

CANADA / JUDGMENT

Flanagan v. VINN Automotive Technologies Limited

2024 BCSC 1236

COURT

Supreme Court of British Columbia

DECIDED

28 May 2024

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2024 BCSC 1236 Flanagan v. VINN Automotive Technologies Limited IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Flanagan v. VINN Automotive Technologies Limited, 2024 BCSC 1236 Date: 20240528 Docket: S233320 Registry: Vancouver Between: Chet Kenneth Flanagan Plaintiff And: VINN Automotive Technologies Limited, Levi Caleb Bernabe, Thomas Glen Greggs Avant, Samuel Foster Archibald, iNovia Capital GP-2018 Inc., Karamdeep Nijjar, Hans Knapp, Arik Broadbent and Dentons Canada LLP Defendants Before: The Honourable Justice Tammen Oral Reasons for Judgment In Chambers Counsel for the Plaintiff: L.A. Buitendyk Counsel for the Defendant, Arik Broadbent: J.G. Dives, K.C. No other appearances. Place and Date of Hearing: Vancouver, B.C. April 29, 2024 Place and Date of Judgment: Vancouver, B.C. May 28, 2024

- [1] THE COURT: This is an application brought by two defendants, Arik Broadbent, a lawyer, and Dentons Canada LLP ("Dentons"), the firm for which he works, for the following relief, set out in part 1 of the notice of application filed November 7, 2023:
- a) that paragraphs 18-19, 34, 38, and 58-80 of the amended notice of civil claim ("NOCC") in this action as they relate to Mr. Broadbent and Dentons be struck;
 - b) that this action be dismissed against Mr. Broadbent and Dentons; and
 - c) that the plaintiff pay special costs to Mr. Broadbent and Dentons.
- [2] The basis for the application is that the pleadings do not plead facts which disclose causes of action and that portions of the claim are vexatious and an abuse of process.
- [3] The relevant factual background is succinctly set out in part 2 of the notice of application, which states as follows:
- 1. This is a claim for wrongful dismissal by the Plaintiff against the Defendant VINN Automotive Technologies Limited ("VINN").
 - 2. This action was filed by the Plaintiff on May 2, 2023.

3. In addition to the Plaintiff's claim for wrongful dismissal, he also claims that the Defendants Arik Broadbent and Dentons LLP Canada ("the Lawyers") were in breach of their fiduciary duty to the Plaintiff, were in breach of their duty of fidelity, honesty and good faith to the Plaintiff, were negligent and that their negligence caused the Plaintiff to suffer damages, intentionally induced the breach of the Plaintiff's employment contract with VINN, intentionally interfered with the Plaintiff's business relationship with VINN and were part of a civil conspiracy to cause injury to the Plaintiff.
 4. Following receipt of the Notice of Civil Claim, the Lawyers referred the conduct of VINN's defense of this action to Farris LLP.
 5. The Lawyers filed a Response To Civil Claim on May 26, 2023.
 6. The Lawyers filed an application on June 2, 2023 to strike the Notice of Civil Claim on the basis that it did not comply with, inter alia, Rule 3-1(2).
 7. The Plaintiff filed an Amended Notice of Civil Claim on June 27, 2023.
- [4] I note as an aside that through an obvious drafting error, Mr. Broadbent was omitted as a named defendant in the amended NOCC, but I will treat him as if he were still a named defendant since that is clearly what was intended by the plaintiff.
- [5] The Supreme Court Rules which apply to this application are Rules 3-1, 3-7, and 9-5, the relevant portions of which read: Rule 3-1
- (2) A notice of civil claim must do the following:
- a) set out a concise statement of the material facts giving rise to the claim.
 - b) set out the relief sought by the plaintiff against each named defendant.
 - c) set out a concise summary of the legal basis for the relief sought.
 - g) otherwise comply with Rule 3-7. Rule 3-7
- (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
- (18) If the party pleading relies on misrepresentation, fraud, breach of trust, willful default, or undue influence, or if particulars may be necessary, full particulars with dates and items if applicable must be stated in the pleading. Rule 9-5
- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition, or other document on the ground that:
- a) it discloses no reasonable claim or defence, as the case might be.
 - b) it is unnecessary, scandalous, frivolous, or vexatious.

- d) it is otherwise an abuse of process of the court, and the court may pronounce judgment or order that the proceeding be stayed or dismissed and may order costs of the applications to be paid as special costs.
- (2) No evidence is admissible on an application under subrule (1)(a).
- [6] Thus, it is clear that in determining if the pleadings disclose a cause of action, I must confine myself to a consideration of the NOCC itself and cannot consider any evidence. However, such evidence may be considered under subrules (b) and (d) when I consider whether the pleadings are vexatious or otherwise an abuse of the court process. The plaintiff has filed an affidavit on this application, which I will only consider when I address the arguments related to Rules 9-5(1)(b) and (d).
- [7] In *Sahyoun v. Ho*, 2013 BCSC 1143, Justice Voith, as he then was, summarized the objects and requirements of a NOCC at paras. 15-33. He noted the following:
- [16] The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1: If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such ...
- [17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."
- [18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.
- [19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.

- [8] Then at para. 21, Voith J. quoted with approval the following from *Homalco Indian Band v. British Columbia*, 25 C.P.C. (4th) 107, 1998 CanLII 6658 (B.C.S.C.):
- [5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 1965 CanLII 767 (BC SC), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.
- [9] Applying those principles to the case at bar, I have no hesitation concluding that the entire claim as it relates to the lawyer defendants must be struck pursuant to both Rules 9-5(1)(a) and 9-5(1)(b) and (d).
- [10] The primary claim of the plaintiff is, as noted in the notice of application, one of wrongful dismissal against VINN, the former employer. In addition to that claim, the plaintiff makes various allegations of wrongdoing against VINN's directors and iNovia Capital GP-2018 Inc. ("iNovia") and one of its officers. Those allegations stem from events which occurred at the time iNovia became a major investor in VINN, and apparently insisted on installing one of its officers as a director of VINN to replace the plaintiff in that role.
- [11] Bound up in the allegations of wrongdoing is an assertion that the defendant Bernabe, the CEO of VINN, made material misrepresentations to iNovia concerning VINN's monthly sales and by extension valuation. As I understand the position of the plaintiff, those misrepresentations are at the epicenter of his various allegations. Over time, he says, the other directors ignored his claims that Mr. Bernabe was responsible for the misrepresentations and should therefore be forced to resign. Instead, the plaintiff was scapegoated and ultimately wrongly fired. He speculates that an unlawful conspiracy must have been formed prior to his termination.
- [12] Leaving aside entirely the convoluted and extremely dubious nature of many of the plaintiff's claims, there are virtually no material facts pleaded which could conceivably give rise to claims against the lawyer defendants. In broad strokes, the pleadings concerning the lawyer defendants are bare allegations, conclusory statements, many which of have baked into them legal conclusions. There are few facts, material or otherwise, pleaded in support of the conclusory statements.
- [13] Unfortunately, to demonstrate the correctness of the aforementioned conclusion, it is necessary to quote the salient portions of the amended NOCC. Paragraphs 18-19 state:
18. On or around November 27, 2019, Broadbent and/or Dentons, collectively "the lawyers," were retained by:

- a) VINN as its corporate solicitor;
 - b) Bernabe, in his personal capacity; and/or
 - c) other individual directors and officers of VINN in their personal capacity.
19. The lawyers provided services to:
- a) VINN in respect to:
 - i) employment agreements; ii) corporate governance; iii) corporate growth and investment strategy; iv) external financing; and/or
 - v) such further particulars as may be advised.
 - b) Bernabe and/or other individual directors and officers of VINN in respect to:
 - i) their rights and obligations as VINN's directors and officers; and/or ii) such further particulars as may be advised; (collectively, the "Legal Services").
- [14] I pause here to note that it is central to the theory of the case advanced before me that the lawyer defendants acted for and advised the plaintiff prior to advising VINN at the time of the plaintiff's termination. That potentially material fact is not pleaded and must be divined from the reference to "other individual directors."
- [15] Paragraphs 28-33 set out the facts surrounding the misrepresentations.
- [16] Paragraph 34 is a conclusory statement attributing knowledge to the Lawyers in these terms: At all material times the lawyers were aware or alternatively should reasonably been aware of:
- a) VINN's proper and accurate valuation;
 - b) the misrepresentation;
 - c) the terms of the initial investment;
 - d) the iNovia changes, including the removal of Flanagan from VINN's board of directors;
 - e) the terms of the altered investment;
 - f) VINN's financing rounds;
 - g) VINN's corporate governance generally;
 - h) VINN's employment agreements; and/or
 - i) such further particulars as may be advised.
- [17] There are then several paragraphs detailing misconduct alleged against each of VINN, VINN's directors, iNovia, and the Lawyers. Regarding the Lawyers, the amended NOCC states:

38. The lawyers implicitly and/or actively participated, condoned, and supported the misconduct of each of VINN, Bernabe, Nijjar, Avant, Archibald, Knapp, iNovia, and/or other representatives of VINN, particulars of which include but are not limited to:
- a) improperly advising VINN with respect to:
 - i) the iNovia changes, including Flanagan's removal from the board of directors; ii) the misrepresentations; iii) its revaluation following iNovia's discovery of the misrepresentations; iv) the terms of the altered investment;
 - v) its obligations to investors and shareholders as a result of the misrepresentations; vi) Bernabe's continued position as CEO and director; vii) Flanagan's wrongful termination; viii) its breach of the employment agreement as defined below; ix) corporate governance;
 - x) investment rounds; and/or xi) such further particulars as may be advised.
 - b) improperly advising each of Bernabe, Nijjar, Avant, Archibald, Knapp, and/or other representatives of VINN with respect to:
 - i) the misrepresentations; ii) their obligations after discovering the misrepresentations; and/or iii) such further particulars as may be advised.
 - c) failing to otherwise complete to legal services in a careful and prudent manner; and/or
 - d) such further particulars as may be advised (collectively, the "Lawyers' misconduct").
- [18] Again, there are no discrete facts pleaded which could bottom the alleged misconduct. The preamble portion refers simply to actively participating in, condoning, or supporting the misconduct of others.
- [19] Paragraph 38 is about allegedly improper advice to VINN. Paragraph 38(b) relates to improperly advising VINN's directors. That pleading is fatally deficient for at least two reasons. First, there are no material facts pleaded in relation to the legal advice, merely a conclusion that the advice was improper. Secondly, the provision of improper advice to VINN, for whom the Lawyers were corporate solicitors, and VINN's directors could not give rise to a cause of action by the plaintiff.
- [20] That same conclusion applies to paragraph 38(c), which says the legal services were not performed in a careful and prudent manner. Paragraphs 39-55 address wrongful dismissal, breach of employment duties, and breach of the employment contract. No allegation is made against the lawyer defendants in those paragraphs.
- [21] Commencing at para. 56, the following tort claims are pleaded: breach of fiduciary duty, negligence inducing breach of contract, interference with economic relations, and civil conspiracy. Each of those claims against the Lawyer suffers from multiple fatal deficiencies. These claims must be struck by application of Rules 9-5(1)(a), (b), and (d).

- [22] First of all, there are no material facts in support of the various torts. The Lawyers are left to guess what it is they are alleged to have done. Many of the claims fail to differentiate among the defendants, simply alleging that each of the defendants owed a particular duty or was aware of certain facts. Each specific reference to the Lawyers simply circles back to their misconduct as set out in para. 38, the deficiency of which I have already addressed.
- [23] Paragraph 58 asserts that the Lawyers owed a fiduciary duty to the plaintiff, yet pleads no facts in support of that conclusion. Paragraph 59 then states: The lawyers breached their duties to Flanagan, particulars of which include but are not limited to the Lawyers' Misconduct.
- [24] The Lawyers' Misconduct is defined in para. 38.
- [25] Paragraph 61 pleads negligence with the bald statement that "each of the defendants owed a duty of care to Flanagan." No facts are pleaded which could give rise to a duty of care. The breach of the alleged duty of care by the Lawyers is said to be the Lawyers' Misconduct, again circling back to para. 38. The claims of inducing breach of contract and interference with economic relations are devoid of any factual description and are really nothing more than bare-bones boilerplate pleadings.
- [26] The pleadings of civil conspiracy are at paras. 74-80, which state: Each of the defendants acted purposely in concert and engaged in an unlawful conspiracy against Flanagan, which has caused Flanagan loss and damages. Any or each of the defendants formed an agreement with any or all of the other defendants to:
- a) remove Flanagan from all of his executive and management roles at VINN;
 - b) terminate Flanagan's employment at VINN;
 - c) prevent Flanagan from disclosing the misrepresentations to VINN's actual investors, potential investors, and/or shareholders;
 - d) prevent Flanagan from holding Bernabe responsible for the misrepresentations;
 - e) prevent Flanagan from disclosing the reasons for the altered investment to VINN's actual investors, potential investors, and/or shareholders; and
 - f) such further particulars as may be advised (collectively the "Conspiracy Agreement"). The:
 - a) dominant purpose of the conspiracy agreement was to cause injury to Flanagan; and/or
 - b) defendants acted unlawfully in carrying out of the Conspiracy Agreement and knew that their conduct was likely to cause Flanagan injury. The defendants' unlawful conduct towards Flanagan includes but is not limited to:
 - a) VINN's misconduct;
 - b) the directors' misconduct;

- c) iNovia's misconduct;
 - d) the lawyers' misconduct;.
 - e) Flanagan's wrongful termination;
 - f) VINN's breach of the employment agreement;
 - g) inducing VINN's breach of the employment agreement;
 - h) breach of fiduciary duties;
 - i) acting negligently towards Flanagan;
 - j) wrongfully interfering with the business relationship between VINN and Flanagan; and/or
 - k) such further particulars as may be advised. Each of Bernabe, Avant, Archibald, Nijjar, and/or Knapp had financial incentives as directors and shareholders of VINN in committing any or all of the unlawful conduct towards Flanagan that were distinct from VINN, including but not limited to:
 - a) diluting Flanagan's share entitlement to increase their own voting power;
 - b) diluting Flanagan's option entitlement to increase the value of their own option entitlements;
 - c) removing Flanagan from decision-making authority so that they may continue to solicit investment funds under false pretenses to wrongfully inflate VINN's share value; and
 - d) such further particulars as may be advised. The defendants knew that in the circumstances, injury to Flanagan would likely result from their unlawful conduct. The defendants' conduct has caused and contributed to the damages.
- [27] Paragraph 75 contains some facts which might support the conspiracy. However, para. 77, said to describe the unlawful conduct of the various defendants, again circles back to para. 38 in relation to the Lawyers.
- [28] In submissions at this hearing, counsel stated that the plaintiff's theory is that the Lawyers were in a disqualifying conflict by virtue of acting for the plaintiff personally while simultaneously being engaged as corporate solicitors for VINN. The theory then posits that the Lawyers' ongoing or past representation of the plaintiff meant that they were disqualified from advising VINN and its directors no relation to the plaintiff's dismissal.
- [29] The plaintiff further submits that this amounts to a novel claim, which should be permitted to proceed, in part to advance the law of the still evolving tort of civil conspiracy. The novel claim to be developed is that a breach of the canons of legal ethics can constitute unlawful conduct capable of supporting the existence of a civil conspiracy. I reject that submission entirely.

- [30] I reiterate, there are no facts pleaded in support of the prerequisites of the claim, namely a solicitor/client relationship between the plaintiff and the Lawyers. The only such relationship pled is between VINN and the Lawyers. That being so, the Lawyers would owe an undivided duty of loyalty to VINN.
- [31] Moreover, if there were facts capable of supporting a personal solicitor/client relationship, they would be within the knowledge of the plaintiff and could easily be pleaded. The failure to plead such facts, particularly when the amended NOCC was drafted in response to an earlier application to strike, is telling.
- [32] Finally, it would be inappropriate to permit the current pleading to remain on the test basis proposed by counsel in submissions. The existence of a disqualifying conflict, without more, could never be the basis for a finding that a lawyer was involved in an unlawful civil conspiracy to cause harm to a plaintiff, as alleged here. Primarily, but not wholly, for that reason, I am persuaded that the pleading of civil conspiracy is both vexatious, as that term is understood in the context of civil pleadings, and an abuse of process.
- [33] Alleging unlawful conduct by a lawyer in the lawyer's representation of a client is extremely serious and not to be done lightly. Here, in my view the pleading was recklessly made. In that regard, I have read and considered the plaintiff's affidavit. From that affidavit, it is crystal clear that the entire conspiracy allegation is based on nothing more than the bare suspicion of the plaintiff. He describes a brief absence from the office in fall 2022 and then being summoned to Mr. Bernabe's office on his return, at which time he was constructively dismissed.
- [34] His suspicions about the reason for and timing of his dismissal are set out at paras. 14-16 of his affidavit:
14. I verily believe that Mr. Bernabe conspired with any or all of the defendants, including during the time while I was out of the office in September and October of 2022 to intentionally and wrongfully adversely affect my rights and interests, including having me wrongfully terminated from VINN.
15. Until the date of my termination, I advocated to have Mr. Bernabe removed from VINN's board of directors and his role as CEO president as a result of the misrepresentations and omissions he made and/or caused to be made to VINN's investors and shareholders.
16. I verily believe that Mr. Bernabe conspired with any or all of the defendants to intentionally and wrongfully adversely affect my rights and interests, including have me wrongfully terminated in order to prevent me from disclosing the truth about the misrepresentations and omissions relating to VINN's share repricing and financial performance.
- [35] The plaintiff says nothing about the reasons he is suspicious of involvement by the Lawyers in the alleged conspiracy. Indeed, the only reference to the Lawyers in the affidavit is para. 11, which addresses only the misrepresentations by Mr. Bernabe much earlier in the year.

- [36] These findings also apply to the other tort claims, and I find that they too are vexatious and an abuse of the court's process. The same basic factual theory, which is both without actual foundation and not expressly pleaded as fact, bottoms the claims of breach of fiduciary duty, interference with economic relations, negligence, and inducing breach of contract. I repeat, there are no facts pleaded, nor reasonably capable of being pleaded, which support the broad theory of misconduct by the Lawyers proposed by the plaintiff in this litigation.
- [37] The Lawyers should never have been named and forced to respond to this claim. Quite apart from the burden on the Lawyers requiring them to retain counsel, the fact that they were added as defendants has meant that VINN was required to retain other counsel to defend these proceedings.
- [38] I have also considered whether to permit a further amendment by the plaintiff and decided that such is not appropriate. I rely on the following from *Jones v. Bank of Nova Scotia*, 2018 BCCA 381, at para. 35: Determining whether to permit an amendment is a preferable to dismissal of inadequate pleadings requires the exercise of a discretion by a trial judge. The exercise of that discretion may require consideration, including the degree to which the pleadings are deficient, of the extent to which the deficiencies may be addressed by an obvious or straightforward amendment, the apparent merit of the claim that may be made out with amendment and the prejudice that may be incurred by dismissing the claim. The exercise of that discretion requires consideration of the factors set out in Rule 1-3:
- (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
 - (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
 - (a) the amount involved in the proceeding,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the proceeding.
- [39] Here the pleadings have already undergone a wholesale revision in response to the Lawyers' first application to strike. Any additional material facts known to the plaintiff should have been pleaded then. As noted throughout this judgment, the amended pleading is woefully deficient and not amenable to any straightforward amendment as a panacea for these failings.
- [40] Finally, the underlying claims against the Lawyers are extremely weak, indeed, one can safely conclude it is virtually devoid of merit. It is not appropriate to permit the plaintiff to attempt through further amendment to plead his case against the Lawyers. The claim against those defendants should be struck in its entirety without leave to amend.

- [41] I have also considered potential prejudice to the plaintiff, and see little. His claim will proceed against the other defendants, and the limitation period has not yet expired. It would run from date of termination, October 2024. I have likewise considered R. 3(1) as contemplated by Jones. A consideration of that rule does not alter the calculus.
- [42] I reiterate that this claim appears to be a reasonably straightforward case of wrongful dismissal. The amount of damages would appear to be comparatively modest, unlikely to be measured in multiples of many hundreds of thousands. There is nothing unusual about the case. Nor is it likely to till any new legal ground. I do not view this litigation as complex, and incline to the view that the plaintiff is deliberately attempting to make it far more complex than it ought to be in order to cast the liability net as widely as possible. That is the primary reason for the multiple defendants and causes of action. In my view, it would not be appropriate to reward a plaintiff who makes his own case unduly complicated by overemphasizing that factor in considering whether to dismiss the claim against two of many defendants.
- [43] I grant the relief sought at part 1, paras. 1-2 of the notice of application. The action is dismissed against Mr. Broadbent and Dentons.
- [44] Finally, I must address the issue of costs. The applicants seek special costs. The plaintiff relies on *Berthin v. British Columbia (Registrar of Land Titles)*, 2017 BCCA 181, para. 53, which says there must be an extra element, not just a claim that is devoid of merit, to justify an award of special costs.
- [45] In my view, my findings on abuse of process set out the factual basis for an award of special costs. I agree with counsel for the applicants that the reckless allegations made against the corporate Lawyers for VINN are an extra element capable of supporting an award of special costs.
- [46] I award the applicants costs of these proceedings as special costs against the plaintiff. That concludes my reasons. "Tammen J."

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