Court of King's Bench of Alberta

Citation: Murray v Windsor Brunello Ltd, 2023 ABKB 375

Date: 20230621
Docket: 1501 00629
Registry: Calgary

Between:

Donald Murray and Linda Murray

Plaintiffs

- and -

Windsor Brunello Ltd, KAPO Fenster und Türen GMBH, Sebastian Bade operating as CS Eurohaus, Luxus Haus Imports Ltd and Alberta Engineering Ltd

Defendants

- and -

KAPO Fenster und Türen GMBH and Luxus Haus Imports Ltd

Third Parties

Reasons for Decision on Application to set aside a Notice to Admit of the Honourable Justice EJ Sidnell

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[1] This decision was delivered orally on June 14, 2023, during the trial. Only minor editorial edits for readability have been made, together with the inclusion of citations and quotations. There have been no changes made to the substance of my oral decision.

Introduction and standing

[2] Two days before the trial commenced, the defendant, Windsor Brunello Ltd (WBL), served a Notice to Admit Facts containing 75 paragraphs of proposed admissions on the lawyer for another defendant, Alberta Engineering Ltd (AEL). At approximately 11:00 pm on the day before trial, the lawyer for AEL provided a Reply to Notice to Admit Facts which admitted the majority of the 75 paragraphs. For ease of reference, I will refer to the Notice to Admit Facts and AEL's Reply to Notice to Admit Facts collectively as the "Notice to Admit Documents".

[3] The plaintiffs, Donald Murray and Linda Murray, and the defendant and third party Luxus Haus Imports Ltd (Luxus), apply under Rule 6.37(8) of the Alberta *Rules of Court*, AR 124/2010, to set aside the Notice to Admit Facts.

[4] Under Rule 6.37(1), WBL, as a party, was entitled to serve the Notice to Admit Facts on AEL, another party.

[5] WBL relies on Rule 6.37(7) which states:

> An admission under this rule is made only for the specific purpose for which it is made and may not be used as an admission against the party making it on any other occasion, or in favour of a person other than the person requesting the admission, without the agreement of the party making the admission.

[6] WBL submits that since the admission "is made only for the specific purpose for which it is made" it is only as between WBL and AEL and the Murrays and Luxus have no standing to apply to set aside the Notice to Admit Facts under rule 6.37(8). The subsection states:

> On application, the Court may set aside a notice to admit.

[7] I do not accept WBL's interpretation of Rule 6.37. Subsections (2) and (4) of Rule 6.37 both require a notice to admit, and any reply, to be served on all parties to the action. These provisions show that Rule 6.37 contemplates that a notice to admit, and a reply, may be relevant to, and affect, other parties to the action. Indeed, WBL noted that it wished to rely on the Notice to Admit Documents as evidence that AEL is liable to the Murrays and not WBL.

[8] I find that both the Murrays and Luxus have standing to bring an application to set aside the Notice to Admit Facts under Rule 6.37(8).

Can a notice to admit facts be served after the commencement of trial?

[9] Although Rule 6.37 does not expressly prohibit the service of a notice to admit after the trial has commenced, the Murrays and Luxus submit that it should be read as limiting its use to a period that is at least 20 days before a trial commences.

[10] In ***TS v Stazenski***, 2011 ABQB 508, at para 8, Burrows J dealt with an application under Rule 6.37(8) to set aside a notice to admit, which had been served during a lengthy trial adjournment:

> First, the Defendant submitted that a Notice to Admit Facts cannot be served after the commencement of the trial. It is exclusively a pre-trial procedure. Indeed, in order to have the effect desired by the party serving it, it must be served more than 20 days before the commencement of the trial. This, the Defendant submits, is the necessary implication of Rule 6.37. That Rule does not expressly require

> that the Notice to Admit Facts be served before trial but it necessarily implies such a limitation because the party on whom the notice is served is given 20 days to reply to the notice. The facts are not deemed to be admitted unless no response is filed within the 20 days.

[11] Notwithstanding his recitation of the defendant's position on whether a notice to admit can be served more than 20 days before trial, Burrows J did not set aside all of the notice to admit and allowed one category of proposed admissions to stand. That case is an example of the special circumstances where it is possible, and perhaps appropriate, to serve a notice to admit after the trial has commenced. I find that there is no prohibition on serving a notice to admit after the trial has commenced; however, the timing of the service may be considered on an application to set aside a notice to admit under Rule 6.37(8).

Test to be applied on an application under Rule 6.37(8)

[12] In ***Andriuk v Merrill Lynch Canada Inc***, 2011 ABQB 59, Martin J (as she then was) considered an application to set aside a notice to admit served before a certification hearing under the *Class Proceedings Act*, SA 2003, c C-16.5. At para 16, Martin J quoted the *obiter* of O'Leary J (as he then was) in ***Canadian Southern Petroleum Ltd v Amoco Canada Petroleum Co*** (1994), 168 AR 126, at paras 22 and 28:

> The Notice to Admit Facts, although I have not been able to find a history of it, is not, in my view, primarily a discovery tool. It is a proof tool. Discovery undoubtedly involves proof of facts, that is developing evidence which can be used to prove facts at trial. That is only one use for discovery, that is oral discovery and discovery of documents. Notices to Admit Facts are not, in my view, primarily designed to discover the truth of matters but, rather, to obviate the necessity and expense of calling evidence at trial. This is, I believe, a traditional view and there is certainly no authority for it.
>
> The nature of the procedure is such that as time proceeds and the matter inches closer to trial, the ability of the parties to make admissions without risking liability or without risking placing themselves in an awkward position will crystallize and they can be made much more freely as they are often done informally as the trial approaches. I do not believe, though, that the procedure should be used as a form of discovery or as a substitute for interrogatories. To do so, in my view, would result in a serious problem for the courts and a serious problem for counsel attempting to sort out all these various things on an interlocutory basis.

[13] In ***Andriuk***, at para 17, Martin J concluded that the comments of O'Leary J could not stand for the proposition that a notice to admit should be set aside as premature if issued in relation to an interrogatory or pretrial application, as was the case before her. Martin J noted that some earlier decisions "took a more expensive view, reasoning that admissions do away with the need for proof at any time in the process and are directed towards goals that include, but are not limited to dispensing with the need to call evidence at trial": para 19. These goals align with the intention of the *Rules of Court* as articulated in Rule 1.2(2), particularly subparagraph (b).

[14] In relation to when a notice to admit facts should be struck, Martin J said, at para 22 of ***Andriuk***:

> There will need to be a good reason, which is inconsistent with the goals and purposes of the new rules, as well as the wording and intention of rule 6.37 before a Notice to Admit will be struck: something that amounts to an abuse of process or strikes at the heart of adjudicative fairness. For example, in *Ironstone v. Jansen*, 2005 ABQB 21 Watson, J., as he then was, recognized in para. 20 that a Notice to Admit has a "forensic value" and its purpose is to gain a "forensic advantage". As such he said it was not unfair to have a long Notice, when a plaintiff is asked to admit facts it ought to know, even if it involved significant work to answer. Such a Notice can only be set aside under the old 230(7) where the Notice involves a denial of adjudicative fairness. He dismissed the application to strike the Notice to Admit. In the Ontario case of *Slate Falls Nation v. Canada* ... the equivalent to a Notice to Admit was struck by the Master as an abuse of process because there had already been significant and extensive discovery. There is nothing of this nature in the case at bar.

[15] In ***Stazenski***, Burrows J briefly noted, at para 17, that one aspect of the notice to admit would cause no prejudice and he permitted it to stand. If reliance on a notice to admit causes prejudice to other parties, it may be an appropriate ground for setting it aside.

[16] I find that the considerations on an application to set aside a notice to admit under Rule 6.37(8) include whether the notice to admit:

(a) achieves the intention of the *Rules of Court*, as set out in Rule 1.2;

(b) it should be set aside for a reason set out in Rule 1.4(2)(b): for being contrary to law, an abuse of process or is undertaken for an improper purpose; or

(c) affects trial fairness or is prejudicial to other parties.

[17] The above list is not exhaustive.

Analysis

[18] The Murrays and Luxus say they are prejudiced by the Notice to Admit Facts because it was served, and replied to, on the eve of trial such that they were unable to prepare for it in an orderly and effective manner.

[19] In addition, in January 2022, AEL entered into a settlement with the Murrays by way of a modified Mary Carter Agreement. At trial, approximately 18 months later, AEL was no longer an ongoing business, its debts exceeded its assets, and it had been struck from the corporate registry in July 2022. When it was struck, AEL, as a corporation, ceased to exist pursuant to s 213(4) of the Alberta *Business Corporations Act*, RSA 2000, c B-9.

[20] On the first day of trial, AEL's lawyer of record was granted leave to withdraw. On the second day of trial, AEL's former director and corporate representative, Mr. Ruggieri, made an application to represent AEL at the trial, which was denied. As a result, no one represented AEL at the trial, at least to the point where this application was heard in the second week. It is also noteworthy that Mr. Ruggieri was one of the founding members of WBL.

[21] The status of AEL is relevant because the Reply to Notice to Admit Facts purports to have been filed on June 5, 2023, by the lawyer of record for AEL. While the lawyer may have still been the lawyer of record on the first day of trial when the application to withdraw was

granted, it is not clear how that lawyer was able to obtain instructions from AEL given that it had been struck from the corporate registry 18 months prior. Because AEL was not represented when this application was heard no representations were made on its behalf.

[22] WBL wishes to use the Reply to Notice to Admit Facts as evidence to show that WBL is not liable to the Murrays and that, to the extent the Murrays prove their claim, AEL is liable. Such a finding would affect both the Murrays and any defendant that might be found to be jointly and severally liable with AEL, including Luxus.

[23] WBL also submits that if it cannot rely on the Reply to Notice to Admit Documents that it will call Mr. Ruggieri as a witness to give evidence. WBL submits that the Murrays and Luxus will not suffer any prejudice because they would have known and anticipated the evidence of AEL. Further, if they wanted to call Mr. Ruggieri to give the evidence of AEL, they could have served him with a notice to attend the trial as a witness.

[24] If Mr. Ruggieri is called as a witness by WBL, the Murrays and Luxus will have the opportunity to cross-examine him on his evidence. On the other hand, if the Notice to Admit Documents are accepted, his evidence will not be subjected to cross-examination. In ***R v Lyttle***, 2004 SCC 5, at para 1, the Supreme Court of Canada said:

> Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.

[25] Cross-examination is a basic tenet of our adversarial system and a fair trial process. Permitting the use of the Notice to Admit Documents, which were served almost immediately before the trial commenced and would preclude some parties from testing that evidence by cross-examination, would be contrary to trial fairness and prejudicial to those other parties.

[26] My conclusion on trial fairness and prejudice is conclusive. However, I also note that I have serious concerns about the Reply to the Notice to Admit having been prepared on behalf of a party which is not a legal entity. Proffering such evidence may be an abuse of process but I do not have to decide that issue.

[27] The application to set aside the Notice to Admit Facts is granted. As a result, WBL cannot rely on the Notice to Admit Documents in this trial.

Heard on the 13th day of June, 2023. Delivered orally on the 14th day of June, 2023.
Dated at the City of Calgary, Alberta this 21st day of June, 2023.

E.J. Sidnell
J.C.K.B.A.

Appearances:

Paul J Stein KC
for the Plaintiffs

Erika Carrasco & Logan Maddin
for the Defendant Windsor Brunello Ltd

Damian Shepherd
for the Defendant and Third Party Luxus Haus Imports Ltd

Sebastian Bade operating as CS Eurohaus
self represented at trial and appeared only on selected dates

No one appeared
for the Defendant Alberta Engineering Ltd

No one appeared
for the Defendant and Third Party KAPO Fenster und Türen GMBH