

CANADA / JUDGMENT

Cotter v. Point Grey Golf and Country Club

2016 BCSC 9

COURT

Supreme Court of British Columbia

DECIDED

6 January 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCSC 9 Cotter v. Point Grey Golf and Country Club IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cotter v. Point Grey Golf and Country Club, 2016 BCSC 9 Date: 20160106 Docket: S144526 Registry: Vancouver Between: Stephen Henry Cotter Plaintiff And Point Grey Golf and Country Club Defendant Before: The Honourable Madam Justice Maisonville Ruling in Respect of Expert Report Plaintiff appearing on his own behalf: S.H. Cotter Counsel for the Defendant: L.L. Bevan Place and Dates of Application: Vancouver, B.C. December 18, 2015 Place and Date of Judgment: Vancouver, B.C. January 6, 2016 I. introduction

- [1] Mr. Cotter, the plaintiff in this matter, comes before the Court seeking to tender into evidence the report of Dr. Joti Samra, a registered psychologist, and consequently to reopen the summary trial of this matter that was heard on November 9 and 10, 2015.
- [2] Counsel for Point Grey Golf and Country Club ("Point Grey") opposes this application. II. background
- [3] Mr. Cotter is self-represented, although he is an educated man and was a chartered accountant and controller with Point Grey in excess of 15 years before he was terminated.
- [4] The notice of civil claim is a claim for wrongful termination brought by Mr. Cotter and includes a number of heads of damages: · Damages for wrongful dismissal; · Bad faith damages; · Aggravated damages; · Damages for infliction of mental suffering; · Punitive damages; · Interest; · Costs; · Such further relief; and · Damages for loss of reputation.
- [5] On November 9 and 10, 2015, an application to have Mr. Cotter's claim dismissed pursuant to Rule 9-7 summary trial rule of the Supreme Court Civil Rules, B.C. Reg. 168/2009 was heard. Mr. Cotter contacted Supreme Court Scheduling and asked for an appearance before the Court in order to have Dr. Samra's report placed into evidence.
- [6] At this morning's hearing, Mr. Cotter first stated to the Court that he had not expected that the Court would actually permit him to make an appearance to apply to court on these matters and, accordingly, seemed somewhat caught off-guard in his argument. In any event, Mr. Cotter proceeded to argue the basis for the admission of the report. This included that the report was further background to his claim and contained important information in respect of his submissions made at the summary trial. He further argued that it would be

unjust to proceed to judgment on summary trial, given that he had been waiting for and had in fact procured this report. Further, this report would enable the Court to see that Mr. Cotter was a "man of his word" and that he had in fact obtained a report in respect of damages inflicted from mental suffering, referring to submissions he had made at the summary trial.

- [7] His second submission answered the Court's question as to what extent he would like the Court to make use of the report. Mr. Cotter submitted that he would like it to be before the Court as evidence for use on the summary trial. Mr. Cotter argued the report is needed to assess the claim for mental damages.
- [8] Mr. Cotter also endeavoured to argue the merits of his case. I advised him that I would not be entertaining those arguments, as arguments on the merits of the case had already been made.
- [9] Mr. Cotter also advised the Court that there is a second report he hopes to tender in a few weeks' time. This is a report of a certified fraud examiner on independent actionable wrongs that Point Grey committed against Mr. Cotter, although there is no such report in existence yet. I am advised this report will address punitive damages. I understand the author of that report was not a witness to events that occurred, but rather is an expert witness on independent actionable wrongs in relation to wrongful dismissals.
- [10] Ms. Bevan for Point Grey submitted that there is no issue on the credibility of Mr. Cotter's assertion that he thought he might obtain additional expert reports and I accept her assertion in that regard. The only issue is, accordingly, whether the report becomes admissible as evidence in the summary trial matter. III. The test for reopening
- [11] The Court of Appeal in *Clayton v. British American Securities Ltd.* (1934), [1935] 1 D.L.R. 432 (B.C.C.A.), made clear at p. 440-441 that the trial judge has an unfettered discretion to reopen the trial to bring forward new evidence: My view has always been that the trial Judge might resume the hearing of an action apart from rules until entry of judgment, but as it was vigorously combatted I have given it careful consideration. The point, as far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial Judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, e.g., a document should be discovered after pronouncement of judgment, but before entry, showing that the judgment was wrong and the trial judge was convinced of its authenticity no lack of diligence by a solicitor in not producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial Judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of

justice does not occur. Accordingly, the decision is discretionary in which I must consider whether an injustice would occur.

- [12] In *Vander Ende v. Vander Ende*, 2010 BCSC 597, the court confirmed that a trial judge has a wide discretion to reopen before the judgement is rendered. The considerations before the court are the relevance of the proposed evidence, the effect, if any, the reopening may have on the expeditious conduct of the trial at large and most importantly, whether the other party will be prejudiced if the reopening is allowed. IV. analysis
- [13] In order to address Mr. Cotter's request, I find that I must review, to some extent, the independent medical examination report of Dr. Samra. The report was not accompanied by an affidavit but is on the court file.
- [14] I must also consider to what extent the report was 'available' to Mr. Cotter before the summary trial and why the defence was not provided with it and the prejudice to the defence if the report is admitted.
- [15] In essence, Ms. Bevan for Point Grey argues the report should be viewed through the lens of the factors of an application to adduce fresh evidence. Counsel for Point Grey argues that the prevailing test for new evidence is the one found in the decision of *R. v. Palmer*, [1980] 1 S.C.R. 759. The key points in considering fresh evidence were set out by Justice McIntyre for the Supreme Court of Canada at p. 775:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen* [[1964] S.C.R. 484].
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial be expected to have affected the result.
- [16] This is not a matter in the classical sense of fresh evidence. It is more a matter of a late report being obtained and the matter reopened. Indeed, it is apparent on the face of the report that the assessments by the psychologist did not conclude until after the conclusion of the evidence in the summary trial. The dates of assessment noted by the doctor on the first page of the report are October 8, 2015 and November 12, 2015. As noted above, the summary trial occurred on November 9 and 10, 2015.

- [17] In considering whether to exercise my discretion, I find the following factors bear on whether the Court should exercise its discretion in this case: · The prejudice to the other side; · Whether evidence will have to be revisited; and · Whether the evidence was intentionally omitted before. See also: Bracken and Dull, *British Columbia Courtroom Procedure* (Markham: LexisNexis Canada Inc., 2013) by Keith Bracken and Monique W. Dull at p. 1152.
- [18] One important factor is that the evidence Mr. Cotter seeks to include does not appear to be relevant. The psychologist noted that Mr. Cotter developed symptoms during the period of July 2010 to November 2013. This was before his termination, and yet the problems Mr. Cotter experienced have been pleaded to be as a result of his termination. I find this factor favours against reopening to permit the introduction of this evidence.
- [19] The evidence tendered at the summary trial related to the directions and requests of Point Grey to Mr. Cotter. It is clear that the psychologist was provided with certain documents from the summary trial but not all of them. Many documents provided were notes of Mr. Cotter. In any event, the matters relate to the period June 2010 to November 2013, when Mr. Cotter was still employed.
- [20] Ms. Bevan for Point Grey additionally pointed out the following passage in the expert report: It is my opinion that Mr. Cotter's prognosis for the future, from a psychological/psychiatric standpoint, is good to excellent, with the caveat that this would require him to have a fair and equitable outcome to his litigation against his former employer, and appropriate restitution for damages suffered.
- [21] Counsel for Point Grey argues that this is outside of the realm of opinion evidence and would be subject to argument if the Court was to admit this evidence. It is argued, accordingly, that the report has significant admissibility issues. V. admissibility and thus significance of The report
- [22] Point Grey argues, inter alia, that the report contains many objectionable passages that would be the subject of argument on admissibility at trial, notably the passage referred to above, which advocates a financial resolution in Mr. Cotter's favour for him to enjoy a good prognosis. From the report, this is the only "caveat" to his enjoying a "good to excellent" outcome. VI. report not provided earlier - Prejudice
- [23] Point Grey argues there is considerable prejudice to them if the report is admitted. At the case planning conference, I note at that conference that Mr. Cotter indicated he would not be obtaining expert reports. At the summary trial, he indicated there may be further reports but none were provided to Point Grey in advance of the hearing to enable them to respond.
- [24] A concern of the Court is that this matter was scheduled for summary trial at a case planning conference on August 6, 2015, with many months' notice to Mr. Cotter. No reasons were advanced as to why this report was not prepared in time for the hearing of the summary trial.

- [25] Accordingly, I must consider all factors to decide if it would be appropriate to exercise my discretion and permit the summary trial to be reopened and this report to be adduced into evidence. VII. Conclusion
- [26] In all of these circumstances, most notably in light of the proportionality to this claim, considering that Mr. Cotter had ample notice to secure this report in advance of the summary trial, and given that there are clear admissibility issues, I am not going to exercise my discretion to permit the summary trial to be reopened to accept this evidence.
"Maisonville J."
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/16/00/2016BCSC0009.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/cotter-v-point-grey-golf-and-country-club-2016-bcsc-9>

Prepared on 28 October 2026 · Esheria