; *New Solutions Extrusion Corp. v. Gauthier* (2010), 184 A.C.W.S. (3d) 1152, 2010 ONSC 1037, affd 188 A.C.W.S. (3d) 300, 2010 ONCA 348; *Hino Motors Canada Ltd. v. Kell* (2010), 185 A.C.W.S. (3d) 1100, [2010] O.J. No. 1105, 2010 ONSC 1329, leave to appeal to Div. Ct. refused 187 A.C.W.S. (3d) 891; *Lawless v. Anderson* (2010), 188 A.C.W.S. (3d) 1006, [2010] O.J. No. 2017, 2010 ONSC 2723, affd 276 O.A.C. 75, 81 C.C.L.T. (3d) 220, 2011 ONCA 102; *Canadian Premier Life Insurance Co. v. Sears Canada Inc.* (2010), 91 C.C.L.I. (4th) 120, [2010] O.J. No. 3987, 2010 ONSC 3834; *Enbridge Gas Distribution Inc. v. Marinaccio* (2011), 201 A.C.W.S. (3d) 121, 2011 ONSC 2313; and *Optech Inc. v. Sharma* (2011), 198 A.C.W.S. (3d) 334, 2011 ONSC 680, addt'l reasons 198 A.C.W.S. (3d) 591, 2011 ONSC 1081: *Combined Air, supra,* footnote 1, at para. 35.
8. *Combined Air, supra,* footnote 1, at para. 6.
9. *Combined Air Mechanical Services Inc. v. Flesch* (2010), 71 B.L.R. (4th) 27, 187 A.C.W.S. (3d) 100, 2010 ONSC 1729, affd 2011 ONCA 764.
10. *Combined Air, supra,* footnote 1, at para. 79.
11. *Ibid.,* at para. 80.

(2) Mauldin v. Hryniak and (3) Bruno Appliance and Furniture v. Hryniak, 2010 ONSC 5490[12]

Both The Mauldin Group and Albert Bruno each invested roughly $1 million with Hryniak. Almost all of the respective investments were lost. Each plaintiff launched a separate action against Greg Peebles, the lawyer for Hryniak, in fraud, and Peebles' law firm, Cassels Brock & Blackwell, in fraud, conspiracy, negligence, and breach of contract. The motion judge, Justice Grace, dismissed the motions for summary judgment against Pebbles and his firm but determined that a trial was required to decide whether Peebles was guilty of fraud or had been "duped" by Hryniak, and whether Peebles had any liability aside from the fraud claim.[13]

(4) 394 Lakeshore Oakville Holdings Inc. v. Misek, 2010 ONSC 6007[14]

The respondent owner of 394 Lakeshore Road in Oakville applied to the Town to develop the land into residential condominiums. The appellant, Misek, opposed the development on the basis that it had a prescriptive easement over the property. The motion judge, Justice Perell, exercised his powers under rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences from the evidence. Justice Perell concluded that there was no prescriptive easement and awarded summary judgment in favour of the respondent.[15]

(5) Parker v. Casalese, 2010 ONSC 5636[16]

This case was an appeal of a judgment of the Divisional Court, affirming the motion judge's decision to dismiss the appellant's motion for summary judgment. The action was commenced under the Rule 76 regime for simplified procedure. The appellants sued the respondent, Scarfo, who had constructed two homes in between their existing homes, alleging that their properties were damaged during the process. The appellants also sued the owners of the new homes on the basis of a theory of vicarious liability. The motion judge, Justice

12. *Bruno Appliance and Furniture Inc. v. Cassels Brock & Blackwell LLP*, 2010 ONSC 5490, 195 A.C.W.S. (3d) 305, revd 2011 ONCA 764.
13. *Combined Air, supra*, footnote 1, at para. 118.
14. *394 Lakeshore Oakville Holdings Inc. v. Misek* (2010), 98 R.P.R. (4th) 21, 194 A.C.W.S. (3d) 1313, 2010 ONSC 6007, affd 2011 ONCA 764.
15. *Combined Air, supra*, footnote 1, at para. 182.
16. *Parker v. Casalese* (2010), 99 C.L.R. (3d) 1, 194 A.C.W.S. (3d) 95, 2010 ONSC 5636, affd 2011 ONCA 764.

Matlow, dismissed the motion on the basis that there were numerous conflicts in the evidence that could only be justly resolved at trial.[17] The motion judge did not identify the conflicts or provide an explanation as to why the powers under the new Rule 20 (having come into force only two months before the hearing of the motion) ought to be used to resolve the issues.[18] On appeal to the Divisional Court,[19] the insufficiencies of the motion judge's reasons were noted but the court ultimately agreed with the result reached.

4. Analysis

In *Combined Air Mechanical v. Flesch*, the Court of Appeal upheld the motion judge's decision to make a rule 20.04(2.2) order.[20] At issue was whether Combined Air was engaged in business similar to several other companies, in violation of a restrictive covenant. The court found that hearing from a limited number of witnesses (one in this case), for a short period of time in order to resolve a narrow and discrete issue was well within the power granted to a judge when looking at the language and purpose of rule 20.04(2.2).[21]

In *Mauldin v. Hryniak*, and *Bruno Appliance and Furniture v. Hrnyiak*, the Court of Appeal noted that these cases were exactly the types of cases that should not be decided summarily and, going forward, that cases such as these will require a trial.[22] The full appreciation of evidence, which called on the judge to make multiple findings of fact on the basis of conflicting evidence from a number of witnesses, could only be achieved at trial. Highlighting this point was the fact that there were 28 volumes of evidence, 18 witnesses with different theories and conflicting evidence, and a lack of reliable documentary yardsticks, making the assessment of credibility much more difficult.[23] While not prepared to uphold the summary judgment in *Bruno Appliance and Furniture*, the court dismissed the defendant's appeal in *Mauldin* on the basis that the evidentiary record supported the motion judge's determination that Hryniak had committed a fraud.[24] The court noted that the motion judge had failed to address an important element of the legal test for civil fraud[25] in *Bruno Appliance and Furniture*.[26]

17. *Combined Air, supra,* footnote 1, at para. 233.
18. *Ibid.*
19. *Parker v. Casalese, supra,* footnote 16.
20. *Combined Air, supra,* footnote 1, at paras. 95-112.
21. *Ibid.*, at para. 111.
22. *Ibid.*, at paras. 144-181.
23. *Ibid.*, at para. 148.
24. *Ibid.*, at para. 156.

In *394 Lakeshore Oakville Holdings Inc. v. Misek*, Misek's appeal of the summary judgment judge was dismissed.[27] The court found that the evidence and witnesses were limited and not contentious and the governing legal principles were not in dispute. Importantly, the court rejected the suggestion that certain categories of cases should not be decided summarily, noting all that is required under rule 20.04(2.1) is a full appreciation of the evidence and issues to make a dispositive finding.[28]

Lastly, in *Parker v. Casalese*, the court dismissed the plaintiff's appeal and upheld the motion judge's decision to send the matter to trial as a simplified procedure action brought under Rule 76.[29] In finding that it may often be the case that a summary judgment motion will interfere with the efficiencies of Rule 76, the court held that a judge will not only have to apply the "full appreciation test"[30] in hearing such a motion, but also assess whether entertaining the motion is consistent with the rationale reflected in Rule 76 procedures. To this end, the court indicated that, although a motion judge in a Rule 76 action could order the hearing of limited oral evidence under rule 20.04(2.2), the better course would be to proceed with a speedy trial.[31]

5. Practical Significance

The Court of Appeal held that there are *generally* three types of cases that are amenable to summary judgment.

The first type is by agreement of the parties. Nonetheless, the court noted that the *Rules* still leave judicial discretion as to whether the matter should, indeed, proceed on this basis. The court stated:[32]

> The first type of case is where the parties agree that it is appropriate to determine an action by way of a motion for summary judgment. Rule 20.04(2)(b) permits the parties to jointly move for summary judgment where they agree "to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment." We note, however, that the latter wording – "the court is satisfied" – affirms that the court maintains its discretion to

25. Philip H. Osborne, *The Law of Torts*, 4th ed. (Toronto: Irwin Law, 2011), at pp. 308-309.
26. *Combined Air, supra*, footnote 1, at para. 170.
27. *Ibid.*, at para. 219.
28. *Ibid.*, at para. 218.
29. *Ibid.*, at paras. 252-261.
30. Discussed *infra*, footnote 34, at para. 54.
31. *Combined Air, supra*, footnote 1, at para. 256.
32. *Ibid.*, at para. 41.

> refuse summary judgment where the test for summary judgment is not met, notwithstanding the agreement of the parties.

This residual discretion may, for instance, protect parties against inexperienced counsel who might unwittingly agree to summary judgment at the expense of the benefit that a trial might provide their client.

The second type is claims or defences that lack merit. The court stated:[33]

> . . . a judge may use the powers provided by rules 20.04(2.1) and (2.2) to be satisfied that a claim or defence has no chance of success. The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motion judge decides to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence, the motion judge must apply the full appreciation test.

The "full appreciation test" is the catch phrase that the court used to describe the judicial weighing that the first instance judge must make when determining whether the matter can be disposed of through summary judgment.[34] In essence:[35]

> [A] motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can

33. *Ibid.*, at para. 73.
34. At paras. 50 and 51, *ibid.*, the court gives the "skinny" on the FAT:
    . . . [phrases] such as "total familiarity with the evidence", "extensive exposure to the evidence", and "familiarity with the case as a whole", provide guidance as to when it is appropriate for the motion judge to exercise the powers in rule 20.04(2.1). In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?
    We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
35. *Ibid.*, at para. 54.

> accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.

The third type is where the issues can be "fairly and justly" resolved by the first instance judge in a summary manner. The court stated:[36]

> In deciding whether to exercise these powers, the judge is to assess whether he or she can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record – as may be supplemented by oral evidence under rule 20.04(2.2) – or if the attributes and advantages of the trial process require that these powers only be exercised at a trial.

The court noted that the latter two types of cases may share some measure of overlap and first instance judges should not be unduly preoccupied with categorizing the case at hand.[37]

In sum, the Ontario Court of Appeal stressed that Rule 20 eliminated only *unnecessary* trials, not trials altogether.[38] Rule 20 warrants that:[39]

> The motion judge may now weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence in determining whether there is a genuine issue requiring a trial with respect to a claim or defence: see rule 20.04(2.1). Moreover, the new rule also enables the motion judge to direct the introduction of oral evidence to further assist the judge in exercising these powers: see rule 20.04(2.2).

It is intended to improve access to justice by ensuring that unnecessary litigation is forestalled at an early stage, thereby freeing up judicial resources, increasing trial courts' efficiency and improving the general confidence and perception of the public in the civil litigation system. The amendments to Rule 20 were clearly

36. *Ibid.*, at para. 74.
37. *Ibid.*, at para. 75.
38. *Ibid.*, at para. 38.
39. *Ibid.*, at para. 36.

well intended and counsel and motion judges can now benefit from the unanimous and clear directions of the Court of Appeal in its application.

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