Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. and Theodore

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5 O.R. (3d) 65

ONTARIO
Ontario Court (General Division)
Master Peppiatt
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Barristers and solicitors -- Professional conduct -- Duty to court -- Solicitor instructed by client not to approve draft order -- Solicitor obliged to approve order in absence of legitimate objection -- Refusal to approve amounting to contravention of Rules of Law Society of Upper Canada -- Obligation not dispensed with by fact that solicitor no longer acting for client.

Judgments and orders -- Settlement of order -- Client instructing solicitor not to approve draft order -- Solicitor obliged to approve order where there are no proper grounds upon which to withhold approval -- Fact that solicitor no longer acting for client not relieving solicitor of obligation.

Where a client has given instructions to a solicitor not to approve a draft order and there are no proper grounds upon which to withhold such approval, the refusal of the solicitor to approve the order contravenes the Rules of the Law Society of Upper Canada. The fact that the solicitor has ceased to act for the client does not relieve the solicitor of his obligation to the court and other solicitors.

Statutes referred to

Courts of Justice Act, 1984, S.O. 1984, c. 11, s. 141 [am. 1984, c. 64, s. 9]

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, Rules 45, 59, rules 57.07, 59.01, 59.02, 59.03 [am. O. Reg. 366/87, s. 12; am. O. Reg. 364/89, s. 7(1)], 59.04 [am. O. Reg. 364/89, s. 7(2); am. O. Reg. 711/89, ss. 56, 57]
Rules of Professional Conduct (Law Society of Upper Canada), Rules 10, 14

RULING concerning the approval of a draft order.

J.P. Willson, for plaintiff.

Helder M. Travassos, for defendants.

MASTER PEPPIATT:-- On July 29, 1991 a motion in this action seeking interim possession of a Mercedes-Benz motor vehicle pursuant to Rule 45 of the Rules of Civil Procedure, O. Reg. 560/84, came before me. Ms. Willson appeared for the plaintiff, moving party, and Mr. Charles Gastle appeared for the defendants. Also present was Mr. Paul Theodore, a personal defendant and the president of the corporate defendant.

When the motion was called for hearing Mr. Gastle requested an adjournment. He informed me that there had been a loss of confidence between his firm and the defendants and that a motion would shortly be brought for an order removing his firm as solicitors of record for the defendants. His clients did not wish him to argue the motion, but intended to retain new solicitors. This was confirmed by Mr. Theodore.

After hearing their submissions and the submissions of Ms. Willson, who opposed the granting of an adjournment, I made an

order adjourning the motion for two weeks subject to certain terms, and I endorsed the record accordingly. I am now informed that an appeal from my order has been launched. The matter now before me does not relate to the merits of my order.

Ms. Willson prepared a draft of my order and sent it to Mr. Gastle for approval. He has refused to approve the order and accordingly, at Ms. Willson's request, I granted an appointment for Friday, August 2, 1991, to settle the order. At that time Ms. Willson and Mr. Travassos attended before me in my chambers.

Mr. Travassos informed me, as Mr. Gastle had previously informed Ms. Willson, that he had no fault to find with the order as drafted by her. The refusal to approve it was based upon two factors, first, that although they were still solicitors of record for the defendants they were not in fact acting for them and secondly, that they had received Mr. Theodore's specific instructions not to approve the order. I was not told why these instructions had been given but it was confirmed to me that Mr. Theodore had been informed of what was involved in the approval of an order and that he understood that such approval did not prejudice any rights of appeal or the right to contend in any appropriate forum that the order was wrong. Nevertheless, he issued emphatic instructions which the solicitors felt bound to follow.

This raises two issues, the first being what is involved in the approval of an order and secondly, the rights and obligations of solicitors in a situation such as this.

There appears to be no authority directly on point and there is no consensus of opinion among those whom I have consulted. It is in the hopes of providing some authority which may be approved or disapproved in due course that I am writing these reasons setting out my views.

In certain circumstances the answer to the questions set out above will have cost consequences for parties and for solicitors.

The settling and signing of orders is governed by Rule 59 and I set out the relevant parts of that rule:

59.01 An order is effective from the date on which it is made, unless it provides otherwise.

59.02(1) An endorsement of every order shall be made on the appeal book, record, notice of motion or notice of application by the court, judge or officer making it, unless the circumstances make it impractical to do so.

(2) Where written reasons are delivered,

(a) in an appellate court, an endorsement is not required;

(b) in any other court, the endorsement may consist of a reference to the reasons,

and a copy of the reasons shall be filed in the court file.

59.03(1) Any party affected by an order may prepare a draft of the formal order and send it to all other parties represented at the hearing for approval of its form.

(2) Approval of the form of an order that merely dismisses a motion, proceeding or appeal, with or without costs, is not required.

(3) An order shall be in Form 59A (order), 59B (judgment) or 59C (order or certificate on appeal) and shall contain,

(a) the name of the judge or officer who made it;

(b) the date on which it was made; and

(c) a recital of the particulars necessary to understand the order, including the date of the hearing, the parties who were present or represented by counsel and those who were not, and any undertaking made by a party as a condition of the order. [am. O. Reg. 366/87, s. 12]

59.04(1) Every order shall be submitted in accordance with subrules (4) and (8) for the signature of, ...

. . . . .

(4) Where all the parties represented at the hearing have approved the form of the order, the party who prepared the draft order shall,

(a) file the approval of all the parties represented at the hearing, together with a copy of the order; and

(b) leave the order with the registrar for signing.

(5) Where approval of the form of an order is not required under subrule 59.03(2), the party who prepared the draft order shall leave it with the registrar for signing.

. . . . .

(6) Where the registrar is satisfied that the order is in proper form, he or she shall sign the order and return it to the party who left it to be signed.

(7) Where the registrar is not satisfied that the order is in proper form, he or she shall return the order unsigned to the party who left it to be signed and the party may,

(a) submit the order in proper form and, if required by the registrar, file the approval of the parties to the order in that form, together with a copy of the order; or

(b) obtain an appointment to have the order settled by the court, judge or officer that made it and serve notice of the appointment on all other parties who were represented at the hearing.

(8) Where approval is not received within a reasonable time, a party may obtain an appointment to have the order settled by the registrar or, where the registrar considers it

necessary, by the court, judge or officer that made it, and notice of the appointment shall be served on all other parties who were represented at the hearing.

(9) In a case of urgency, the order may be settled and signed by the court, judge or officer that made it without the approval of any of the parties who were represented at the hearing.

(10) Where an objection is taken to the proposed form of the order in the course of its settlement before a registrar, the registrar shall settle the order in the form he or she considers proper and the objecting party may obtain an appointment with the court, judge or officer that made the order to settle the part of the order to which objection has been taken and serve notice of the appointment on all other parties who were represented at the hearing.

. . . . .

(13) Where an appointment is not obtained under subrule (10) or (11) within seven days after the registrar settles the order, a party may require the registrar to sign the order as settled by him or her.

(14) After an order has been settled under subrule (10) by the judge or officer who made it, or under subrule (11) and (12), the registrar shall sign it unless it was signed by a judge or officer at the time it was settled.

The purpose of this procedure is to ensure, so far as humanly possible, that the formal order upon which an appellate court, and other members of the same court, sheriff, accountant, etc., will act accurately sets out the intention of the court which pronounced the order as reflected in the endorsement or the reasons. It is important that this should be done so that all concerned may know their rights, obligations and duties. It is far more than a mere formality.

It will be seen that raising an objection to a draft order or refusing to approve it involves the person seeking to take out

the order in additional time and cost. In addition, since courts and officers will not and should not, usually, act upon an endorsement but only upon a formal order signed, issued and entered, delay may nullify the effect of rule 59.01.

The approval of orders is, therefore, one of the things which is necessary in order to permit the court to function. It is akin to being on time for a hearing. It is perhaps unnecessary to say that if there is legitimate objection to the form of the draft order it is quite proper to pursue the objection through the process laid out by the rules. However, to refuse approval, or to raise specious or frivolous objections in order to gain a collateral advantage, such as delay, or simply to cause additional trouble and expense to the other side is an abuse of process.

I should make it clear that, as I have mentioned above, approval of a draft order is only an agreement that that is what the court ordered. It is not, in the slightest degree, a concession that the order was right, or that the court had jurisdiction, or an agreement not to appeal. It is purely an administrative act for the purpose of permitting the court system to function.

In what I have said above I have drawn no distinction between the counsel and the client. However, in the circumstances which obtain here, the issue is the duty of counsel where the client has given instructions not to approve the order, and there are no proper grounds upon which to withhold such approval and it is to that issue which I now turn.

It is well to start with the general well settled proposition that a solicitor is the agent of his/her client and must, like any other agent, follow the principal's instructions. This is, however, subject to the exception that those instructions must be lawful. It is no defence for an agent who has committed a tort or criminal offence to say that it was committed upon the instructions of the principal.

Members of the bar are subject to particular constraints arising from their position as officers of the court. The Rules

of Professional Conduct of the Law Society of Upper Canada are of great assistance, and shed light upon the matter before me. There are two specific rules to which I refer.

Rule 10

When acting as an advocate the lawyer, while treating the tribunal with courtesy and respect, must represent the client resolutely and honourably within the limits of the law.

Commentary

2. The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect.

The lawyer must not, for example:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

(b) knowingly assist or permit the client to do anything which the lawyer considers to be dishonest or dishonourable;

Rule 14

The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith.

Commentary

1. Public interest demands that matters entrusted to a

lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the Rule will impair the ability of lawyers to perform their function properly.

2. Any ill feeling which may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

. . . . .

4. The lawyer should avoid sharp practice, and should not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of the client's rights.

[Footnotes omitted]

In my view, the refusal to approve a draft order to which there is no genuine objection contravenes those rules.

Does the fact that a solicitor has ceased to act for the client alter these obligations? In my opinion, it does not.

The obligation to approve an order, to which there is no legitimate objection, is owed to the court and to the other solicitors as well as to the client. Ceasing to act for the client does not relieve the solicitor of the obligations to the court and other solicitors. It may not release the obligations owed to the client in this respect. If the order is not approved by the solicitor who appeared on the motion, a

succeeding solicitor may well say that he cannot give approval as he was not present on the motion or there may be no succeeding solicitor. There is, therefore, a breakdown in the court process resulting in unnecessary delay and expense. It is the duty of solicitors to avoid this if possible, and it can hardly be said that the brief amount of time and effort required to consider a draft order, endorse the approval upon it and return it to the solicitor who has drafted it is an unreasonable burden upon a solicitor.

It should hardly be necessary to add that at a time when the court system is under attack from many quarters, including those who should know better, it is short-sighted for members of the legal profession to provide ammunition for their enemies.

In dealing with the costs consequences of such conduct the applicable rule of civil procedure is rule 57.07:

> 57.07(1) Where a solicitor for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
>
> (a) disallowing costs between the solicitor and client or directing the solicitor to repay to the client money paid on account of costs;
>
> (b) directing the solicitor to reimburse the client for any costs that the client had been ordered to pay to any other party; and
>
> (c) requiring the solicitor personally to pay the costs of any party.
>
> (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the solicitor is given a reasonable opportunity to make representations to the court.

(3) The court may direct that notice of an order against a solicitor under subrule (1) be given to the client in the manner specified in the order.

I have reviewed the cases decided under that rule and under s. 141 [am. 1984, c. 64, s. 9] of the Courts of Justice Act, 1984, S.O. 1984, c. 11, and those relating to the inherent jurisdiction of the court to control its own officers through an award of costs against them. It appears to me that an important factor in those cases is the good faith of the solicitors in question and whether their actions were reasonable. I have no doubt that the solicitors for the defendants have acted entirely in good faith. I am satisfied that they did their best to have their client act reasonably and that, after careful consideration, they came to the conclusion that they were bound to follow his instructions.

In that latter respect, I think that they were wrong but that is not nearly enough to justify an order for costs against them personally. Before a solicitor, acting in good faith, can be ordered to pay costs personally, he or she must be guilty of outrageous conduct or incompetence amounting to outrageous conduct. That is far from the case here, particularly in view of the fact that, as I have mentioned earlier, there is no authority on the point and opinion is divided. It may be that if this judgment comes to the attention of the bar it will no longer be possible to say that there was an honest belief that the client's instructions must be followed in these circumstances.

I therefore award costs of the settlement of the order against the defendants but not against their solicitors.

Order accordingly.