2009-2248(IT)G

TAX COURT OF CANADA

BETWEEN:

SENTINEL HILL PRODUCTIONS IV CORPORATION, IN ITS CAPACITY AS DESIGNATED MEMBER OF SHAAE (2001) MASTER LIMITED PARTNERSHIP

Appellant

and

HER MAJESTY THE QUEEN

Respondent

BARRISTER'S BRIEF ON RULE 53

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1) *Odgers* states the general purpose of pleadings as:

> The function of pleadings, then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus arrive at certain clear issues on which both parties desire a judicial decision. In order to attain this object it is necessary that the pleadings interchanged between the parties should be constructed according to certain fixed rules [...].

2) The principles of proper pleadings are summarized in *Holmsted and Watson*:[1]

> This is *the* rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to the basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

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[1] Ontario Civil Procedure, Vol. 3, pages 25-20 to 25-21.

3) Most jurisdictions have specific rules governing pleadings in which the material facts are set out in a discrete section separate and apart from and the legal claim or defence. For example, the *Ontario Rules of Civil Procedure* provide:

> 25.06(1) Material facts – Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.
>
> 25.06(2) Pleading law – A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

4) The *Tax Court of Canada Rules* (the "Rules") are no exception. They are most specific on the structure of pleadings. Rules 21 and 48 and their reference to Form 21(1)(a) provide that a Notice of Appeal will:

> [....]
>
> (c) relate the material facts relied on;
>
> (d) specify the issues to be decided;
>
> (e) refer to the statutory provisions relied on; and
>
> (f) indicate the relief sought;

5) Rule 49 is also most specific on the structure of the Reply:

> 49.(1) Subject to subsection (1.1), every reply shall state
>
> (a) the facts that are admitted,
>
> (b) the facts that are denied,
>
> (c) the facts of which the respondent has no knowledge and puts in issue,
>
> (d) the findings or assumptions of fact made by the Minister when making the assessment
>
> (e) any other material fact,
>
> (f) the issues to be decided,
>
> (g) the statutory provisions relied on,
>
> (h) the reasons the respondent intends to rely on, and
>
> (i) the relief sought.

6) Rule 49 could not be more specific in requiring that a Reply be broken into discrete segments: Rules 49(1)(a) to (e) deal with facts and only with facts. Having specified how the facts of a case are to be pleaded, then and only then does Rule 49(1)(f) specify the issue and Rules 49(1)(g), (h) and (i) deal with a Respondent's legal claim based on the facts previously pleaded. This regime, if followed, prevents what Ferguson J. decried in *Cadillac Contracting Development Limited v. Tannenbaum*[2]:

> A pleading ought to be a concise statement of fact and not a rambling, diffused, mixed-up mass of facts, evidence, arguments and law.

7) Unique to tax litigation is Rule 49(1)(d), which requires the Respondent to state the findings or assumptions of fact which the Minister has made when making the assessment. The jurisprudence with respect to this rule provides that in this portion of the Reply only facts should be stated. As Rothstein J.A. stated in *Anchor Pointe Energy Ltd.*:[3]

> 24. Paragraph 10(z) was struck by Rip J. for an additional reason. He considered it to be a conclusion of law "that has no place among the Minister's assumed facts."
>
> 25. I agree that legal statements or conclusions have no place in the recitation of the Minister's factual assumptions. The implication is that the taxpayer has the onus of demolishing the legal statement or conclusion and, of course, that is not correct. The legal test to be applied is not subject to proof by the parties as if it was a fact. The parties are to make their arguments as to the legal test, but it is the Court that has the ultimate obligation of ruling on questions of law.
>
> 26. However, the assumption in paragraph 10(z) can be more correctly described as a conclusion of mixed fact and law. A conclusion that seismic data purchased does not qualify as CEE within the meaning of paragraph 66.1(a) involves the application of the law to the facts. Paragraph 66.1(a) sets out the test to be met for a CEE deduction. Whether the purchase of the seismic data in this case meets that test involves determining whether or not the facts meet the test. The Minister may assume the factual components of a conclusion of mixed fact and law. However, if he wishes to do so, he should extricate the factual components that are being

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[2] [1954] O.W.N. 221 at p. 224

[3] *Anchor Pointe Energy Ltd. v. The Queen*, [2004] 5 C.T.C. 98 at p. 104

> assumed so that the taxpayer is told exactly what factual assumptions it must demolish in order to succeed. It is unsatisfactory that the assumed facts be buried in the conclusion of mixed fact and law.

8) Although the Court's reference in *Anchor Pointe* is specifically to the assumptions of fact to be pleaded pursuant to Rule 49(1)(d), the principle it evokes applies to all portions of the factual section of a Reply. The assumption portion of a Reply is only relevant in the question of onus. The reasoning that conclusions of law should not be pleaded as fact obtains as well to Rules 49(1)(a), (b), (c) and (e).

9) Finally, Rule 53 provides that the Court may strike out a pleading, with or without leave to amend if the pleading

> (a) may prejudice or delay the fair hearing of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of the process of the Court.

10) In *George v. Harris*[4], Epstein J. of the Ontario Supreme Court of Justice at paragraph 20 considered the meaning of "scandalous, frivolous or vexatious":

> The next step is to consider the meaning of "scandalous", "frivolous" or "vexatious". There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous.

11) The Overview and the Summary of Tax Loss Creation Scheme in paragraphs 2 to 15 of the Reply should be struck as being scandalous, frivolous or vexatious on the following bases:

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[4] [2000] O.J. No. 1762

a) **Redundancy**:

i) Rules 49(1)(a) to (e) set the regime by which material facts are to be pleaded. The subject Reply follows that regime (subject to the further grounds for this motion set out below). Thus, facts which the Respondent admits or denies, or of which the Respondent has no knowledge (Rules 49(1)(a), (b) and (c)) have been described in paragraphs 16 to 45 inclusive of the Reply; factual assumptions made in reassessing (Rule 49(1)(d)) are set out in paragraph 46 of the Reply; and other material facts (Rule 49(1)(e)) are set out in paragraph 47 of the Reply.

ii) It necessarily follows that if all of the material facts have been pleaded in the manner required by Rule 49, then to the extent the Overview and the Summary contain statements of fact, those statement of facts either cannot be material or, if later repeated, are redundant, and as such not material.

b) Conclusions of Law, or Mixed Fact and Law

The general rules of pleading require that conclusions of law, or mixed fact and law, must not be pleaded as fact, and may only be pleaded if there is first provided a factual base. Rule 49 mandates discrete divisions to a reply which, if followed, ensures that these principles are respected by limiting legal conclusions to the "issues to be decided" (Rule 49(1)(f)) and "reasons the respondent intends to rely on" (Rule 49(1)(g)) sections of the reply.

The Overview and Summary violate these principles. Conclusions of law are mingled with and pleaded as facts and are pleaded without a factual foundation.

c) Argumentation, Coloration and Embellishment

As stated above, the Overview and Summary are redundant as to assertions of fact and improper in pleading as facts unsupported conclusions of law. As such, their only purpose can be coloration and embellishment as is demonstrated by the unusual and provocative style of those portions of the Reply.

A statement by the Master in *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp.*[5] is most apposite:

> The pleading has an overview. As the overview refers, essentially, to the three grounds for the relief sought, these belong in the body of the claim, not hanging out front on their own.
>
> The pleading contains a summary, which essentially repeats the overview. This will be unnecessary when the claim is pleaded properly. Including the summary and the overview means the same things are repeated three times in the pleading. They should only be discussed once, in the body of the claim, where they fall chronologically.

12) The Applicant says that the following portions of the Reply, which were bracketed in the Notice of Motion, are conclusions of law or mixed fact and law stated as facts, and as such should be struck as being scandalous, frivolous or vexatious:

> Paragraphs 1(i), (k), (l), (o), (r), (s), (t), 18, 19, 20, 22, 24, 34, 46(a), (b), (c), (f) (p), (q), (ss) and (aaa).

13) In paragraphs 16 to 45 inclusive of the Reply, the Respondent provided a "Response to the Allegations of Fact in the Amended Notice of Appeal". Those paragraphs should conform with Rules 49(1)(a), (b) and (c) which require a respondent to state the facts set forth by the appellant that are admitted, denied or of which the respondent has no knowledge. In the following paragraphs of the Reply, bracketed in the Notice of Motion, the Respondent interlaced what was specified by Rules 49(1)(a), (b) and (c) with gratuitous statements and argumentation and legal conclusions. These inclusions were scandalous, frivolous or vexatious and should be struck:

> Paragraphs 18, 19, 20, 22, 23, 24, 28, 29, 30, 31, 32, 33 and 34.

14) Throughout the portion of the Reply entitled "Facts", the Respondent has put quotation marks around words intended to lead the Court to the legal conclusion that the true meaning of the

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[5] 2008 Can LII 58422 (Ont. S.C.)
See also *H.V.K. v. Children's Aid Society of Haldimand-Norfolk*, 2003 Can LII 2364, 37 R.F.L. (5th) 348, (Ont. S.C.) at para. 60

words is not as represented. Pleading such legal conclusions as fact is scandalous, frivolous or vexatious and should be struck.[6] The offensive quotations are found as follows:

Paragraphs 22, 36, 41, 46(g), (j), (m), (n), (vv) and (bbb).

15) Throughout the portion of the Reply entitled "Facts" the Respondent has used the word "circular" and its derivatives, which words have no accepted legal meaning, are undefined, and can only have been inserted to colour or embellish. As such, the words are scandalous, frivolous or vexatious and the paragraphs in which they are included should be struck. The offensive paragraphs are:

Paragraphs 46(p), 47(f), (q), (kk) and (pp).

Costs

16) The Rules provide as follows:

> 147(1) Subject to the provisions of the Act, the Court shall have full discretionary power over payment of the costs of all parties involved in any proceeding, the amount and allocation of those costs and determining the persons by whom they are to be paid.
>
> (2) Costs may be awarded to or against the Crown.
>
> (3) In exercising its discretionary power pursuant to subsection (1), the Court may consider
>
> > (g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of a proceeding,
> >
> > > (i) whether any stage in the proceedings was
> > >
> > > > (i) improper, vexatious or unnecessary.
>
> (4) The Court may for all or part of the costs with or without reference to Schedule II, Tariff B and, further, it may aware a lump sum in lieu of or in addition to any taxed costs.
>
> (5) Notwithstanding any other provision in these rules, the Court has the discretionary power,

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[6] *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (O.C.G.D.) at p. 687
See also *H.V.K. v. Children's Aid Society, supra* at para 38
See *Moore v. Bertuzzi,* 2008 Can LII 3228 (Ont. S.C.)

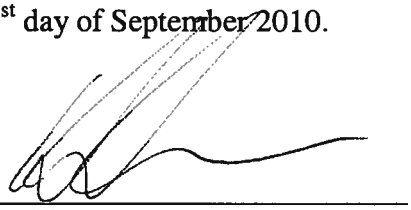
(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award all or part of the costs on a solicitor and client basis.

17) This is not a case in which the Appellant seeks to have struck a few discrete provisions of the Reply. In this case the Overview and Facts portion of the Reply is a "rambling, diffused, mixed-up mass of facts, evidence, arguments and law", designed to obfuscate and colour the proceedings. It violates the procedure established by Rules 49(1)(a) to (e).

18) The Appellant has incurred significant legal fees in preparing for and advancing this Motion, and requests an award of costs in excess of party and party costs, either on a lump sum or solicitor and client basis.

DATED at Vancouver, British Columbia this 21st day of September 2010.



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