

CANADA / JUDGMENT

Cochran v. Advent Communications Corp.

2003 BCSC 691

COURT

Supreme Court of British Columbia

DECIDED

10 January 2003

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Citation:

Cochran v. Advent Communications Corp. and Chui

Date:

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Docket:

C984169

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment

The Honourable Mr. Justice Melvin

January 10, 2003

BETWEEN:

FLOYD COCHRAN

PLAINTIFF

AND:

ADVENT COMMUNICATIONS CORP. and VICTOR CHUI

DEFENDANTS

Counsel for Plaintiff

T.A. McKendrick

A. Spence

Counsel for Defendants

J.A. Dawson

Place and Date of Hearing:

Vancouver, B.C.

January 10, 2003

- [1] THE COURT: The relief sought in these proceedings, I will take from the statement of claim, the third amended or third statement of claim, which is found in the record. It is described in paragraph 5, paragraph 6, and paragraph 7, which are the significant paragraphs with a claim for damages and a prayer for relief on a claim for payment for expenses outstanding.
- [2] In paragraph 5, the plaintiff claims that on or about September 24, 1997, he agreed to assist with promotion of shares of the corporate defendant in exchange for the transfer to him, that is the plaintiff, of an amount of free trading shares equal to 15 percent of the number of shares traded or caused to be traded by the plaintiff's actions.
- [3] He alleges -- and there is B, C, and D, I am not going to deal with. In paragraph 6, he further alleges at or about that same time, September 26th, two days later, the above terms were accepted by the corporate defendant and personally guaranteed by the individual defendant, Mr. Chui, and that the corporate defendant requested that the plaintiff begin assisting promotion of the shares immediately in accordance with their agreement.
- [4] It further alleges that the anticipated transfer of shares to the plaintiff was to be made by direct transfer of shares that Chui claimed he personally held in the Cayman Islands. And then the significant allegation by the plaintiff, pursuant to the agreement, that is the agreement by the corporate defendant and guaranteed by Chui, the plaintiff's actions caused to be traded over one million shares of Advent, and he alleges that at that time the shares were trading at \$1.58 per share, and further alleges that both Chui and Advent were enriched as a result of the plaintiff's efforts.
- [5] I leave the balance of the statement of claim. It generally outlines the nature of the plaintiff's cause of action, and the basic allegation, if I can call it that, that there is an oral contract with the corporate defendant, guaranteed by the individual defendant, to make a market for the corporate defendant shares. This is in accordance with the plaintiff's own evidence.
- [6] In other words, the plaintiff has an agreement with the corporate defendant to take steps to increase the market price and the volume of the corporate defendant's own shares on the open market, in exchange for which, the plaintiff testifies, he is to receive 15 percent of the market -- and I will come back to that aspect of it later -- plus expenses. This is to be

provided to the plaintiff by the corporate defendant and guaranteed by Mr. Chui, the individual defendant. The parties, according to the plaintiff, his evidence and the allegation in the statement of claim, are the corporate defendant, the entity with whom he entered into this oral contract, and that oral contract, the performance of it, was guaranteed by the individual defendant, Mr. Chui. The period of time in which the plaintiff's actions, according to his evidence, took place, was from September, the end of September, to the end roughly of December of 1997, a relatively short period.

- [7] His actions, that is the plaintiff's actions, I think are important, and I am going to refer to just a portion of them, taken from my notes, as to what he did to make a market for the corporate defendant Advent Communications Corporation's shares. He said this: He tells clients to watch the stock. He speaks to investment groups and brokers, recommending to check the company, that the company has financial possibilities, and he may by himself buy stocks with a friend. He then testified -- he did not elaborate that, and he testified further in this subject:

I began working September the 26th. I contacted family and brokers. I start to buy the corporate defendant Advent's shares. On an ongoing basis, I contacted investors. I recommend they buy shares or contact brokers about buying. If contract [sic] brokers, that would assist in moving the market. I spoke to investors and clubs. I know a number who invest. I contact them, tell them what I'm doing and to keep an eye on this stock.

- [8] Further, from my notes, take the following, this came up in cross-examination:

I created a market for the corporate defendant shares by recommending the stock to prospective purchasers.

- [9] Finally a passage:

I told friends, brokers, associates, I recommend they investigate a real good buy. I speak to them and speak to their brokers or an officer of the corporate defendant.

And in that respect, of course, the evidence would be that Mr. Getty, on behalf of the corporate defendant, was in the office in the event anybody phoned in relation to the suggestions of the plaintiff. He further testified that he spoke to brokerage and financial institutions, "Because I think this is a real good buy. I had a track record with these people," he testified. So that was what he was doing. There is no doubt, in his own evidence, in chief and in cross-examination, he was recommending that people buy these shares.

- [10] At the relevant period of time, the only shares that were in existence, in terms of the corporate defendant, were the treasury shares plus the shares that were on the open market, and, of course, Mr. Chui had personally some shares, either in his own behalf or on behalf of some offshore investors. I think that it is immaterial in that respect.

- [11] The existence of this oral contract, which the plaintiff testifies existed and he performed, is denied by the defendant. The terms of the oral contract, if it exists, vary with the recollection of witnesses, their affidavits, the plaintiff's answers to interrogatories and answers to demand for particulars. It is not surprising that there is a difference in recollection in relation to oral contracts. That is the danger with oral contracts because individuals' memories change with time. Their recollection might not be as good, one witness as to another witness, and of course one looks at what other outside circumstances may exist that may tend to demonstrate that the witnesses' evidence is cogent and reliable.
- [12] In this instance, the plaintiff, Mr. Getty, who I referred to, Mr. Burnie, Mr. Newsome (phonetic), and a Mr. Luke (phonetic). The latter two witnesses have not been called as witnesses, but seemed to have or did have a connection with the corporate defendant and/or Mr. Chui at the relevant period of time.
- [13] Obviously, Mr. Burnie had been involved in making a market earlier in 1997, according to his evidence, and he, in effect, had run out of ideas or run out of options in terms of how to make a market or perhaps contacts.
- [14] Getty entered into a formal contract with the corporate defendant, in the area of investor relations, a type of formal contract recommended by or advised by or approved, then, by the Vancouver Stock Exchange. Various meetings took place between Mr. Burnie, Mr. Newsome and Mr. Getty and the individual defendant, initially at Mr. Newsome's office.
- [15] A proposal, a deal, Exhibit 1, tab 11, was outlined in a memorandum of September 1971, signed by Mr. Burnie, Mr. Newsome and Mr. Chui. The plaintiff was not a party to that memorandum or that agreement and he was not at that particular meeting.
- [16] This memo seems to be the beginning of the series of transactions which involve these individuals with their proposed options. It outlines various courses of conduct which they proposed to take in order to market some shares. Perhaps, as Mr. Burnie suggests, exercise options to buy shares where his profitability would be the spread between the buy and the sell. But the plaintiff, in this instance, alleged a separate and distinct oral contract. There is no one, as I mentioned a moment ago, save and except Mr. Getty, who has a written contract at this relevant period of time, concerning the share activity or business activity of the corporate defendant. To make a market, the plaintiff was brought in by Mr. Burnie, he testifies, and he alleges the contract terms were discussed with Mr. Burnie and then confirmed by and guaranteed by the defendant Chui and confirmed by the defendant Chui in his capacity as president of the corporate defendant and guaranteed by Mr. Chui, himself, personally. As I mentioned, Mr. Chui denies the existence of the contract and of course denies the existence of an oral separate guarantee.

- [17] There is no memorandum of this oral contract. There is no letter. There is no record by the plaintiff for his own purpose, for example, an internal memorandum of such a conversation. The defendant's evidence, that is in April 1998, he first learns that the plaintiff is demanding some 165,000 shares as his percentage of the market movement in the fall of 1997, and this, from his evidence, with some surprise.
- [18] So the evidence of the existence of the oral contract is then based on the evidence of the plaintiff, the evidence of Mr. Getty, and the evidence of Mr. Burnie. One of the terms of that contract has been the subject of a number of comments and submissions, questions by the court, and I am going to go through this relatively quickly, but I want to touch on some of it.
- [19] The plaintiff's evidence in his answer to interrogatories in 1999 was that he was to receive 15 percent of the shares "I assisted successful promotion of". February 2000 affidavit, "I was to receive 15 percent of the shares sold." There is no reference to cause or no reference to assist in that respect. April 2000 affidavit, "Remuneration is based on total volume of shares traded," no reference to causing or assisting. At trial, the plaintiff testifies that he is to receive 15 percent of shares traded or caused to be traded, so cause is then introduced after it had not been in existence in the two affidavits in February and April of 2000. So the plaintiff's evidence shifted from "causing or assisting," to total stock sold without any language of "causing or assisting" or any qualification of that aspect, then back to "traded or caused to be traded" at trial and in the last amended statement of claim.
- [20] In addition, I note that in the interrogatories number 7, in 1999, which is found in Exhibit 2, tab 1, if my numbering is correct, the plaintiff's evidence, when asked what the defendant Advent's involvement was, it was, "The issue of the shares and received the funds for the shares and paid my expenses, in assisting Ad. and Chui with the finding of purchasers for the shares." As I mentioned, no treasury shares, or I should say, no treasury shares were issued by the defendant Advent at the relevant period of time and the plaintiff's subsequent evidence, above referred to, changes the contract, changes the context to the volume of shares traded on the open market. The two concepts, in my view, are inconsistent.
- [21] The plaintiff must prove his case. He must prove the contract and he must prove the terms and he must prove the parties. Mr. Getty testifies as to the contract through his affidavit, which is in November 1998, "all shares placed with plaintiff's assistance," and at trial, he said that affidavit was true. February 2000, he said, "15 percent on all shares traded," no reference to "cause or assistance." At trial, 15 percent of the shares, whatever the trading value is. And he was cross-examined on his affidavit where he said, "In relation to the plaintiff's trades, with the plaintiff's assistance." According to Mr. Getty, the affidavits mean the same and the second affidavit is to clarify.
- [22] In my view, nothing needs clarification. The language of the first affidavit was abundantly clear; the latter language in the second affidavit and testified to at trial, is different, in my opinion, in a significant way.

- [23] Mr. Burnie deposed, in his affidavit in 1998, it was 15 percent of all sold with his, that is the plaintiff's, assistance. February 2000, it is 15 percent of all shares sold. At trial, it was 15 percent of the shares, 15 percent of whatever share is moved, and after the plaintiff moved a million shares, he was to be paid 15 percent, and then when he's cross-examined on his affidavit, 15 percent of any shares sold. So Mr. Burnie gave, in effect, three versions in relation to his evidence at trial.
- [24] In addition, I should note, with reference to his evidence, he produces Exhibit (sic) 41 -- tab 41 from his records, kept in his files, in his writing, which purports to obtain a direction by Mr. Chui to transfer 165,000 shares to the plaintiff. The second page of this document, and it obviously would contain a second page if it had any validity at all, was not produced. Why Mr. Burnie would have that particular record in his possession, if it is a record that is kept to demonstrate what the plaintiff and the defendant may have entered into or what the defendant, Mr. Chui, may have promised, is somewhat inexplicable. I note this witness was also involved in the false invoices.
- [25] So in my opinion, the evidence of the plaintiff, the evidence of Mr. Burnie, the evidence of Getty, is inconsistent on an important aspect of the contract that is alleged, that is the term. These inconsistencies, in my view, cause one to seriously question the reliability that I should place on their evidence. The difference between "all shares traded" and "all shares traded with the plaintiff's assistance" or "traded or caused to be traded" is, in my opinion, material and is significant.
- [26] "All shares traded" would entitle the plaintiff to remuneration from transactions unrelated to his actions or unrelated to himself; that is, if the plaintiff did nothing, according to his contract, according to what he says his contract is in the one version and as he testifies to at trial and as he pleads, if he did absolutely nothing from September to December of 1997, he would be entitled to 15 percent of the volume of the shares which traded on the Vancouver Stock Exchange. That proposition, of course, is absurd.
- [27] In my opinion, "traded or caused to be traded" means that if a contract existed as outlined by the plaintiff, its term was that there must be a causal link, or nexus, between the plaintiff's actions and the shares traded. There is no direct evidence of this causal link or nexus. The plaintiff cannot say who he called or when he called or how often he called, nor has he produced a list of those he may have called. It is left for the court to infer that whatever the plaintiff says he did between September and December 1997 resulted in the volume of shares traded and the corresponding price increases as shown in the exhibit filed. In my opinion, the lack of specifics of his actions, his lists, his contacts, his broker records, telephone records, and the like, which must exist if the transactions took place, make that information -- and that information should be available, make it difficult to the establishment of performance of the plaintiff of his alleged contract. The market is fluid. To draw the inference I have been asked to draw by counsel for the plaintiff that the plaintiff's actions were the cause, is not justified without an evidentiary foundation for the inference.

- [28] The evidence of the plaintiff, Mr. Burnie, and Mr. Getty, cannot provide the evidentiary basis for such an inference. Consequently, if a contract did exist, I am not satisfied, by a preponderance of evidence, that there is the causal link established that is required in order to establish the right for remuneration.
- [29] That begs the question, of course, was there a contract at all, an oral contract, as I mentioned, with all the difficulties associated with proving an oral contract. Nothing in writing, save and except Mr. Getty's separate contract; no memorandum, such as in Exhibit 1, tab 11; no confirming letter by the plaintiff to the defendant corporation or the defendant individually about their understanding; no internal note or memorandum by the plaintiff in his own records, his own files, which might indicate, "Today I spoke to Mr. Chui who said thus and so"; none of this exists.
- [30] In addition, the plaintiff varies in his identity of the parties to the contract. This was made quite significantly by counsel for the defendant. I do not think that is a significant factor, except that the vagueness and changes and inconsistencies of the plaintiff and his witnesses throw the evidence of the existence of the contract, that is denied by the defendant, in serious doubt.
- [31] I consider one of the submissions on behalf of the defence, specifically as it relates to what is called illegality, *ex turpi causa non oritur actio*. Much was made of the Securities Act and the then Policy 8 of the Vancouver Stock Exchange.
- [32] The defence submits that even if the contract was performed that is described by the plaintiff, it contravened the Vancouver Stock Exchange policy that then existed, and he refers to Exhibit 2, tab 12. This is Policy 8, dealing with promotional or marketing activities. I am going to read portions of it because it has been touched on by both counsel. 8.11:

The subject of promoters' activities and their effect on the marketplace and on listed companies is one that generates a considerable amount of debate. As a starting point, the Exchange acknowledges that an accepted definition of promoter has not been articulated by securities regulators, stock exchange or courts. Statutory definitions are recognized as being too narrow to capture the wide range of activities engaged in by persons referred to colloquially as promoters. It is in a colloquial sense that the word "promoters" is used in this policy. Promoters in the exchange venture capital market, generally characterized the activities as fulfilling one or both of the following functions:

- (a) communicating with investment dealers, advisers and shareholders, both current and prospective, to increase awareness of, and interest in, the issuer.

And then there is a second, the maintenance of an orderly market.

- [33] There is another aspect of it as to the marketplace role and at Policy 8.3:

This policy is not intended to define, discourage, or sanction market making activity, but to remind all market participants of the law governing such market practices and set out certain general guidelines that the Exchange considers helpful in drawing a distinction between market making activities and market manipulation or market control. The number of common features that generally define proper marketing activities are described below.

8.33: A person engaged in market making activity should be following the market insofar as the market should be allowed to rise and fall naturally, with the market making activity operating primarily to smooth out these imbalances so as to facilitate an orderly market.

It is clear that what the plaintiff was doing was not to facilitate an orderly market.

[34] 8.34, there is a description of the market making activity and the policy states, "This allows the market to find its own level at a stable rate," which is not what the plaintiff was doing. And 8.35:

Persons involved in market making activities should consider conducting such activities through one account only for a particular security or, if more than one account is used, ensure that trading is conducted so as to avoid misleading appearances of our investor participation in the marketplace.

Et cetera, et cetera. Obviously, the idea behind the marketplace role in relation to the Vancouver Stock Exchange is to facilitate an orderly market.

[35] As to the plaintiff's knowledge of Policy 8, he denies any knowledge of it, but I note that he has had prior dealings and prior market making activities, in his own evidence. That is why Mr. Burnie contacted him. I note, as well, that at the beginning of his evidence, he testified that he had taken financial brokerage courses. Under those circumstances, it is somewhat surprising to hear that a man of this background and experience is not aware of policy directives such as Policy 8.

[36] The activity the plaintiff was engaged in, accepting that it occurred, for purposes of illustration, is a violation of this policy. I agree, however, with counsel for the plaintiff, that if the plaintiff was registered with the Vancouver Stock Exchange, then this would raise a discipline issue. However, the plaintiff's actions were clearly not facilitated, or designed to facilitate, an orderly market. His actions were designed to artificially increase the volume and the price without any activity within the company, the corporate defendant, to justify such a change. If I may say so, that type of activity is in violation of the spirit, if not the legislation, in the terms of the policy directive and the conduct attracts a rather distinct and distasteful odour.

[37] The Securities Act itself, s. 57 provides this:

A person ... must not, directly or indirectly, engage in or participate in [directly engage in or participate in] a transaction or series of transactions relating to a trade in or acquisition of a security or a trade in an exchange of contract if the person knows, or ought reasonably to know, that the transaction or the series of transactions

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, any security or exchange contract traded in British Columbia.

[38] In my opinion, that is exactly what the plaintiff did in the case at bar. The legislation provides that it is an offence and a penalty may be imposed. Counsel for the plaintiff, in this respect, submits that mere illegality is not sufficient to cause an otherwise valid contract to be void or voidable, that certain components are necessary. The contract -- the conduct described in the contract must be illegal, and I am satisfied here that it violates s. 57. But, secondly, he points out, the statute itself does not say such a contract is illegal, and that is an integral part of the application of the doctrine of *ex turpi causa*, or alternatively, there must be a breach of the policy consideration of the statute by harming people the statute is designed to protect. I agree with him that there is no statutory provision stating that a contract violating s. 57 is unenforceable.

[39] However, regarding the second factor, who does the statute protect? It protects the public investor and, by prohibiting conduct described by the plaintiff, is the manner in which it purports to protect by s. 57. It is the public investor who is placed at risk by the actions described in s. 57 and, in this respect, the plaintiff's conduct.

[40] In *Ames v. Investo-Plan*, counsel for the plaintiff points out that the court stated in paragraph 16 of the decision:

The determination of the effect of the breach of [the] statutory provision upon a contract is often a difficult one and must, of course, depend upon the terms and the intent of the provision under consideration. In some cases the statute clearly forbids the making of a certain type of contract. In such a case the contract cannot be valid if it is in breach of the provision.

And of course, as I mentioned, this particular statute does not clearly forbid the making of a certain type of contract.

[41] Here, however, in my view, the prohibition is important. Conduct that has been prohibited cannot be rewarded by reaping the benefit from carrying out the prohibited contract that may cause harm to the persons who are designed to be protected by the legislation. There is an absolute prohibition under s. 57. If the plaintiff's case is made out, the plaintiff is not entitled to violate that provision knowingly and, at the same time, reap the benefit of that violation, as the purpose of the legislation is to protect members of the public who are directly impacted by the increase in price of shares which has been generated as a result of his activity.

[42] I am satisfied that if there is a contract as described by the plaintiff, and I dealt with that already, it violates the provisions of the Securities Act and, due to its nature, renders the plaintiff's claim for compensation for that violation unenforceable.

[43] Consequently, the plaintiff's action is dismissed. So unless there are some further submissions, the defendants will be entitled to costs on Scale 3.

"F.A. Melvin, J."

The Honourable Mr. Justice F.A. Melvin

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