

CANADA / JUDGMENT

Chaplin v. Sun Life Assurance of Canada

2002 BCSC 224

COURT

Supreme Court of British Columbia

DECIDED

13 February 2002

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Citation: Chaplin v. Sun Life et al Date:

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2002 BCSC 224 Docket:

C961849

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DAWN CHAPLIN

PLAINTIFF

AND:

SUN LIFE ASSURANCE COMPANY OF CANADA

DOING BUSINESS AS SUN LIFE OF CANADA

AND ROYAL BANK

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE R. HOLMES

Counsel for the Plaintiff: G. Turriff

G. Palm

Counsel for the Defendants: V.R.K. Orchard

S.K. Padmanabhan

Counsel for Lawrence Everett Pierce: D.C. Quinlan

G. Ritchey

Date and Place of Hearing: December 18 & 19, 2001

Vancouver, BC

STATEMENT OF FACTS

- [1] Reasons for Judgement in this action were delivered February 26, 2001. The plaintiff's action was dismissed. Submissions were invited as to costs failing agreement by the parties. In March 2001 the defendant Sun Life responded with a claim for Special costs against the plaintiff's solicitor Mr. Pierce, or alternatively, against the plaintiff. Further alternative claims were for Increased or Scale 5 costs.
- [2] The claim by the defendant Sun Life for Special costs is based upon the premise that Mr. Pierce's conduct in the proceeding was reprehensible and not on the basis of negligence in the prosecution of the plaintiff's claim.
- [3] The range of claimed special costs has been estimated at \$350,000 to \$400,000.
- [4] In a separate proceeding taken under the Legal Profession Act, Mr. Pierce claims costs in relation to the action of approximately \$30,000 against the plaintiff for unpaid disbursements and interest.
- [5] On March 28, 2001 the plaintiff filed Notice of Appeal of the trial judgement.
- [6] On June 19, 2001 the plaintiff obtained an Order from Mackenzie J.A. staying her appeal pending a determination of the defendant Sun Life's cost application.
- [7] On June 29, 2001, Master Patterson, ordered an adjournment of the review of Mr. Pierce's claim against the plaintiff for disbursements pending determination of the plaintiff's claim against Mr. Pierce for damages for breach of contract and negligence.
- [8] The plaintiff seeks Orders pursuant to Rule 57(37) of the Rules of Court:
 - (a) that any costs ordered against the plaintiff be paid by Mr. Pierce or, alternatively that he indemnify her for the costs;
 - (b) that Mr. Pierce not be allowed his disbursements charged to her and that he be required to repay paid disbursements; and,
 - (c) that Mr. Pierce pay the plaintiff damages including aggravated damages for breach of contract of retainer and for negligence in the prosecution of this action on her behalf.
- [9] The plaintiff applies to have the costs and the damages questions heard and determined at the same time.
- [10] The defendant Sun Life and Mr. Pierce oppose the application.
- [11] Mr. Pierce notes as relevant facts for consideration in regard to the issue certain findings noted in the Reasons for Judgement as to the plaintiff's credibility:

that as a result of video surveillance and the plaintiff's testimony, her credibility was found to be lacking; that there was an element of exaggeration in the plaintiff's evidence regarding damages stemming from being cut off LTD benefits and alleged difficulties she encountered on various other occasions; that the plaintiff's evidence had to be treated with caution as there was reason to be suspect of her credibility.

AT ISSUE

[12] The issues before me in these matters are as follows:

1. Does Rule 57(37)(d) of the Rules of Court allow the plaintiff to advance a claim for damages for breach of contract and/or professional negligence as against her solicitor within the context of Sun Life's application for costs?
2. Should the plaintiff be entitled to seek, within the context of Sun Life's costs application, an order under Rule 57(37)(a) disallowing Mr. Pierce's claim as against the plaintiff for unpaid disbursements?

THE PLAINTIFFS POSITION

[13] The foundation of the plaintiff's position is the avoidance of a multiplicity of actions being fundamental to our rules of civil procedure. [McNaughton v. Baker [1988] 4 W.W.R. 742 B.C.C.A at p. 746; Law and Equity Act, R.S.B.C. 1996, c. 253; Searle v. Choat (1184) 25 Ch. D. 727 (C.A.)].

[14] Section 57(37)(d) provides the Court may "...make any other order that the court considers appropriate...". This in the plaintiff's view becomes the mechanism that enables the court when deciding a costs claim to include related claims and thereby attain the desirable objective of avoiding a multiplicity of actions.

[15] The plaintiff argues the court has since at least 1906 held the power to include related claims. MR 986 then provided:

If in any case it shall appear to the Court or a Judge that costs have been improperly or without any reasonable cause incurred, or that by reason of any undue delay in proceeding under a judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, the Court or the Judge may call on the solicitor of the person by whom such costs have been so incurred to show cause why such costs should not be disallowed as between the solicitor and his client, and also (if the circumstances of the case shall require) why the solicitor should not repay to his client any costs which the client may have been ordered to pay to any other person, and thereupon may make such order as the justice of the case may require.

[16] The plaintiff claims the ability to join in the costs proceeding under section 57(37) it's proposed damages claim for breach of contract and negligence as being within the concept parameters endorsed in *Myers v. Elman* [1939] 4 All E.R. 484 (H.L.), where Lord Wright at page 509, observed:

This summary procedure may often be invoked to save the expense of an action. Thus, it may, in proper cases, take the place of an action for negligence...

[17] This concept explained by Lord Wright was adopted and approved by Gibbs J. in *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1987), 16 B.C.L.R. (2d) 135 (S.C.).

[18] The plaintiff seeks to draw an analogy between R. 57(37) and Third Party Proceedings under Rule 22. The plaintiff argues Rule 57(37) sanctions claims by clients against their lawyers and gives the Court a broad discretion under 57(37)(d) to make all orders appropriate to those circumstances.

[19] The plaintiff reasons that as a party may file a Third Party Notice as of right, the analogy here should be that the plaintiff's claim is taken to be included, with the onus upon Mr. Pierce to show it ought to be excluded.

[20] The plaintiff notes that where punishment costs are being claimed the trial judge is required to consider all evidence that might cast light on the character of the conduct of the party against whom costs are sought. [*Bank of Credit & Commerce International (Overseas) Ltd. v. Akbar* (2001), 86 B.C.L.R. (3d) 312 (C.A.)] In this action Sun Life claims special costs against Mr. Pierce which the plaintiff reasons will trigger the need for a full inquiry of Mr. Pierce's conduct. It is the plaintiff's submission that to enlarge that proceeding by adding the plaintiff's damage claim would only minimally enlarge the scope of the inquiry otherwise required.

[21] The plaintiff argues prejudice if required to engage in the costs proceedings but then face a second and separate action in respect of damages, which would involve her in substantial extra expense, and the loss of a summary proceeding resolution would also occasion considerable delay.

[22] It is urged that not only is the plaintiff prejudiced but the public interest would not be best served unless the matters were tried in a single proceeding.

ANALYSIS

[23] The trial of this action apart from the question of costs is complete. Rule 57(37) under which the plaintiff seeks to ground a new claim for damages for breach of contract of retainer and negligence in the prosecution of her action is found within the Cost provisions of the Rules of Court and is entirely oriented to cost issues.

- [24] I agree with counsel for Sunlife that the historical MR 960 cited by the plaintiff appears by its concluding words "...and thereupon may make such order as the justice of the case may require" appears to limit the Court's discretion to incidental orders that give effect to prior specific mentioned orders.
- [25] Additionally I accept that Section 10 of the Law and Equity Act, *supra*, is directed to avoiding a multiplicity of legal proceedings in respect of "...a cause or matter...". In present context the "causes or matters" must logically equate to issues of costs and do not reasonably encompass a damage action for professional negligence.
- [26] Section 57(37) provides no mechanism that permits a party to launch a new and independent cause of action for damages.
- [27] The discretion contained in Section 57(37)(d) should be read *ejusdem generis* to the prior sub-sections (a), (b), and (c). They deal with costs and (d) must also be so limited. [see Driedger on the Constuction of Statutes, Third Edition, at page 203].
- [28] Section 57(37) is designed to permit reimbursement to a successful litigant for the costs incurred that result from a solicitors default. The object is compensation to the litigant, not punishment of the solicitor. It is punitive only in that the solicitor must of course personally pay those costs that his defaults occasioned. [Young v. Young (1991) 50 B.C.L.R. 2d 1 at page 64 (C.A.)]
- [29] The standard the Court applies where an order for costs against a solicitor is sought is high. There must be serious misconduct that occurs in those very special circumstances where the alleged misconduct is "beyond doubt" and "very clear". Mistake, error in judgement, and negligence will not suffice. [Hannigan v. Ikon Office Solutions Inc. [1998] B.C.J. No. 2868 (C.A.)].
- [30] The issues to be decided in the independent claim the plaintiff advances against the solicitor are damages, aggravated damages, breach of contract of retainer, and professional negligence, all of which in law require an entirely different focus than the cost issues.
- [31] I do not consider the damage claim for professional negligence may fairly be said to arise from, or relate to the costs issue that is necessary to conclude the trial judgement, permit an order to be entered and allow the appeal process to proceed.
- [32] Counsel for the plaintiff despite his well researched and ably argued position is unable to find any supporting precedent where a party was allowed to commence an action for damages for breach of contract and professional negligence under Rule 57(37).
- [33] It would appear superficially that the comment of Lord Wright in *Myers v. Ellam*, *supra*, as commented upon by Gibbs J. in *World Wide Treasure Adventures Inc. v. Trivia Games Inc.*, *supra*, indicate the acceptability of permitting a negligence claim.

- [34] However, what is supported in *Myers v. Ellam*, *supra*, and *World Wide Treasure Adventures Inc. v. Trivia Games Inc.*, *supra*, is an ability for a client to recover costs from his solicitor that the solicitor has been ordered to personally pay. In that instance section 57(37) takes the place of an action for negligence for that singular purpose. It relates entirely to costs, and no new independent cause of action for damages was introduced.
- [35] I agree with counsel for Mr. Pierce and Sun Life that Rule 57(37) does not incorporate procedure analogous to Rule 22 Third Party Proceedings, nor does it appear to contemplate Third Party Proceedings.
- [36] Rule 57(37) (b) and (c) are not of the nature of a Third Party Proceeding. They do provide cost relief that is known in practice as "Bullock" or "Sanderson" orders. Rule 57(37) mirrors the costs relief as between solicitor and client that is provided between co-defendants under Rule 57(18).
- [37] Rule 22(1) itself allows only a party who is not a plaintiff to issue a Third Party Notice. The plaintiff in any event is not applying under Rule 22 and it is doubtful she could meet Third Party criteria in any event.
- [38] I cannot agree with the arguments of counsel for the plaintiff that combining a damage and aggravated damage claim for breach of contract and professional negligence will only "minimally" or "slightly increase", or add but a "little bit more" to the time and cost of resolution of Sun Life's cost proceeding.
- [39] Counsel for Mr. Pierce indicated, as I would have assumed, that he will fully and vigorously defend any claim for professional negligence and take the full advantage a professional negligence action would afford, including defined pleadings, discovery of documents, examinations for discovery, and the calling of expert and lay witnesses. Given the nature of the claim and background to it there may be serious issues of credibility to be resolved.
- [40] The plaintiff has appealed the trial judgement. That appeal awaits the completion of the costs issue. Although it might be possible I would consider it unlikely and highly unusual that a plaintiff would prosecute a professional negligence action against her counsel without first knowing the outcome of her appeal.
- [41] The public interest must serve all the parties to the action. A balance of time and cost must be fair to all
- [42] I do not consider the interests of Sun Life or Mr. Pierce would be well served by the process the plaintiff proposes. I see both would be substantially delayed and prejudiced.
- [43] I am also of the view that any cobbled process to join the damage action to the cost proceeding and then attempt to insure Mr. Pierce a fair opportunity for defence and trial through the trial judge attempting to utilize Rule 52(8) and (11) would likely lengthen the hearing rather than shorten it, delay the ultimate result unreasonably, and could ultimately increase the costs for all.

CONCLUSION

- [44] I conclude that the plaintiff is not entitled on a proper interpretation of Rule 57(37)(d) to join the action for damages sought in paragraph 4 of the Notice of Motion of June 29, 2001 with the Sun Life's cost application in the action.
- [45] The issue as to disallowance of any disbursements between the plaintiff and Mr. Pierce, and repayment of any disbursements paid, as set forth in paragraph three of the Notice of Motion of June 28, 2001, I understand has been adjourned pending determination of the plaintiffs damage claims for professional negligence. That issue will therefore not be combined for hearing with Sun Life's cost application.
- [46] The relief sought in paragraphs 1 and 2 of the Notice of Motion is not opposed and is entirely appropriate under Rule 57(37) to be tried and determined in the Sun Life cost proceeding.

"R.R. Holmes, J."

The Honourable Mr. Justice R.R. Holmes

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