

**Trinity Anglican Church v. Janeiro, [2012] O.J. No. 3791**

Ontario Judgments

Ontario Superior Court of Justice

K.L. Campbell J.

July 31, 2012.

Court File No. 00-CV-183951

**[2012] O.J. No. 3791**

Between Trinity Anglican Church, Plaintiff, and Michael Scott Janeiro, Colin Ford and Peter Martynowski, Maria Janeiro, Eric Sousa Janeiro, Joanne Ford, Malcolm Ford, Bozena Martynowski, and Sylwester Martynowski, Defendants

(8 paras.)

## **Counsel**

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Martin Forget for the moving parties, the defendants Colin Ford and Joanne Ford.

Angelo G. Sciacca and Pamela Vlasic for the respondent, plaintiff, Trinity Anglican Church.

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### **ENDORSEMENT OF JUSTICE CAMPBELL**

#### **K.L. CAMPBELL J.**

1 The defendants Colin and Joanne Ford move pursuant to the rule 6.1.01 of the *Rules of Civil Procedure* for an order bifurcating the trial of this case on the issues of liability and damages. Counsel for these defendants contend that there are persuasive reasons why it makes sense to now order the bifurcation of these issues. This argument has not persuaded the plaintiff, nor has it persuaded the Janeiro defendants, all of whom are opposed to this bifurcation motion.

2 I note this opposition from the other parties because it is important. Rule 6.1.01 provides that:  
"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."

3 Counsel for the moving defendants argues that this rule perfects the discretionary inherent jurisdiction of the court to order the bifurcation of issues where it is in the interests of justice. I disagree. The clear and unequivocal language of the rule permits the court to order bifurcation only "with the consent of the parties". If the court maintained a jurisdiction to order bifurcation in the face of opposition from the parties such a result would void the opening language in the rule. This rule makes it clear that the "consent of the parties" is a necessary pre-condition to the discretionary jurisdiction to make an order of bifurcation.

4 The standard procedural texts and rule annotations all observe that, while Justice Osborne, in his report on making Justice More accessible and affordable, recommended that the Civil Rules Committee should consider passing a rule that permits bifurcation on any motion or on the court's own initiative, the committee did not accept

this recommendation, but rather created rule 6.1.01 (which came into effect on January 1, 2010) which requires the consent of the parties. See Carthy, Millar and Cowan, Ontario Annual Practice (2011-2012), p. 643; Watson and McGowan, Ontario Civil Practice 2012, at p. 351; Fuerst and Sanderson, Ontario Courtroom Procedure (3rd ED., 2012) at pp. 453-455. This same conclusion was reached by Turnbull J. in WM. Whiteley Ltd. v. Gauthier, [2010] O.J. No. 149 (S.C.J.) at para 9, A decision with which I am in respectful agreement. This conclusion has also, in my opinion, been at least impliedly accepted by the Court of Appeal for Ontario in Kovach v. Kovach, [2010] O.J. No. 643, at para. 34, where Blair J.A., delivering the judgment of the court, after quoting rule 6.1.01, commented that this rule may well permit the bifurcation of issues, even where a jury notice has been filed, "where the parties consent ..." the language of the rule requiring the consent of the parties was placed in italics for emphasis. Given my interpretation of rule 6.1.01, and the opposition to this motion by a number of other parties, the motion by the moving defendants must be dismissed. I simply have no jurisdiction to allow the motion and make the requested bifurcation order in the absence of "the consent of the parties."

**5** Having reached this conclusion on the jurisdictional issue, it is not strictly necessary for me to address the merits of the motion had I possessed the jurisdiction to determine it. However, having heard the parties fully argue the issue, I feel obliged to address the issue at least briefly.

**6** While counsel for the moving defendants has persuasively said are that can be said in favour of an order bifurcating the issues of liability and damages, I would not have acceded to this request even if I had concluded that I had jurisdiction to make the requested order.

**7** The older authorities make it clear that the moving party bears a heavy onus in trying to justify the making of an order of bifurcation, as it is a narrowly circumscribed power that can only properly be exercised in the rarest of cases. I am simply not satisfied that the moving party defendants have met that heavy burden in all of the circumstances of this case. Without reviewing individually each of the 14 factors outlined in Bourne v. Saunby [1993] O.J. No. 2606 (Ont. Ct. Gen. Div.) at para. 30, I am simply not satisfied that, at this stage in this litigation, that the extra ordinary step of bifurcation of the issues is justified. Rather, it makes more sense to me to permit the trial, currently scheduled for six weeks starting on October 6/2010 to proceed, and allow all of the various factual and legal issues to be resolved by the trier of fact at that time. Accordingly, for this reason as well the motion must be dismissed.

**8** Having successfully resisted this motion, the plaintiff is entitled to its costs on a partial indemnity basis. Having reviewed the materials prepared and assembled by both parties on this motion, and the costs outline provided by counsel for the plaintiff, I fix the plaintiff's partial indemnity costs of this motion at \$6,025.83 including disbursements and taxes. The moving party defendants shall pay these costs to the plaintiff within 30 days.

K.L. CAMPBELL J.