CITATION: The Canada Life Assurance Company et al. v. Aphria Inc., 2024 ONSC 5901
COURT FILE NO.: CV-22-00682888-0000
DATE: 20241025

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CANADA LIFE ASSURANCE COMPANY, LG INVESTMENT MANAGEMENT, LTD. as trustee for IG MACKENZIE REL PROPERTY FUND and OPTRUST OFFICE INC., Plaintiffs / Defendants by Counterclaim

AND:

APHRIA INC., Defendant / Plaintiff by Counterclaim

BEFORE: Justice John Callaghan

COUNSEL: *Sydney Hodge* for the Plaintiffs / Defendants to the Counterclaim

David Foulds and *Christopher Liang* for the Defendant / Plaintiff by Counterclaim

HEARD: In writing

DIRECTION AND ENDORSEMENT

[1] The Plaintiffs/Defendants by Counterclaim (the "Plaintiffs") bring a motion pursuant to Rule 59.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*") seeking to vary this Court's judgment. This Court issued reasons on December 12, 2023 (the "Reasons"). A judgment was subsequently issued on February 6, 2024 (the "Judgment").

[2] The Plaintiffs assert that there are two errors. First, it is argued that the calculation of the rental damages is incorrect. Second, it is argued that the interest calculation in the Judgment is incorrect.

[3] For the reasons set out below, I agree that the Reasons contain an error in expressing the manifest intention of the court. An incorrect date appears in para. 97 of the Reasons. There is no error in the Judgment. The Reasons when read with this Direction and Endorsement should be sufficient to clarify this error.

[4] In respect of the interest calculation, counsel prepared and approved the form of Judgment that provided the interest calculation. I do not agree that this calculation should be varied.

[5] The defined terms in the Reasons shall apply to this Direction and Endorsement. The Reasons are reported at *The Canada Life Assurance Company et al. v. Aphria Inc*., 2023 ONSC 6912.

Background

[6] As revealed in the Reasons, the main issue decided by the court was whether a legal principle relating to mitigation of damages arising from the Supreme Court of Canada's decision in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.*, [1971] S.C.R. 562 ("*Highway Properties*") should be revisited. That principle dictated that a landlord need not mitigate where the landlord does not accept a repudiation of the lease by the tenant.

[7] In rejecting the argument, this Court awarded damages to the Plaintiffs for the proven arrears. At para. 97 of the Reasons, the damages owing to the Plaintiffs were described as "$638,171.40 being the rent up to June 15, 2023". However, $638,171.40 represents the unpaid rent up to November 3, 2022, being the date of the evidence filed on the summary judgment motions. June 15, 2023 was the date of the written argument. The rent owing to June 15, 2023, is said to be $1,047,137.36, not $638,174.40.

[8] The Judgment awarded damages in the amount of $638,171.40 without reference to any date. However, when read with the Reasons, it is reasonable to conclude that this amount was for rent to June 15, 2023, and not November 3, 2022. This is a difference of some $400,000. Moreover, it was always contemplated that the Plaintiffs would make a further claim as rent accrued. As such, the date in para. 97 informs when any subsequent claim for rent would begin to accrue.

[9] The second alleged error relates to the calculation of pre-judgment interest. The Reasons provided that the Plaintiffs were entitled to interest on all unpaid amounts at the rate of five (5) percentage points above the prime rate per annum which was in accordance with the Lease. If there was an issue with the application of the interest, the Reasons provided that the parties were free to address the court on that issue.

[10] After the release of the Reasons, the Judgment was drafted by counsel, approved by the court, and entered. There was no disagreement between counsel as to the form of the Judgment and no requested attendance with the court.

[11] There is some debate as to when the errors were first raised and by which counsel. Counsel for both parties filed affidavits with differing accounts. In my view, resolving that dispute is unnecessary for the resolution of this motion.

[12] By June, the issue had been squarely raised as it related to para. 97 of the Reasons. The Plaintiffs wrote the Defendant that the court appeared to have "inadvertently included the incorrect damages amount in [its] Decision". At this time, there was no mention of the interest calculation.

[13] The court was contacted for the first time in late August. A case conference was held on September 3, 2024. As the Defendant's position was that the matter needed to be decided by motion, the matter was scheduled to be addressed as a motion in writing. There then followed the filing of motion material, including affidavits as to the back and forth between counsel. The motion material was filed in mid-October.

[14] The Judgment is currently under appeal and is to be heard by the Court of Appeal on November 13, 2024.

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Issues

[15] This motion addresses whether this Court should vary the Reasons or Judgment as requested. Accordingly, the motion requires consideration of the law relating to Rule 59.06 and its application to the two alleged errors.

Law

[16] Ordinarily, a judge is *functus officio* after the formal judgment is issued. The doctrine of *functus officio* is a doctrine that is intended to bring finality to the judicial process: *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 S.C.R. 785, at para. 34 ("*CBC v. Manitoba*"). Any subsequent challenge is to be made by way of appeal, if available.

[17] However, the *Rules* recognize errors do occur and, in limited circumstances, justice requires that those errors be rectified. Rule 59.06 sets out circumstances where an "order" (which includes a judgment) that contains an error may be rectified. The rule reads as follows:

> Amending
>
> 59.06 (1) An order that contains an error arising from an accidental slip or omission or requires amendment in any particular on which the court did not adjudicate may be amended on a motion in the proceeding.
>
> Setting Aside or Varying
>
> (2) A party who seeks to,
>
> (a) have an order set aside or varied on the ground of fraud or of facts arising or discovered after it was made;
>
> (b) suspend the operation of an order;
>
> (c) carry an order into operation; or
>
> (d) obtain other relief than that originally awarded,
>
> may make a motion in the proceeding for the relief claimed.

[18] In *CBC v. Manitoba*, the Supreme Court discussed the limited jurisdiction to revisit alleged errors. In considering the circumstances that warranted intervention, the Court stated at para. 33:

> In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision. A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered. After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to

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> correct an error in expressing its manifest intention, or where the matter has not been heard on its merits. [Citations omitted.]

[19] Years earlier, the Supreme Court recognized, like the courts of England, that a court may correct limited errors in a judgment. In *Paper Machinery Ltd. et Al. v. J.O. Ross Engineering Corp. et Al.*, [1934] S.C.R. 186, Justice Rinfret stated at p. 188:

> The question really is therefore whether there is power in the Court to amend a judgment which has been drawn up and entered. In such a case, the rule followed in England is, we think,-and we see no reason why it should not also be the rule followed by this Court- that there is no power to amend a judgment which has been drawn up and entered, except in two cases: (1) Where there has been a slip in drawing it up, or (2) Where there has been error in expressing the manifest intention of the court. [Citations omitted.]

[20] The rule also provides "that a judge can give directions or make an order to carry an order into operation": *Jeffery v. London Life Insurance Company*, 2018 ONCA 716 (CanLII), at para. 84. In applying the *Rules*, they are intended to be "liberally construed to secure the **just**… determination of every civil proceeding on its merits": Rule 1.04 (emphasis added).

[21] The parties have not provided any case law regarding the subsequent amending of reasons, as opposed to the judgment and whether the test ought to be the same for varying reasons as opposed to an order or judgment. On its face, Rule 59.06 applies to orders: *Susin v. Eugene Goodreau and Goodreau Excavating Ltd.*, 2008 ONCA 165, at para. 8. There may be plenty of corrections to reasons that ought not to engage Rule 59.06, such as typographical errors that do not impact the reasons or judgment but merely clarify matters for the reader. However, in this case, as the alleged error relates to the awarded damage amount, the combination of the Judgment read with the Reasons creates the clear conclusion that the amount awarded was for rent owing to June 15, 2023. In this regard, the Reasons inform the Judgment. Given the prospect of further arrears and claims for those arrears, the date from which the rental arrears were calculated is a substantive issue which ought to be examined through the lens of the case law under Rule 59.06.

[22] The Defendant states that any manifest error may be corrected on appeal. This is undoubtedly true, but it does not preclude this Court from addressing any error that may be properly rectified under this court's jurisdiction. As expressed by the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 81, the court's ability to vary an order already granted does not undermine the availability of appeal. In my view, the varying of the Reasons or Judgment at this stage is still appropriate and does not interfere with the appeal to be undertaken in November. To the contrary, to the extent of any error, it allows the Court of Appeal to have an accurate reflection of the intention of this Court free of any slip or manifest error.

Rent Calculation

[23] The Reasons include a manifest error in that the Reasons refer to rent owing as of June 15, 2023, as being $638,171.40. In fact, this is the amount owed as of November 13, 2022. When read

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with the Judgment, it creates a manifest injustice as it precludes the Plaintiffs from recovering any rent that may be owed from November 13, 2022, to June 15, 2023.

[24] As noted, the evidence of the Plaintiffs was that the rent owing as of November 13, 2022, being the date of its affidavit in support of the summary judgment motions, was $638,171.40. The Plaintiffs' summary judgment motion asked for rent to the date of judgment, but there was no updated affidavit. However, in its compendium, it filed an updated statement of account setting out the amount of rent owing as of June 1, 2023, of $1,047,137.36 (the "Updated Statement of Account").

[25] The Plaintiffs submit that the manifest intent of the Reasons was to grant Judgment for rent up to June 2023 as set out in the Updated Statement of Account and request that the Judgment be varied to include that amount. That was not the intent.

[26] While the Updated Statement of Account was contained in the compendium, it was not filed in evidence, and there was no concession by the Defendant that the Updated Statement of Account was accurate.

[27] The manifest intent of the Reasons was to award damages up to the date of the evidence, as any further damages required proof of not only the rental amounts accrued but that there had been no mitigation or act terminating the Lease. Neither fact was proven by evidence or otherwise conceded.

[28] The slip in the Reasons was to refer to the factum date of June 15, 2023, rather than the date of the evidence being November 3, 2022. The date in para. 97 of the Reasons should be November 13, 2022, and not June 13, 2023.

[29] To be clear, this is not a case where the parties are relitigating an issue. This is a case of a clear error. It is unfortunate that it was not caught by either counsel or the court prior to the Judgment being issued. However, it would be unjust not to correct the error.

[30] Accordingly, there is no variation of the Judgment required. This is a case where a direction by way of endorsement should facilitate carrying the Judgment into operation. When read with this Direction and Endorsement and para. 97 of the Reasons, it should be clear that the Judgment awarded damages of "$638,171.40 being the rent up to November 13, 2022".

Interest Calculation

[31] In my view, the pre-judgment interest calculation is neither a slip nor a manifest error.

[32] In this case, the alleged error is in the Judgment, not the Reasons. The interest amount of $69,667 (the "Interest Amount") in the Judgment was to reflect pre-judgment interest.

[33] The calculation of interest in the Reasons was clear. It was to be the prime rate plus 5%. It was then left to counsel to arrive at the Interest Amount and to attend before the court if there was

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disagreement. The parties calculated the Interest Amount and included it in the Judgment for the court's approval.

[34] The Plaintiffs state that the Interest Amount does not reflect the fluctuation of prime as provided for in the Reasons. The Defendant states that the calculation of interest became an issue of negotiation, there was no request for fluctuating interest, and the Interest Amount was agreed upon by counsel.

[35] If the Interest Amount is an error, it was not a slip or manifest error of the court. It was the amount submitted to the court by agreement of counsel. In such circumstances, I do not think the court can now recalculate the interest. To do so would be to open the discussions between counsel in settling the order which is beyond the intent of correcting manifest errors or slips. Accordingly, I decline to reopen the calculation of interest.

Disposition

[36] No amendment to the Judgment is required. Rather, this Direction and Endorsement provides clarity that the award in the Judgment of $638,171.40 is for rent owing up to November 13, 2022. The motion is otherwise dismissed.

[37] Given the circumstances and the divided success, this Court is not inclined to award costs. Nonetheless, if either party requests costs, that party shall provide cost submissions by October 29, 2024, at 4 pm of no more than 3 pages. Any responding submissions of no more than 3 pages shall be filed 2 days thereafter. Any reply to those submissions shall be filed the following day and consist of no more than one page. This truncated schedule is necessitated by the pending appeal.

Callaghan J.

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