

CANADA / JUDGMENT

Ambleside Chinese Restaurant Ltd. v. Strata Corp. VR 575

2001 BCSC 1182

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN: AMBLESIDE CHINESE RESTAURANT LTD.
PLAINTIFF

AND: STRATA CORPORATION VR 575 AND
NOORDIN MADATALI
RESPONDENTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE SCARTH

(IN CHAMBERS)

Counsel for the Plaintiff, Ambleside Chinese Restaurant Ltd.: Robert W. Gourlay, Q.C.

Counsel for the Defendant, Strata Corporation VR 575:

Patrick A. Williams

Counsel for the Defendant, Noordin Madatali: Ravi R. Hira, Q.C.

Date and Place of Hearing: May 8, 2001

Vancouver, BC

- [1] The plaintiff Ambleside Chinese Restaurant Ltd. applies for increased costs with respect to its application for an interlocutory injunction which was granted by the Court against both defendants, Strata Corporation VR 575 and Noordin Madatali, on February 16, 2001. Counsel for the plaintiff at the hearings of the application, and on the present application for costs, was and is Robert W. Gourlay, Q.C. By notice of motion dated May 1, 2001 and filed in this proceeding, Mr. Madatali applies for an order "enjoining the law firm of Gourlay, Spencer and Wade from acting as counsel for the Plaintiff in these proceedings" on the ground Mr. Gourlay acted as counsel for Mr. Madatali in a matter involving "similar" issues to the issues raised in this proceeding in 1996. The facts follow.
- [2] The plaintiff Ambleside Chinese Restaurant Ltd. ("Ambleside") is owned by Kenneth Sung. Mr. Sung owns Strata Lot No. 3 within the defendant Strata Corporation VR 575. Ambleside is located in Strata Lot No. 3. The restaurant has been in operation for approximately 16 years. For the first 12 years of the restaurant's operation Mr. Sung leased the strata lot from the defendant Mr. Madatali. Then about 4 years ago Mr. Sung purchased Strata Lot No. 3.
- [3] Mr. Madatali is one of the directors, officers and shareholders of a private British Columbia company, 1571 Bellevue Holdings Limited. In 1994 Bellevue purchased an interest in Strata Corporation VR 575. It presently holds a majority interest (78 percent) in the strata corporation. The strata corporation "controls" or, in the words of s. 3 of the Strata Property Act, 1998 S.B.C. c. 43, is responsible for managing and maintaining for the benefit of the owners of the strata lots the common property which is the subject of this proceeding. Mr. Madatali is president of the strata council by which the powers and duties of the strata corporation are exercised and performed. He is said by Mr. Sung to "control" the strata corporation. Mr. Madatali's wife is the property manager for the strata corporation.
- [4] Ambleside serves its customers both in its restaurant premises and by way of take-out deliveries to various locations in West Vancouver. Relevant to this proceeding is the fact that there are two separate access doors to the restaurant. One is the front door customer's entrance off Bellevue Avenue. The other is the rear door, the only access to which is by means of an outside fire separation door which opens to the parking lot and is located in a common property area of the strata corporation. It is this fire separation door which lies at the heart of this proceeding. The importance of the door so far as Ambleside is concerned is described in the affidavit of William Seto, the manager of the restaurant, sworn to February 10, 2001, as follows:
11. It is essential to the operation of the restaurant that we have access to the restaurant through the separation door. We must have supplies delivered to the restaurant through the separation door, and garbage taken out to the lane dumpster through the separation door. Our delivery employees enter and leave the restaurant to make customer deliveries through that door. We cannot properly and efficiently operate the restaurant with employees entering and leaving the restaurant through the restaurant seating area for customers,

which would be the situation if we were able to use only the front entrance door.

- [5] The circumstances which led to the plaintiff's application for an interlocutory injunction are set out in Mr. Sung's affidavit sworn to February 10, 2001 as follows:
5. Approximately in late November 2000, a dispute arose with Madatali over the rear outside access door ("the separation door") to the restaurant. The separation door permits access to our restaurant from the parking lot adjoining our building.
 6. The dispute was over damage to the separation door and whether VR 575 or the restaurant should pay for the replacement of the separation door. The separation door is located on common property of VR 575. I asked an employee of the strata property management company, whose name is Dennis, to repair the door. He said the door needed to be replaced and the strata property management company would do so. Thereafter Madatali refused to do so.
 7. Madatali insisted that the restaurant must pay for replacement of the separation door, even though the separation door is in a common area. At the same time, Madatali made complaints regarding our use of the separation door and took the position that the damage to the separation door was caused by the restaurant's employees.
 8. Because of Madatali's threats to put a lock and alarm on a new separation door, near the end of January 2001 we retained a solicitor, Ms. Janet Wade, to attempt to resolve the dispute with Madatali.
 9. After doing so, there was an exchange of correspondence between Ms. Slade and Madatali, and on February 2, 2001, Madatali and Ms. Slade met in an attempt to resolve the issue.
 10. On February 5, 2001, Madatali had installed a new separation door with a lock and alarm and turned on the alarm. This has severely restricted our ability to effectively do business, as we cannot take our garbage and hot oil to the lane through the separation door. We also cannot have deliveries made both to and from the restaurant by the separation door, as we have no control over the alarm which sounds when the door is opened from the inside. We also have no key allowing the door to be opened from the outside. The key is solely under the control of Madatali.
 11. Since the separation door is an area of common property, for the past 16 years we have used the separation door to allow access to and from the restaurant and to conduct our business. We no longer can do so.
- [6] Mr. Gourlay obtained short leave on February 12, 2001 for the hearing of an application for an order that the defendants remove the alarm and lock or relinquish control to the plaintiff of the alarm and lock located on common property of Strata Corporation VR 575 and not interfere with the plaintiff's lawful access to its business premises.

- [7] The application came on for hearing before me on February 15 and 16, 2001. Mr. Gourlay appeared as counsel for the plaintiff. Mr. Madatali appeared on his own behalf. The strata corporation did not appear and was not represented by counsel at the hearing. On the second day of the hearing, February 16th, Mr. Madatali raised several matters, including the strata corporation's wish to have counsel represent it and an allegation that Mr. Gourlay was in a conflict of interest position so far as he, Madatali, was concerned. Mr. Madatali requested an adjournment of the hearing. The adjournment was granted. In the interim an order was made, in essence by consent, in the following terms:

ORDER

THE APPLICATION of the Plaintiff coming on for hearing on this day at Vancouver, and on hearing Robert W. Gourlay, Q.C., Counsel for the Plaintiff; and on hearing the Defendant, Noordin Madatali, appearing on his own behalf, and no one appearing on behalf of the Defendant, Strata Corporation VR 575, although duly served; and on reading the material filed:

THIS COURT ORDERS that:

1. The Defendants, by no later than 1:00 p.m. on Saturday, February 17, 2001, turn off the alarm on the fire separation door on the common property at the rear of the Plaintiff's restaurant at 1579 Bellevue Avenue, in the District of West Vancouver, Province of British Columbia, and, by no later than 1:00 p.m. on Saturday, February 17, 2001, provide as many keys as the Plaintiff requires to the lock on the separation door on the common property at the rear of the Plaintiff's restaurant at 1579 Bellevue Avenue, in the District of West Vancouver, Province of British Columbia.
 2. The fire separation door shall be closed when not in use, but can be used for the Plaintiff's proper business purposes, and the Defendants shall not interfere with the Plaintiff's proper business use of the separation door.
 3. This Order is to remain in effect until the trial of this action or further Order of this Honourable Court.
 4. The Plaintiff's application for an order for costs be adjourned generally (with leave granted to the Plaintiff to reapply for an order for costs on written notice to the Registry of this Honourable Court.)
 5. The balance of the application in this matter be adjourned generally.
 6. The approval of this Order by the Defendant, Noordin Madatali, be dispensed with.
- [8] Certain observations regarding this order ought to be made. First, although the order is expressed to be an interlocutory order pending the trial or further order of the Court, it essentially provides for the entirety of the relief sought by the plaintiff, albeit damages, general, exemplary and punitive, "as a result of the Defendant's malicious and unlawful denial of access" are also claimed in the writ of summons. Mr. Gourlay tells the Court he

does not expect the matter will go to trial. The writ was filed on February 9, 2001. A statement of claim has not been delivered to the defendants; nor, I understand, demanded.

[9] Second of all, the order does not contain an undertaking by the plaintiff to abide by any order which the Court may make as to damages as required by Rule 45(6) of the Rules of Court. Mr. Williams, on behalf of the defendant strata corporation, points out that Mr. Madatali, who appeared in person at the hearing, was not told of this requirement. Nor did the Court order that the plaintiff's undertaking be dispensed with.

[10] Thirdly, no application up to the present time has been made to vary or set aside the order.

[11] The situation giving rise to the allegation of conflict of interest is set out in Mr. Madatali's affidavit sworn to April 27, 2001 as follows:

5. During 1996, the property located across the lane way opposite 1571 Bellevue was being developed. Construction was occurring on that property, 1544/1522 Marine Drive, West Vancouver, British Columbia.
6. The sub-trades and consultants working on the construction site were using the parking lot of the Strata Corporation without authorization. As the then property manager for the Strata Corporation, I was concerned about this unauthorized use of the Strata Corporation's property. On many occasions, I had to contact tow-trucks to have these vehicles removed.
7. On the afternoon of Wednesday, April 3, 1996, a consultant working on the construction site had parked his vehicle in the Strata Corporation's parking lot. I requested him to move his vehicle. He refused to do so and an incident arose in the parking lot area. The West Vancouver Police investigated the incident and I was charged with assault and with driving without reasonable consideration for others using the highway. ...
8. During early May 1996, I was referred to Robert Gourlay, Q.C. to assist me with these charges. After meeting with Mr. Gourlay, Q.C., I retained Mr. Gourlay as my counsel on or about May 9, 1996.
9. During May, June, July and August 1996, I had a number of meetings and telephone discussions with Mr. Gourlay, Q.C. Attached hereto and collectively marked as Exhibit "B" to this my Affidavit are accounts rendered to me by Mr. Gourlay, Q.C. dated May 31, July 31 and August 31, 1996 which set out the numerous meetings and telephone discussions between myself and Mr. Gourlay, Q.C.
10. At the outset of the retainer, Mr. Gourlay, Q.C. made it clear to me that I ought to tell him all about my background, current circumstances, financial situation, and my association with 1571 Bellevue Avenue in order for him to properly represent me.
11. I complied with the instructions of Mr. Gourlay, Q.C. and told him about:
 - (a) My background;

- (b) My education;
 - (c) My accounting practice;
 - (d) My involvement in the community including my volunteer work;
 - (e) The financial makeup and circumstances of Bellevue; and
 - (f) My personal financial circumstances.
12. I provided Mr. Gourlay, Q.C. with the financial statements of Bellevue.
13. Mr. Gourlay, Q.C. questioned me in some detail regarding the structure and income of Bellevue and I answered those questions.
14. On October 1, 1996, I pleaded guilty to the Motor Vehicle Act charge of driving without reasonable consideration for others using the highway and received a \$10.00 fine. ...
- ...
17. I feel very uncomfortable, having disclosed to Mr. Gourlay, Q.C., my entire personal and financial circumstances and the history and financial circumstances of Bellevue, with Mr. Gourlay, Q.C. now acting against me in a matter related to the Strata Corporation, myself, and indirectly Bellevue. I am concerned that in the numerous hours that Mr. Gourlay, Q.C. has spent with me during 1996, he has learned much about my personal affairs and my approach to problems and issues. I am troubled that this knowledge will be used against me during the course of this litigation which, not unlike the retainer in 1996, involves myself, the Strata Corporation, and its property.
- [12] The leading authority in Canada with respect to conflict of interest in the context of a solicitor-client relationship is *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. Mr. Justice Sopinka wrote the judgment for the majority of the Court. At p. 1260 Mr. Justice Sopinka wrote:

Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

- [13] The evidence before the Court amply establishes that in connection with acting for Mr. Madatali on the assault and driving charges in 1996 Mr. Gourlay received confidential information attributable to a solicitor and client relationship between him and Mr. Madatali. The issue is whether that confidential information is relevant to the present proceeding involving Ambleside. The onus of establishing that no information was disclosed to Mr. Gourlay by Mr. Madatali in connection with the retainer to act for Mr. Madatali which could be relevant to the present proceeding lies upon Mr. Gourlay. The onus is a heavy one. As Mr. Justice Sopinka wrote in *Martin* at pp. 1260-1:

In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. American courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.

- [14] I must note that Mr. Gourlay spoke to the conflict of interest assertions. No affidavit was filed by him in response to the assertions. On the hearing Mr. Gourlay, as "an officer of the Court", sought to state certain facts regarding the assertions. Objection was taken by Mr. Hira, Q.C. on behalf of Mr. Madatali. I ruled that Mr. Gourlay could not introduce evidence in that fashion on the ground the assertions involved him personally. There was of course no suggestion of an apprehension of dishonourable conduct on the part of Mr. Gourlay by Mr. Hira or the Court in its ruling.
- [15] Mr. Gourlay submits that there is not a conflict of interest on the facts here as mandated by law; nor is there an apprehended conflict. The facts in the Martin case, above; 437192 B.C. Ltd. v. Maledy, [1997] B.C.J. No. 1461 (S.C.B.C.); Bell v. Nash, [1993] B.C.J. No. 1873 (B.C.C.A.); and Clouthier v. Milljour, [1995] B.C.J. No. 1969, referred to by Mr. Hira, differ, it is said. In those cases lengthy civil litigation was involved. The lawyers against whom conflict of interest was asserted had confidential information which could be used to the detriment of a former client in the unfolding litigation, particularly in cross examination. This is not the situation here, Mr. Gourlay argues. The plaintiff will not proceed with the litigation. The action was started solely for the purpose of obtaining the injunction. Further, personal matters involving Mr. Madatali which could create the uneasy feeling on his part that they had their genesis in the previous relationship are not involved here. There is, moreover, no conflict because the previous matter is unrelated to the current matter, Mr. Gourlay says.
- [16] Mr. Gourlay concedes that if this case goes to trial there may be a problem if he were to cross examine Mr. Madatali. But that is not the stage we are at, it is said. It won't get to that point, Mr. Gourlay says.

- [17] The plaintiff's business was put in jeopardy by the defendants' actions, it is argued. The plaintiff needed legal assistance which Mr. Gourlay provided by obtaining the injunction in the belief he was not in a position of conflict because the previous matter is unrelated to this matter. Costs flowed from that application. The plaintiff should have those dealt with at this time and not have to incur further expense by retaining different counsel, it is said.
- [18] Moreover, Mr. Gourlay submits, Mr. Madatali raises the conflict issue in an attempt to avoid dealing with the plaintiff's application for costs.
- [19] Mr. Hira, in submitting that the law firm ought to be enjoined from acting for the plaintiff in this proceeding, says that the dispute here, as it was in 1996, is how the strata property is being used. This litigation involves similar, although not identical, issues, it is said. It involves the strata property, use of the parking lot, and confrontations involving Mr. Madatali arising from the use of the strata property. Mr. Gourlay, it is argued, from his representation of Mr. Madatali in 1996, gained information with respect to how Mr. Madatali approaches issues and problems which could be embarrassing in this litigation and create discomfort on Mr. Madatali's part. From the private and confidential information imparted by Mr. Madatali to Mr. Gourlay in 1996, Mr. Hira submits, Mr. Gourlay has an understanding of Mr. Madatali's strengths and weaknesses and what would cause him to do well in the witness box and what would cause him not to do well. There was much contact between Mr. Gourlay and Mr. Madatali in 1996. Mr. Gourlay's statements of account for services rendered to Mr. Madatali in 1996 indicate there were eight or more meetings between Mr. Gourlay and Mr. Madatali, Mr. Hira states.
- [20] Mr. Hira submits that this litigation is not at an end. The defendants could seek to dissolve the interim order. They are entitled to a statement of claim, and have the right to challenge the allegations of "malicious and unlawful" conduct alleged in the writ of summons.
- [21] Mr. Williams adopts Mr. Hira's submissions.
- [22] I conclude that an order must go enjoining the law firm of Gourlay, Spencer and Wade from acting as counsel for the plaintiff in these proceedings.
- [23] Given the evidence of Mr. Madatali as to the nature of the information he imparted to Mr. Gourlay in 1996 in connection with the defence of the assault and driving charges brought against him, I find that Mr. Gourlay has not discharged the onus which rests upon him of satisfying the Court that "no information was imparted which could be relevant" to this proceeding. It is difficult to imagine that in obtaining instructions with respect to the criminal charges Mr. Gourlay did not glean from Mr. Madatali information of a personal nature, including information as to the type of man Mr. Madatali is. In this proceeding Mr. Gourlay has asserted that Mr. Madatali is disingenuous and a liar, and that the plaintiff is entitled to increased costs because it was driven to apply for an injunction as a result of Mr. Madatali's intransigence and arrogance. Plainly Mr. Madatali would be justified in feeling at a disadvantage if subjected to cross examination by Mr. Gourlay. As Mr. Justice Sopinka wrote in *Martin* at p. 1261:

Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

As Mr. Gourlay conceded during argument that if the case goes to trial there may be a problem if he were to cross examine Mr. Madatali. Without admitting a conflict of interest, Mr. Gourlay says he would consider obtaining other counsel.

[24] With respect to the second question posed by Sopinka J. in *Martin* - Is there a risk that [the confidential information] will be used to the prejudice of the client? - Mr. Justice Sopinka stated at p. 1261 that where a lawyer received relevant confidential information from a former client the disqualification is automatic. Sopinka J. wrote:

The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the qualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. ...

[25] Here, Mr. Gourlay tells the Court that the plaintiff intends to proceed no further with this action. It has what it wants. There is therefore no need for the Court to make an order enjoining his law firm from acting as counsel for the plaintiff in this proceeding.

[26] With respect, the control of the litigation does not lie entirely in the plaintiff's hands. Either defendant may take steps. Moreover, enforcement of any order for costs arising out of the plaintiff's injunction application could involve the cross examination of Mr. Madatali. In my judgment disqualification of the law firm from acting in this proceeding for the plaintiff must follow the conclusion that Mr. Gourlay, in defending Mr. Madatali on the criminal charges in 1996, received confidential information attributable to the solicitor-client relationship between him and Mr. Madatali which is relevant to the matter at hand.

[27] This leaves the question of what disposition ought to be made of the plaintiff's application for increased costs with respect to its application for the injunction. I conclude that it is appropriate to decide this issue on the basis of the material before the Court and the submissions of counsel.

[28] Mr. Gourlay seeks an award under Rule 57(13)(b) of the Rules of Court of lump sum costs of the plaintiff's motion for an interlocutory injunction, assessed as increased costs pursuant to s. 7 of Appendix B.

[29] Apart from the short leave application on February 12, the adjournment on February 14, and the two hearing days on February 15 and 16, counsel has had to appear on this application for costs. The application for an injunction should not have been necessary, it is said. It was necessitated by Mr. Madatali's unreasonable and arrogant behaviour in refusing to unlock

the separation door and turn off the alarm in order to permit the plaintiff access to and egress from its premises. The plaintiff should not be saddled with the full costs of the application. Moreover, there would be an "unjust result" if costs were assessed under Scales 1 to 5, it is argued.

- [30] Mr. Hira submits that costs should be in the cause in accordance with Rule 57(12)(a). The litigation has just begun, it is said, and may very well proceed. What if the interim injunction is set aside, Mr. Hira postulates. The evidence with regard to Mr. Madatali's malice is merely opinion and not direct evidence, Mr. Hira argues. No statement of claim has been delivered and thus the basis of the claim against Mr. Madatali is unknown by him. Further, it is said, no reprehensible conduct on the part of Mr. Madatali in the course of the litigation has been shown.
- [31] Mr. Williams also submits that costs should be in the cause. If officers of the strata corporation have acted maliciously, then an award of damages can address that conduct. It is, however, inappropriate to deal with the issue of malice through an award of costs without the pleadings being closed and evidence adduced on the issue.
- [32] In my judgment costs of the plaintiff's application for the interlocutory injunction should be in the cause.
- [33] The issues of malice and unlawful activity on the part of Mr. Madatali remain to be tried. I agree with Mr. Williams that those issues should not in effect be determined by an award of costs on a motion for interim relief. It would be unfair to the defendants if, at the end of the day, the interlocutory injunction is shown to have been wholly unjustified. Equally, it would be unfair to the plaintiff to deprive it of an award of increased or special costs if the circumstances are shown to justify such an award. As I indicated, such a determination should not be made at this stage of the proceedings.
- [34] Orders accordingly.

"W.B. Scarth, J."

The Honourable Mr. Justice W.B. Scarth

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