When is an Order Final or Interlocutory?
Issue Estoppel and Summary Judgment Motions

A Commentary on
***Ashak v. Ontario (Family Responsibility Office)*, 2013 ONCA 375 and**
***Dams v. TD Homes and Auto Insurance Company*, 2013 ONCA 730**

The Ontario Court of Appeal has recently delivered two very important judgments clarifying its earlier decision in *Ball v. Donais* (1993), 13 O.R. (3d) 322 (C.A.) as to when an order dismissing a summary judgment motion is an interlocutory order or a final order. This is an important issue as final orders can be appealed directly to the Court of Appeal, but interlocutory orders are appealed to the Divisional Court and require leave. As the time limits are different for the two types of appeal, misjudging whether an order is final or interlocutory can result in an appeal being filed late and dismissed on procedural grounds.

These decisions also determine when issue estoppel attaches to decisions made by a judge dismissing a summary judgment motion. Again this is a very important issue as it is obviously important to know what issues remain alive for trial after a failed summary judgment motion.

The Court of Appeal laid out some rules as to what judges must put in their reasons to trigger an issue estoppel and what counsel must include in drafting the resultant order. It is very important that counsel be aware of these rules as a lack of care in drafting an order can result in unexpected consequences.

Ball v. Donais was a case in which the defendant moved under rule 21.01(1)(a) for summary judgment on the ground that the action was barred by a limitation period. The motions court judge found the action was not barred by the limitation period. Normally a dismissal of a summary judgment motion is considered an interlocutory order as the action is allowed to continue. In this case, however the Court of Appeal held that it was a final order as it finally disposed of the issue as to whether the limitation period was applicable and that issue was no longer open for consideration by the trial judge.

In *Ashak*, the plaintiff sued the Crown as represented by the Director of the Family Responsibility Office ("FRO") for negligence and breach of fiduciary duty in collecting support arrears owing to Ms. Ashak.

FRO brought a summary judgment motion requesting that the action be dismissed. Rather than accepting FRO's position that it did not owe a duty of care to the respondents, in the course of his reasons, the motion judge indicated he was satisfied that Ms. Ashak had established a prima facie duty of care in relation to her negligence claim and that other issues required a trial.

FRO appealed to the Court of Appeal taking the position that the order was a final order per *Ball v. Donais* because the motion judge finally determined the question of whether FRO has a prima facie duty of care to the respondents in the circumstances of this case and that finding would be binding on the trial judge. The Court of Appeal disagreed and dismissed the appeal for want of jurisdiction.

The Court noted that:

> [7] ... As was noted by this court in *Leone v. University of Toronto Outing Club*, 2007 ONCA 323, at para. 2, it is well-established that, in general, an order dismissing a motion for summary judgment is not a final order because a decision under Rule 20 determines only that a genuine issue requiring a trial exists. Accordingly, to the extent that a motion judge may purport to make findings of fact in reasons for judgment dismissing a Rule 20 motion, such findings do not have binding effect:
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> > An order dismissing a motion for summary judgment brought under Rule 20 is not a final order in that it determines only that there are genuine issues for trial. Consequently, any apparent findings of fact made by this motion judge in the course of his reasons for dismissing the motion for summary judgment do not support a res judicata or issue estoppel claim in the subsequent proceedings: see V.K. Mason Construction Ltd. v.

> Canadian General Insurance Group Limited (1998), 42 O.R. (3d) 618 (C.A.).
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> [8] At para. 3 of its reasons, the court in Leone went on to identify the ability of a motion judge to make binding determinations of fact under rule 20.05 when dismissing a motion for summary judgment. However, the court was careful to emphasize that, if a motion judge proposes to exercise the powers under rule 25.05, the motion judge should say so – and the formal order should reflect that:
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> > We note that Rule 20.05(1) and (2) do contemplate, in the circumstances described in Rule 20.05(1), findings of fact even where a motion for summary judgment is dismissed. If a motion judge proposes to make findings of fact under Rule 20.05(1), he or she should expressly invoke that provision and the order should refer to that provision.

The Court distinguished *Ball v. Donais*, stating

> …we note that in Ball v. Donais (1993), 13 O.R. (3d) 322 (C.A.), a case relied upon by FRO, the order under appeal set out the question of law decided against the appellant. In Ball, the defendant moved under rule 21.01(1)(a) for a determination before trial of a question of law raised by the pleadings, namely, that the action was barred by a limitation period. The motion judge decided the question of law against the defendant and the formal order read as follows:
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> > 1. THIS COURT DETERMINES that the action herein is not barred by the reason of the two year limitation period as provided in Section 180(1) of the Highway Traffic Act, R.S.O. 1980, chapter 198 as amended.

The Court went on to say:

> [11] Like the court in Leone, it is our view that, if a motion judge dismissing a motion for summary judgment proposes to exercise the power under rule 20.04(4) to make a binding determination of law,

> the motion judge should specifically invoke the rule, and reference to the rule, as well as the legal determination made, should form part of the formal order. In our opinion, the issue of whether an order is final or interlocutory should not turn on the forcefulness of the reasons for the conclusion: see S.(R.) v. H.(R.), at para. 16.
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> …
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> [13] In our view, in most instances, the content of the formal order is integral to determining what has been decided against a party in a fashion that is binding. As this court held in Grand River Enterprises v. Burnham (2005), 197 O.A.C. 168 (C.A.), **"the law is clear that an appeal lies from an order, not from the reasons given by the judge making the order"** (at para. 10). [emphasis added]

The Court revisited this issue in *Dams v. TD Homes and Auto Insurance Company,* stating:

> [3] This court recently made an important ruling interpreting and clarifying the decision in *Ball v. Donais* in the case of *Ashak v. Ontario (2013)* ONCA 375. That case clarifies that in most instances as the appeal is from the order and not the reasons, the order must contain any finding of law that the parties and the motion judge intended would be final, in order to give this court jurisdiction to hear an appeal. A corollary is that if the finding below is not final, it has not been finally determined in the action, and if not appealed with leave, it remains an open question for trial.

In summary then, the following lessons can be taken from these cases:

1. An order dismissing a summary judgment motion is generally an interlocutory order and findings of fact in the motion court judge's reasons are not binding on the trial judge.

2. Findings of fact or law by the motions judge may be final and may be binding on the trial judge, particularly where the moving party had singled out the legal issue for determination.

3. However, if a motion judge dismissing a motion for summary judgment proposes to exercise the power under rule 20.04(4) or 20.05(1) to make a binding determination of law or fact, the motion judge should specifically invoke the rule, and reference to the rule, as well as to the legal or factual determination made, should form part of the formal order.

4. In the result, care must be taken in the drafting of the motion materials and the formal order to make sure the result is as intended by the parties and the court. If there is any doubt, the parties may wish to seek clarification from the motions court judge before settling the formal order.

UPDATE (Dec. 23, 2013)

The Court of Appeal has further reiterated its position as set out above in *Hunter v. Richardson*, 2013 ONCA 731.

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