Citation: 3764525 Manitoba Ltd. v. CGU Insurance Co of Canada, 2006 MBCA 34

Date: 20060314
Docket: AI04-30-05950

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Scott
Mr. Justice Charles R. Huband
Mr. Justice Guy J. Kroft

BETWEEN:

3764525 MANITOBA LTD. o/a ROADSHOW SOUND o/a MIDNIGHT SOUND	)	***N. H. Kravetsky*** *for the Applicant/Appellant*
(Plaintiff) Applicant/Appellant	)	***M. G. Finlayson*** *for the Respondent/Respondent*
- and -	)	*Application heard:* ***March 13, 2006***
CGU INSURANCE COMPANY OF CANADA	)	*Decision pronounced:* ***March 14, 2006***
(Defendant) Respondent/Respondent	)	

SCOTT C.J.M. and HUBAND J.A.:

1 The appellant has applied for leave to produce further evidence on this appeal. It is conceded that most of the evidence sought to be introduced was available before the end of the trial with the exercise of due diligence, but the court is invited to relax this normal requirement for the admission of new evidence in the interests of justice.

2 The application, if granted, would result in the withdrawal of a formal admission made by two experienced counsel at trial, followed by the introduction of "fresh evidence," the effect of which would be to completely change the nature of the plaintiff's case in a way that is wholly inconsistent

See (2004), 183 Man.R. (2d) 13, 2004 MBQB 95

with what was presented and argued at trial. Implicitly, granting the application would give rise to a new trial.

3 We are aware of no authority that would permit such a result. Cases such as *Canada v. National Bank of Canada (T.D.),* [1993] 3 F.C.J. No. 664 (T.D.) (QL), *Philpott v. Philpott Estate,* [1999] N.J. No. 233 (C.A.) (QL), and *Brown v. Wawanesa Mutual Insurance Co.*, [2000] S.J. No. 205, 2000 SKCA 39 (QL), are distinguishable on their facts.

4 None of these cases had before them the two critical issues earlier identified, namely, the withdrawal on appeal of an admission made at trial followed by the introduction of "fresh evidence" to support a radical new approach to the case.

5 Mr. Finlayson also points out that the "fresh evidence" sought to be introduced is not clearly decisive of the central issue to be decided in the case, namely, whether the principal of the appellant, or someone on its behalf, committed arson or was a party to it; and then there is the question of the finding of the trial judge that the plaintiff's principal acted in bad faith.

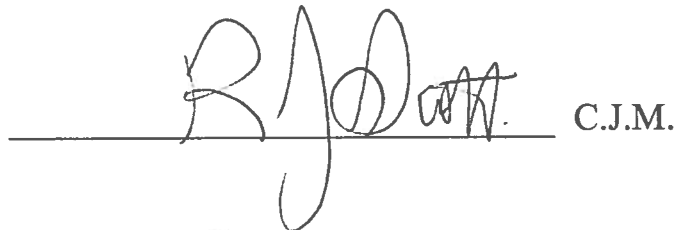
6 The appellant stresses that this court should exercise its discretion to avert an injustice.

7 We are of the view that it constitutes no injustice to the appellant to have this application denied. As noted, the appellant freely entered into the agreed statement of facts and then advanced its case on a theory of causation consistent with that agreement.

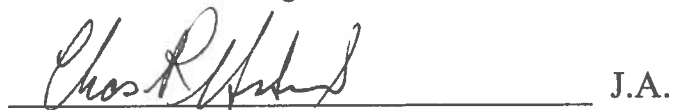
8 In our view, any perceived injustice would fall upon the respondent if

this application were allowed. The respondent successfully defended the claim based on the agreed statement of facts. It would be monstrous to now require the respondent to incur the cost of defending a new trial, based not on "fresh" but on stale and reconstituted evidence, providing the appellant with a second chance to make out its case.

9 It is not the custom to allow new trials of civil cases, and there is no cause to depart from the general rule in the present case.

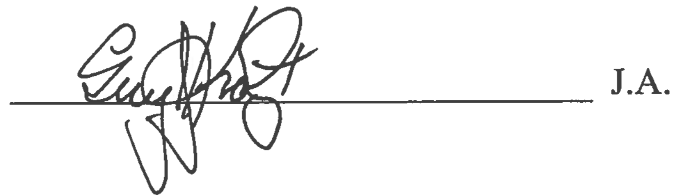


C.J.M.



J.A.

I Agree:



J.A.