COURT OF APPEAL FOR ONTARIO

CITATION: Duggan v. Durham Region Non-Profit Housing Corporation, 2020 ONCA 788
DATE: 20201215
DOCKET: C67430

Feldman, Fairburn and Nordheimer JJ.A.

BETWEEN

Gavin Duggan, Minor by his Litigation Guardian Philip Knight, and Jessica Knight, and Philip Knight

Plaintiffs

(Appellants)

and

Durham Region Non-Profit Housing Corporation

Defendant

(Respondent)

Thomas J. Hanrahan and Meredith A. Harper, for the appellants

David G. Boghosian, Avril Allen, and Shaneka Shaw Taylor, for the respondent

Heard: In writing June 23, 2020

On appeal from the order of the Divisional Court (Justices Harriet E. Sachs, Julie Thorburn, and Regional Senior Judge M. Gregory Ellies, dissenting), dated June 4, 2019, with reasons reported at 2019 ONSC 3445, 146 O.R. (3d) 196, affirming the order of Justice Janet Wilson, dated April 4, 2018, with reasons reported at 2018 ONSC 1811, 21 C.P.C. (8th) 405, affirming the order of Master Donald E. Short, dated August 25, 2017, with reasons reported at 2017 ONSC 4875.

Feldman J.A.:

[1] The issue on the appeal is the proper interpretation of r. 6.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which provides:

> SEPARATE HEARINGS
>
> 6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages

[2] The case is a personal injury claim on behalf of an infant plaintiff and his parents. Neither side served a jury notice. The plaintiffs asked the court to delay setting a date for trial until the minor plaintiff's injuries had stabilized. The defendant opposed that motion but, in the alternative, asked the court to bifurcate the liability and damages issues. The Master granted the plaintiffs' request to adjourn, but only for the damages trial, and granted the defendant's request for bifurcation. The plaintiffs appealed the bifurcation order on the grounds that r. 6.1.01 does not permit the court to make a bifurcation order without their consent.

[3] The courts below dismissed the plaintiffs' appeal. The majority of the Divisional Court held that the effect of r. 6.1.01 is to allow the court to order bifurcation of a jury trial only when the parties consent, but where the trial is by judge alone, the court retains its inherent jurisdiction to bifurcate without the consent of the parties. The dissenting judge's view was that r. 6.1.01 applies equally to jury and non-jury trials and that the consent of the parties is required in both situations before a court may order a trial to be bifurcated.

[4] For the reasons that follow, I agree with the dissenting judge. I would allow the appeal.

Background Facts and Judicial History

[5] The appellants are an infant plaintiff and his parents. At age 4, the infant plaintiff fell from a second-floor balcony of the apartment his parents leased from the respondent, and suffered significant head injuries.

[6] In 2017, when the child was 11, the appellants moved for an extension of time of three years to set the action down for trial, in order to obtain further evidence on his injuries and prognosis as he aged. The respondent not only opposed the motion for an extension of time but also brought a cross-motion for an order bifurcating the trial on the issues of liability and damages, with a view to proceeding to set down the liability hearing. The appellants opposed the motion to bifurcate the trial.

[7] The Master granted the appellants' request to extend the time for the assessment of damages, but, over the appellants' objection, he granted the respondent's request to bifurcate the trial, allowing the issue of liability to proceed before the damages hearing.

[8] The appellants appealed the latter decision on the basis that r. 6.1.01 does not give the court jurisdiction to order bifurcation without the consent of the parties,

or, alternatively, that if the court did have jurisdiction, bifurcation should not have been ordered on the record before the court.

[9] On appeal to the Superior Court, the Superior Court appeal judge upheld the decision of the Master. She found that r. 6.1.01 did not oust the inherent jurisdiction of the court to order bifurcation without the consent of the parties in a judge-alone trial. In the exceptional circumstances of this case, she agreed that bifurcation was appropriate.

[10] Leave to appeal was granted by the Divisional Court. The majority of the court confirmed the decision of the Master and the first appeal judge. The majority held that the effect of the rule is to broaden the court's ability to bifurcate trials to include the bifurcation of jury trials with the consent of the parties, but not to remove the court's inherent jurisdiction to bifurcate non-jury trials without the consent of the parties.

[11] The majority also found that it was not bound by the 2015 decision by Molloy J. of the Divisional Court in *Bondy-Rafael v. Potrebic,* 2015 ONSC 3655, 128 O.R. (3d) 767, leave to appeal to Ont. C.A. refused, M45885 (March 30, 2016), where the court held that r. 6.1.01 applies to both jury and non-jury trials. The court reasoned that because *Bondy-Rafael* was a jury case, the pronouncement with respect to non-jury cases was *obiter dictum*.

[12] The majority decision also rejected Molloy J.'s conclusion that r. 6.1.01 occupied the field on the ability of a court to order bifurcation, and found that the court's inherent jurisdiction to order bifurcation in non-jury cases had not been ousted, as the wording of the rule was not clear enough. The court also pointed to the word "may" in the rule as permissive language that did not preclude the court from also making a bifurcation order without the consent of the parties.

[13] Finally, the majority said that its interpretation of r. 6.1.01 was consistent with the Supreme Court of Canada decision in *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87, where the court stated that "the process [of adjudicating disputes] is illusory unless it is also accessible — proportionate, timely and affordable". The majority also found support in r. 1.04 of the *Rules*, which provides that the rules should be interpreted "liberally".

[14] In upholding the decision of the first appeal judge, the majority summarized its holding in three conclusions, at paras. 38-40:

> A plaintiff has a presumptive right to have all issues dealt with in a single trial. However, this right is not absolute and bifurcation of issues may be necessary and in the interests of justice in limited and exceptional cases.
>
> Rule 6.1.01 enables the court to bifurcate a jury trial where the interests of justice dictate and on the consent of the parties, a right unavailable to the Court prior to the enactment of the Rule.
>
> For the above reasons, in exceptional cases, the court should not be restricted from exercising its inherent

> jurisdiction in a non jury case because one party refuses to consent.

[15] The dissenting judge found that the court had no authority to bifurcate the trial without the consent of the parties. He agreed with Molloy J. in *Bondy-Rafael* that the legislature had occupied the field by enacting r. 6.1.01 and that it did so with “clear and unambiguous” language.

[16] He also pointed out that, prior to the enactment of r. 6.1.01, the court already had the jurisdiction to bifurcate a jury trial with the consent of the parties. This undercut the premise of the majority that the intent of the rule was to extend the court’s jurisdiction to bifurcate jury trials on consent, rather than limit its jurisdiction to bifurcate without consent in non-jury trials. As the rule therefore added nothing in the jury context, the purpose of the rule must have been to limit the court’s ability to bifurcate in the non-jury context only to cases where the parties consent and thus make the ability to bifurcate consistent, whether the trial was to be by jury or by judge alone.

Issue

[17] Leave to appeal to this court was granted in order to address one issue: does r. 6.1.01 limit the court’s ability to bifurcate a trial only on consent in both jury and non-jury trials, or does the court retain its inherent jurisdiction to bifurcate a non-jury trial over the objection of one or both parties?

Analysis

[18] As this question involves a matter of statutory interpretation, the standard of review is correctness: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 30.

[19] The principles to be applied are found in the familiar test from the Supreme Court decision in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, taken from Driedger's *Construction of Statutes*:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed. (Markham, Ont.: LexisNexis Canada, 2014) at paras. 2.1-2.5.

Wording of the Rule

[20] The first step is to examine the words of r. 6.1.01 itself, found under the heading: Separate Hearings. I restate the text of the rule for ease of reference:

> With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

[21] The majority decision under appeal finds that the rule should be interpreted to differentiate between jury and non-jury cases. However, nothing in the wording of the rule suggests any such distinction. To the contrary, the rule applies to a

"proceeding", defined in r. 1.03(1) to mean an action or an application. A jury notice for the trial of factual issues can be served in an action (Rule 47). Rule 6.1.01 does not differentiate between an action to be tried by a judge alone or by a judge and jury; on its face, it applies to all proceedings.

Purpose and Context of the Rule

[22] The state of the law before the rule was enacted is an important contextual factor for interpreting the rule, the intent of the Civil Rules Committee ("CRC") and of the legislature. Blair J.A. explained the court's power to bifurcate before the enactment of the rule, together with the history and rationale for the interpretation of the court's inherent jurisdiction in *Kovach (Litigation Guardian of) v. Kovach*, 2010 ONCA 126, 100 O.R. (3d) 608, leave to appeal refused, [2010] S.C.C.A. No. 165.

[23] Before r. 6.1.01 was enacted, neither the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), nor the *Rules* expressly conferred the power to bifurcate a civil trial. Nevertheless, as Morden J.A. explained in *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills*, 55 O.R. (2d) 56 (C.A.), at p. 5, the court had the inherent jurisdiction to exercise its discretion to bifurcate a non-jury trial, including ordering separate hearings to determine liability and damages. He described the power as "narrowly circumscribed". The power to bifurcate had to be exercised with caution and in the interests of justice: *Elcano*, at p. 6.

[24] However, it was accepted that the inherent jurisdiction to bifurcate did not extend or would not be exercised in the case of a trial where a jury notice had been served, except on the consent of the parties. Courts reasoned that bifurcating a jury trial without consent would conflict with a litigant's statutory right to have issues of fact or of mixed fact and law decided by a jury: *CJA*, s.108(1); *Kovach*, at paras. 24-28.

[25] Like the dissenting judge below, I do not read the jurisprudence prior to the enactment of r. 6.1.01 as preventing a court from bifurcating a jury trial where the parties consent. In *Kovach (Litigation Guardian of) v. Kovach*, (2009) 95 O.R. (3d) 34 (Div. Ct.), the Divisional Court considered whether courts could bifurcate jury trials with consent. The Divisional Court concluded that courts had this power, but warned against granting this request lightly. At para 45, it held that: "We are not prepared to conclude that under no circumstances may a jury trial be bifurcated. If all parties to the action consent, the judge will then be required to determine whether it is appropriate."

[26] On the appeal, Blair J.A. reached a similar conclusion. Near the end of his reasons, at para. 42, he concluded that: "The practice in Ontario has long been understood to preclude the bifurcation of trials where a jury notice has been served, *in the absence of consent*." [Emphasis added].

[27] These conclusions are consistent with the reasons for not extending the court's inherent jurisdiction to bifurcate to jury trials. A litigant's right to a jury is entrenched in the *CJA*. The court's inherent jurisdiction cannot be exercised in a way that undermines this statutory right: *Kovach*, at para. 25; *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, at p. 480.

[28] If a party consents, however, they voluntarily give up their right to have the issues tried by a single jury. Nothing in the *CJA* suggests that a party cannot waive this right. Indeed, if that Act prevented courts from bifurcating jury trials on consent, that jurisdictional impediment would still exist today, regardless of r. 6.1.01. Section 66(3) of the *CJA* provides that the CRC cannot make rules that conflict with a statute.

[29] Rule 6.1.01 must be read with this background in mind. The rule was enacted in 2008 and came into force in 2010 as part of a package of changes to the *Rules* following the delivery of the Honourable Coulter A. Osborne's report entitled *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) ("Osborne Report") which recommended changes to the civil justice system. The Osborne Report recommended that a rule be enacted by the CRC to address the court's discretion to order bifurcation, and to set out the criteria that could be applied. The report does not suggest that there be different rules for jury and non-jury cases, nor does the discussion, set out below, refer to any distinction:

Pre-Trials and Trial Management:

One trial management issue – bifurcation – requires separate comments. The power to order issues in an action to be split into two or more trials is not expressly conferred by statute or the Rules of Civil Procedure. The power to order bifurcated proceedings appears to exist as part of the inherent jurisdiction of the court. In the leading case, the Court of Appeal held that it is a “basic right” of a litigant to have all issues in dispute resolved in one trial and that bifurcation must therefore be regarded as “a narrowly circumscribed power.” In a later case, *Bourne v. Saunby*, the Ontario Court (General Division) listed fourteen criteria that the court should consider when evaluating the merits of a motion to sever liability from damages. The catalogue of factors set out in *Bourne*, though not an exhaustive list, is generally taken into account in determining whether bifurcation should be allowed. A decision of the Divisional Court suggests that a party's inability to fund the litigation is an “extraneous” factor that should not be considered when deciding whether to bifurcate a trial.

While I view bifurcation to be the exception, cost considerations militate in favour of bifurcation in some cases. In commercial litigation, for example, when dealing with damages will expose a party and sometimes all parties to significant costs, it may make sense to separate the issues of liability and damages and deal with liability first. Upon the determination of one issue, parties may be inclined to settle the balance of the issues in dispute. This can result in a significant savings of time, money and judicial resources. It would also be of particular benefit to those litigants who cannot afford a trial of all issues. There is no doubt that bifurcation can delay the final resolution of the entire proceeding and, where issues overlap, evidence and testimony may need to be repeated. Where these concerns apply, a bifurcation order should not be made.

The Civil Rules Committee should consider prescribing, at least in general terms, when it is open to the court to make a bifurcation order. In the end, the court's discretion in making bifurcation orders should be expanded while recognizing that bifurcation remains the exception, not the rule.

Recommendations:

The Civil Rules Committee should consider addressing bifurcation in a rule that would permit an order for bifurcation to be made on motion

> by any party or on the court's own initiative, after hearing from the parties. Any rule permitting bifurcation could reference some or all of the 14 factors listed in *Bourne v. Saunby*.

[30] Rule 6.1.01 was enacted following the report. It granted the court discretion to order bifurcation by using the word "may". The criteria to be applied are not set out explicitly, but the list of factors to consider provided in the *Bourne v. Saunby*, (1993), 23 C.P.C. (3d) 333 (Ont. Gen. Div.) case remains available to guide a court in making an order that is in the interests of justice.

[31] What the rule adds, and arguably was not contemplated by the Osborne Report recommendation, is the precondition for the exercise of the discretion that bifurcation be on the consent of the parties. Placed in the context of the previous state of the law, the rule's requirement for the parties' consent before bifurcation may be ordered confirms the court's power in jury cases, but it circumscribes the court's inherent jurisdiction in non-jury cases.

The Rule's Interaction with Inherent Jurisdiction

[32] The majority decision below also found that the rule does not occupy the field or oust the inherent jurisdiction of the court to order bifurcation in a non-jury trial without the consent of the parties. Referring to the decision of *R. v. Rose*, [1998] 3 S.C.R. 262, at para. 133, the majority below found that the language of the rule does not contain the clear and precise wording necessary to oust the inherent jurisdiction of the court. Also, referring to the use of the word "may" in the rule, the court stated that the rule is permissive, not mandatory, and that the

language of the rule does not state that bifurcation may *only* be granted where the parties consent.

[33] I reject these findings as constituting an error of law in the interpretation of the rule.

[34] The majority's reasons suggest that the language of the rule means that the court is permitted to make the order on consent, but that that is not the only time it is permitted to do so. Because the rule is not mandatory but uses the word "may", they say, the court may make the order on consent, but may also make the order where there is no consent.

[35] That conclusion is also linked to the majority's assertion that the rule does not contain clear language that precludes the court from exercising its previous inherent jurisdiction to order bifurcation in non-jury trials where there is no consent.

[36] In my view, there is no basis either in the language of the rule, or in its purpose, that substantiates the majority's interpretation.

[37] The purpose and effect of the word "may" in the context of the wording of the rule is to give the court the discretion to make an order, but not require it to do so, even where the parties consent. That discretion allows the court to implement the philosophy of s.138 of the *CJA,* which provides that "As far as possible, multiplicity of legal proceedings shall be avoided." It also accords with the cautionary approach to the previous inherent jurisdiction to make such orders

referred to by Morden J.A. in *Elcano* at p. 5, as follows: "…since it is a basic right of a litigant to have all issues in dispute resolved in one trial it [the inherent jurisdiction of the court] must be regarded as a narrowly circumscribed power."

[38] In my view, the language of the rule precludes making an order without the consent of the parties. To test that conclusion, I ask the following question: can the authority granted by the rule and the inherent jurisdiction live together? Or does one preclude the other? See I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr*. *Legal Probs* 23, at p. 24, approved by L'Heureux-Dube J. in *Rose* at para. 64:

> Moreover, the term "inherent jurisdiction of the court" is not used in contradistinction to the jurisdiction conferred on the court by statute. The contrast is not between the common law jurisdiction of the court on the one hand and its statutory jurisdiction on the other, for the court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, *so long as it can do so without contravening any statutory provision*. [Emphasis added.]

[39] In this case, the rule cannot be interpreted to mean that the court is granted the discretionary power to order bifurcation where there is consent, but it can also order bifurcation without consent. The authority of the court to make the bifurcation order is predicated on the opening words of the rule, "with the consent of the parties". Contrary to the finding of the majority below, by making consent a precondition of the exercise of the court's discretion, the drafters have used clear and precise language that limits the court's authority under the rule to consensual

orders. To interpret it otherwise, would undermine the unequivocal wording and meaning of the rule. Inherent jurisdiction cannot be exercised so as to conflict with a statute or rule: *Baxter*, at p. 480.

[40] In this case, the majority's interpretation of the rule requires the court to read in a distinction based on whether the order is being made in the context of a jury or a non-jury trial, without any basis in the wording for doing so. Reading in such a distinction is inappropriate because it conflicts with the unambiguous direction that the rule applies to all proceedings.

[41] I would also test whether the language is clear by considering how a self-represented litigant would read the rule. When there was no rule, such a litigant would have had to look at other sources, including the case law, to ascertain what power the court had to order bifurcation. But where there is a rule that on its face speaks to the issue and contains no exceptions, it would come as a surprise to be told that in the face of the words of the rule, the court retains an inherent jurisdiction to make an order that is directly contrary to the words of the rule.

[42] In my view, this case can usefully be compared with, and distinguished from, *Ziebenhaus (Litigation guardian of) v. Bahlieda*, 2015 ONCA 471, 126 O.R. (3d) 541, where the issue was whether s. 105 of the *CJA*, which allows a court in the context of a proceeding to order a physical or mental examination of a party by a health practitioner, defined to mean a licensed physician, dentist, or psychologist,

has the effect of ousting the inherent jurisdiction of the court to order an assessment by someone who is not a health practitioner.

[43] In analyzing the intent of the legislature, the court perceived a gap in the statutory provisions which failed to address the numerous assessments by other practitioners that are routinely relied on in personal injury litigation. It concluded that it would not be contrary to the intent of s. 105 to allow the court to also make orders for such assessments to ensure justice and fairness. Most importantly, the court found that while the language of the section permits the court to order examinations by the defined health practitioners, it does not clearly preclude the court from making orders for other assessments where it is in the interests of justice to do so.

[44] Comparing the statutory provision in *Ziebenhaus* with r. 6.1.01, while both provisions use the permissive “may” language that gives the court discretionary power to make a certain order, s. 105 of the *CJA* does not contain any language that constrains the court from making another order, while r. 6.1.01 limits the court to exercise its discretion where the parties consent. Taken together, the words “with the consent of the parties” and “proceeding” in the rule are limiting words that do not permit the authority granted by the rule and the court’s inherent jurisdiction in non-jury trials to live together. “May” in this context can have only one meaning; the court can refuse to grant the bifurcation motion despite the consent of the parties.

Additional Considerations: Judicial Efficiency

[45] The majority decision below also supported its analysis of the meaning of the rule by referring to the Supreme Court of Canada decision in *Hryniak*, with its emphasis on making the litigation process "accessible — proportionate, timely and affordable", and to r. 1.04 of the *Rules*, that calls for the rules to be interpreted liberally.

[46] The *Hryniak* decision involved summary judgment and the use that a summary judgment motion judge can make of the trial management powers contained in r. 20 of the *Rules*, which includes the power to decide an issue that does not require a trial and order a trial of the other issue or issues.

[47] Requiring the consent of the parties as a precondition to a bifurcation order pursuant to r. 6.1.01 in non-jury proceedings is not inconsistent with the court's power to order partial summary judgment. In such cases, the court has decided that one issue does not require a trial, so that there is no bifurcation where two trials are held.

[48] This court has already explained in *Mars Canada Inc. v. Bemco Cash & Carry Inc.,* 2018 ONCA 239, 140 O.R. (3d) 81, at para. 36, that r. 6.1.01 does not apply in the context of a summary judgment motion where the motion judge has the power to decide issues that do not require a trial, and, where it is appropriate to do so, to leave the balance of the issues to be tried as directed.

[49] To the extent that the majority's reference is to the desirability of having the court be able to case manage an action to make it proceed more efficiently and cost effectively, it is evident that in enacting the rule the way it is, the CRC determined that on the issue of bifurcation, fairness requires that any such order only be made where the parties consent. One can imagine legitimate reasons why a party may not consent, such as the cost of preparing twice for a trial in the context of a contingency fee arrangement, and the potential for an appeal of the liability finding with the cost and delay associated with it.

[50] In any event, such policy considerations would already have been considered by the CRC in arriving at the wording of the rule with its restriction to consent orders.

Stare Decisis

[51] Before concluding these reasons, it is, I believe, important to address the issue of *stare decisis* in the context of the decision of the Divisional Court in *Bondy-Rafael*. While that decision was not unanimous, the majority decided unequivocally that r. 6.1.01 limits the court's power to bifurcate a proceeding to actions, whether jury or non-jury, where the bifurcation is on consent of the parties. In this case, all levels of court from the Master on up took the view that they were not bound by the *Bondy-Rafael* decision. In my view, they erred in so doing.

[52] The doctrine of *stare decisis* requires that all courts follow and apply authoritative precedents. Intermediate appellate courts, like the Divisional Court, are generally bound by their past decisions: *Kovach* (Divisional Court), at para. 42; *Fernandes v. Araujo*, 2015 ONCA 571, 127 O.R. (3d) 115, at para. 45. As Sharpe J.A. explained in *Fernandes*, at para. 45, this doctrine is a bedrock principle of our legal system:

> As an intermediate court of appeal, we are ordinarily bound to follow our past decisions, even decisions with which we disagree. It is important that we do so. Our common law legal tradition rests upon the idea that we will adhere to what we decided in the past. As expressed by the Latin phrase *stare decisis*, we stand by things that have been decided. The rule of precedent provides certainty, consistency, clarity and stability in the law. It fosters the orderly and efficient resolution of disputes and allows parties to obtain reliable legal advice and to plan their affairs accordingly.

[53] The Superior Court appeal judge addressed the *stare decisis* issue directly. She concluded that the *Bondy-Rafael* decision was not binding for two reasons: 1) The *ratio decidendi* of the decision was the application of the rule to a jury trial. The discussion of how the rule applied to a non-jury trial was therefore *obiter dictum* and not binding; 2) Applying the test from the Supreme Court of Canada decision in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the decision in *Hryniak* constituted “a change in the circumstances or evidence that ‘fundamentally shifts the parameters of the debate’” regarding the conduct of civil

litigation, that allowed the court to reconsider its prior decision on the proper interpretation of the rule.

[54] The majority decision below did not address the *Carter* basis, but found that the *Bondy-Rafael* case was not binding because it involved a jury trial and, therefore, Molloy J.'s interpretation of the rule as it applies to non-jury trials was *obiter dictum*. I would reject these arguments.

[55] In *R. v. Puddicombe*, 2013 ONCA 506, 308 O.A.C. 70, leave to appeal refused, [2013] S.C.C.A. No. 496, a five-judge panel of this court considered the jurisprudence from the Supreme Court of Canada in *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, regarding to what extent *obiter dictum* from that court is to be treated as binding. In *Henry*, the court explained at para. 57:

> All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not 'binding'…

[56] In *Puddicombe*, at para. 68, the court confirmed its approach from *R. v. Prokofiew*, 2010 ONCA 423, 100 O.R. (3d) 401, aff'd 2012 SCC 49, [2012] 2 S.C.R. 639, following *Henry,* that "*obiter* that was integral to the analysis underlying the *ratio decidendi*" is binding on this court, while "*obiter* that was incidental or collateral to that analysis" is not.

[57] Applying that approach, an examination of the majority decision in *Bondy-Rafael* makes it apparent that the court's interpretation of the rule requiring consent to bifurcate in all cases is based on a single analysis encompassing all proceedings, jury and non-jury. It is either not *obiter*, or, to the extent that the interpretation of the rule as it applies in the non-jury context may be considered to be *obiter dictum*, that part of the analysis is integral to the *ratio* of the case and therefore binding.

[58] Paragraph 35 of the majority judgment in *Bondy-Rafael* demonstrates this clearly:

> Counsel for the respondents submits that it could not have been the intent of the Rules Committee to remove the inherent jurisdiction to order bifurcation because the Rule is expressed in permissive rather than prohibitory manner. He points as well to the trend towards a more expansive approach to these kinds of issues, as reflected in other Rules and jurisprudence in areas such as summary judgment, which he suggests supports an interpretation of the Rule that retains the common law jurisdiction to order bifurcation over the objections of the parties in non-jury trials. I do not find that submission to be persuasive. The Rule is clear. It makes no distinction between a jury trial and a non-jury trial. In both cases, consent is required before the judge's discretion as to whether to order bifurcation is triggered. Whether this is expansive or restrictive of the prior common law is irrelevant. In any event, the current Rule could be said to be both expansive (in that it applies to jury trials) and restrictive (in that for non-jury trials consent is now mandatory, whereas at common law it was only a very strong factor). Perhaps the intent was to take a balanced approach. However, it is the language of the Rule itself which governs. In the absence of any ambiguity or

> lacunae in the Rule itself, it is not relevant to consider what might have been the intention of the Rules Committee, particularly when that requires us to speculate on what it might have been.

[59] Furthermore, in my view, it was not open to any of the courts that decided the case under appeal to treat the *Bondy-Rafael* decision as *obiter*, the very same argument having been rejected by this court in the *Kovach* appeal in relation to comments that Morden J.A. had made in the *Elcano* decision in his analysis of the extent of the inherent jurisdiction of the court to bifurcate. *Elcano* was not a jury case, but while describing the court's power in non-jury cases, Morden J.A. enunciated the jury exception to the exercise of the court's inherent jurisdiction. In the *Kovach* appeal, the appellant argued that Morden J.A.'s comments in the jury context were *obiter*.

[60] Blair J.A. firmly rejected the submission at para. 18:

> First, Justice Morden's comment in *Elcano* is not *obiter dicta*, in my view. An expert in procedural matters, Justice Morden was not given to discursive comments. It is true that *Elcano* was not a jury case. Having concluded that the court's inherent jurisdiction empowered it to bifurcate a trial in appropriate circumstances, however, it was necessary for him to state the exception in order to make the proposition he was enunciating accurate. This does not make the caveat he expressed *obiter*; it was essential to his reasoning process, and therefore part of the *ratio decidendi* of the decision.

[61] Similarly, in the *Bondy-Rafael* case, Molloy J.'s analysis of the rule had to involve both jury and non-jury situations; as in *Elcano*, both parts were essential to the interpretive analysis of the rule.

[62] I would also reject any applicability of the *Carter* decision on *stare decisis* to this case. In *Carter*, at para. 44, the Supreme Court discussed two circumstances where a court would not be bound by *stare decisis*: where a new legal issue is raised or "where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.'" In this case, the *Bondy-Rafael* decision interpreting the same rule was decided after the *Hryniak* case in the Supreme Court. There was no basis for the courts below to ignore the doctrine of *stare decisis*.

[63] The doctrine of *stare decisis* makes an important contribution to the cost-effective and efficient management of litigation by ensuring that a legal issue, including the interpretation of a legislative provision, regulation or rule, once decided, is not relitigated in the next case. In my view, the courts below erred in law by failing to treat the *Bondy-Rafael* case as binding.[1]

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[1] In *Bondy-Rafael*, counsel sought to rely on r. 2.03 as the basis for a judge to dispense with compliance with r. 6.1.01 "in the interests of justice." Molloy J. for the majority, at para. 36, rejected any application of r. 2.03 beyond irregularities or minor issues. It could not provide jurisdiction to dispense with compliance "in the face of a Rule that provides to the contrary." While that argument was not raised in this case, I consider it part of the analysis of Molloy J. that this decision is upholding and that was binding on the courts below.

Conclusion

[64] I agree with the analysis in the dissenting reasons below. I would allow the appeal, set aside the decision of the Divisional Court majority and the order bifurcating the trial of the liability and damages issues with costs of the appeal and leave to appeal motion to the appellants. If the parties cannot agree on the quantum of costs, they may make brief written submissions (maximum 2 pages) together with each of their bills of costs, within 3 weeks of the release of these reasons.

Released: K.F. December 15, 2020

K. Feldman J.A.

I agree Lauwers J.A.

I agree J. Miller J.A.