

CANADA / JUDGMENT

Gardner v. Ganapathi

2004 BCCA 228

COURT

British Columbia Court of Appeal

DECIDED

16 April 2004

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2004 BCCA 228 Gardner v. Ganapathi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gardner v. Ganapathi,

2004 BCCA 228

Date: 20040416

Docket: CA026870

Between:

Robert C. Gardner, Pacific Point Holdings Ltd. and

Magna Management Ltd.

Appellants

(Plaintiffs)

And

Nathan Ganapathi, Stan H. Ashcroft,

Laird Cruickshank and Sefton Levine carrying on a law partnership under the name and style of

Ganapathi, Ashcroft, Cruickshank, Levine and the said Ganapathi, Ashcroft, Cruickshank, Levine

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Lambert

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Oppal

Oral Reasons for Judgment

R-M.L. Basham, Q.C. and

V. Stewart

Counsel for the Appellants

D. Lunny and

J.A. Dawson

Counsel for the Respondents

Place and Date:

Vancouver, British Columbia

16 April 2004

- [1] LAMBERT, J.A.: This action arises from the intermingling of the legal practices of the plaintiff Gardner and the defendants Ganapathi, Ashcroft, Cruickshank and Levine. The two plaintiff companies were the management company and the leasing company controlled by Gardner. The relevant circumstances in this action occurred in the years around 1991.
- [2] In the statement of claim, Gardner alleges that a partnership of all five lawyers was formed on 1 February 1990 and that he was expelled from the partnership on 31 January 1991. In the statement of claim these claims are made:
11. The total amount of Gardner's capital account as at January 31, 1991 excluding his share of the work in progress was therefore \$285,893.60 being the sum of \$127,911.00 and \$157,982.60.
 12. Gardner has demanded repayment of his capital account but the defendants and each of them have refused to repay it. As at the date of issuance of these proceedings, the said sum of \$285,893.60 remains due and owing to Gardner.
 13. Further, pursuant to the partnership agreement between Gardner and the four individual defendants, each partner was entitled to be paid in equal shares of the unbilled work in progress as at each year end which was billed and collected in the following year end.
 14. As at January 31, 1991, Gardner's share in the unbilled work in progress in the Partnership as stated in the Statement of Partners' Capital in the financial statements of the Partnership as at January 31, 1991 was one-fifth of \$1,450,612 which equals \$290,124.00.

15. Gardner has demanded an accounting of the work in progress as at January 31, 1991 and all accounts sent and collected for the work in progress and for payment of such amount as may be found to be owing to Gardner upon such accounting.
- ...
20. At all material times, the individual defendants and each of them stood in a fiduciary and trust position to Gardner as his partners and former partners and came into possession and control of Gardner's capital account thereby. The individual defendants and each of them breached their fiduciary and trust duty owed to Gardner by among other things appropriating his capital account to their own use and benefit and withholding the said appropriation from him. Gardner has suffered loss and damage thereby and claims therefor.
- ...
22. Further, the defendants have wrongfully converted the said sum of \$157,982.60 to their own use and benefit. Gardner seeks return of and judgment for the said sum and damages for the loss and damage he has suffered as a result of the wrongful conversion.
- ...
27. In the premises, Magna claims that the said sum of \$60,933 constitutes money had and received by the defendants and each of them from Magna to Magna's use. Further, the defendants and each of them have converted the sum of \$60,933.00 to their own use and benefit.
28. Magna has demanded repayment of the said sum but the defendants and each of them have refused to repay it. As of the date of issuance of this action, the said sum of \$60,933.00 remains due and owing to Magna.
- ...
35. As at the date of issuance of these proceedings, the defendants and each of them owe Pacific Point the sum of \$57,424.74 being the total of \$7,118.75 for rent in arrears, \$34,950.99 for property taxes and utilities in arrears and \$15,355.00 for past debt.
- ...
40. Gardner also seeks aggravated and/or exemplary damages against the defendants and each of them and relies on the following facts and matters to support his claim:
- (a) the defendants and each of them reallocated Gardner's capital account which they knew and acknowledged to be owing to Gardner without notice to Gardner;
 - (b) the defendants and each of them negotiated the repayment of Gardner's capital account without informing him that his account had been reallocated and paid to them;

- (c) the defendants and each of them appropriated Gardner's money which came to be in their possession and control while Gardner was their partner for their own benefit to create a tax shelter for themselves at Gardner's expense and without his knowledge;
- (d) the defendants and each of them did not inform Gardner at any time after they appropriated his money to their own use and benefit and led Gardner to believe that the money was intact to avoid paying him the money and to enable them to gain from the tax shelter they created;
- (e) the defendants and each of them resisted Gardner's attempts to obtain financial information from them and their accountants to prevent Gardner from discovering their wrongful appropriation of his capital account; Gardner discovered the defendants' wrongful appropriation only after persistent efforts were made by him;
- (f) the individual defendants and each of them stood in a position of trust to Gardner and carried out their wrongful acts while they were trustees of the funds;
- (g) the defendants knew at all material times that Gardner relied on the financial statements of year ending January 31, 1991 which recorded his capital account to be \$127,911 as at that date and reallocated his account in subsequent financial statements which they withheld from Gardner and knew that he would not be able to see them without the defendants' consent.
- (h) from or about January 31, 1991, the defendants and each of them, knowingly and without the knowledge or consent of Gardner, wrongfully authorized the purchase of telephone directory advertising for BC tel telephone number 669-9000 an account belonging to and held in the name of Gardner, and wrongfully used the telephone number, name and goodwill of Gardner for the benefit of the defendants and each of them;
- (i) in or about December, 1993, the Defendant Ganapathi with the knowledge of the defendants and each of them, wrote and caused a letter to be sent to the telephone company, which letter contains defamatory statements about Gardner.

[Emphasis in original.]

- [3] The defendants filed a statement of defence and counter-claim. The counter-claim asked for damages for breach of fiduciary duty, damages for misrepresentation and non-disclosure, damages for abuse of process and an accounting.
- [4] After 19 days of trial between January and April 1999 Mr. Justice McEwan reserved judgment. Reasons for judgment were issued in January 2000 and a corrigendum was issued in February 2000. Mr. Justice McEwan in his reasons said this:

XIII

- [83] In summary, the essential facts I derive from the evidence are as follows:

1. In the lead-up to the formation of the five-man firm, Robert Gardner had largely lost interest in the full time practice of law.
2. This was a clear concern to at least some of the prospective members of the five-man firm.
3. Mr. Gardner wanted to recoup the stake he had in the firm, represented by the Magna and Pacific Point liabilities carried on the books from previous years.
4. The way he sought to do this was to offer partnerships to the defendants, Mr. Ashcroft, Mr. Cruickshank and Mr. Levine for \$100,000 each.
5. Mr. Gardner represented to the incoming partners that he would be an active partner.
6. As a result of this representation the defendants invested in the firm.
7. There was no meeting of the minds on a wide number of subsidiary topics. It is clear that Mr. Gardner promoted the positive aspects of partnership. His objective was abetted by the statement prepared by Mr. Fowler "to show the defendants what they could anticipate earning" which was materially misleading as to the liabilities of the firm.
8. The incoming partners showed a singular lack of caution or diligence in examining what was presented to them or in confirming the actual terms of their bargain. It is evident that they knew the accounting did not give them a true picture.
9. Mr. Gardner exploited this, in applying the incoming partners' capital contributions directly to the reduction of his bank liability, in circumstances where he knew the defendants did not know his intentions, or authorize what he did.
10. Mr. Gardner virtually ceased to practice law as of the inception of the five-man firm. While he dealt with the difficulties with the Law Society/Radok matter as quickly as possible, he never did fulfil his promise to actively practice. I do not accept his assertions to the contrary.

XIV

- [84] The consequence of these findings is that the partnership was, in essence, stillborn. Partnership is defined in section 2 of the British Columbia Partnership Act R.S. 1996, Chap. 348:
2. Partnership is the relation which subsists between persons carrying on business in common with a view to profit.

[85] Partnership arises out of contractual relationship:

Partnership, though often called a contract, is a relation resulting from a contract.

Lindley on Partnership

13th Ed., 171, p. 14

[86] Mr. Gardner never delivered on the essential term of the parties' agreement to become partners. Given the events of February 1990, the position the defendants were in, and the dynamics of their relationship with Mr. Gardner, it is not surprising that the defendants elected to salvage the situation by carrying on in practice. They did, after all, hold out the hope for quite some time that Mr. Gardner would return to set things right.

[87] Mr. Gardner's position that the defendants cannot tenably maintain that they were entitled to share in the assets he brought to the firm but not in the liabilities, is as far as it goes, well taken....

...

XV

[89] Mr. Gardner's claim against the individual defendants and against Ganapathi, Ashcroft, Cruickshank, Levine arises, it appears, out of a theory that his capital account was "re-allocated" and "shared among the individual defendants and . . . applied to their own use and benefit . . ." (Amended Statement of Claim, paragraph 18); "converted . . . to their own use and benefit . . ." (A.S.C., paragraph 19); or that the defendants "breached their fiduciary and trust duty by . . . appropriating his capital account . . ." (A.S.C., paragraph 20), among other things. I think the evidence shows that the new four-man partnership used the existing figures as a base line and that they simply backed Mr. Gardner out of the new partnership accounting. I do not accept that there is anything necessarily sinister about this: I accept the defendants' submission that any liability to Mr. Gardner on account of those sums would be a liability of the Gardner, Ganapathi, Ashcroft partnership to be settled on an accounting, not a matter of debt as against the named defendants (see *Evans v. Holmes* [1922] 2 W.W.R. 696 (Sask. C.A.)).

[90] It follows that Mr. Gardner has not established a sustainable claim against the defendants he has named. The premises underlying his case include, as I said at the outset, that there was a partnership; that it assumed the liabilities he alleges; that he was an active contributor and participant in the partnership; that the figures presented are reliable enough that, in the absence of contradiction from the defendants, they ought to be accepted by the court; and that, finally, these figures can be traced into the successor firm, Ganapathi, Ashcroft, Cruickshank, Levine and visited as a debt upon it and upon his former partners personally. He has failed to carry the burden of proof of such a claim.

XVI

[91] Given what actually occurred, I think the only remedy that will do justice between the parties is a full accounting of the costs and benefits passing between the parties as a consequence of their relationship during the fiscal year February 1, 1990 - January 31, 1991. I think it clear that the plaintiffs picked up something of value from Mr. Gardner on February 1, 1990, but whether, or to what extent, it is offset by the repayment to Magna and Pacific

Point or by any other equities, and who, in the final analysis, owes what to whom can only be determined on the result of such enquiry.

- [92] Accordingly I direct that an accounting of the partnership be conducted pursuant to Rule 32, before a Master, Registrar or Special Referee and that the result be stated in the form of a report and recommendation to the court.
- [93] Because it is difficult to extricate the claims, the accounting shall include an enquiry into the sums owing (if any) by the partnership to each of Pacific Point and Magna.
- [94] I forbear any final ruling as to the claims made by any of the parties, including those for damages and costs pending receipt of the accounting and report. Further submissions will be invited thereafter.
- [95] I expect directions may well be required, at least as to whether a Master or a Special Referee ought to be appointed, among other things. Counsel shall be at liberty to apply.

[Emphasis added.]

[5] The reasons give rise to a number of questions. Among those questions are these:

- (a) If a partnership is stillborn, was it formed and did it exist or not?
 - (b) If Gardner has not established a sustainable claim against the defendants he has named
 - (i) are all his claims dismissed?
 - (ii) are some of his claims dismissed and if so which?
 - (iii) are none of his claims dismissed?
 - (c) In para. 92 an accounting of the partnership is directed. Which partnership for which period?
 - (d) In para. 93 the accounting is to include an inquiry into the sums owing, if any, by the partnership to each of Pacific Point and Magna. Which partnerships for which period?
 - (e) What is the effect of para. 94? Does it affect the statement in para. 90 that Gardner has not established a sustainable claim against the defendants he has named?
- [6] The parties could not agree on a form of order and an order was settled by a Master. The operative parts are in these terms:

THIS COURT DECLARES that the Plaintiff, Robert C. Gardner, has no sustainable claim against the named Defendants, and that any liability to the Plaintiff, Robert C. Gardner, would be a liability of the partnership of Gardner, Ganapathi, Ashcroft, Cruickshank and Levine to be settled on an accounting;

THIS COURT ORDERS AND DIRECTS that an accounting of the partnership of Gardner, Ganapathi, Ashcroft Cruickshank and Levine, including an enquiry into the sums owing by the partnership, if any, to the Plaintiffs, Pacific Point Holdings Ltd. and Magna Management Ltd., be conducted pursuant to Rule 32, before a Master, Registrar or Special Referee and that the result be stated in the form of a report and recommendation to this Honourable Court.

THIS COURT FURTHER ORDERS that the claims of the parties, including those for damages and costs, are hereby adjourned for determination following receipt of the accounting and report and following submissions thereon, if any, by the parties.

THIS COURT FURTHER ORDERS that the parties are at liberty to apply for directions.

- [7] The first paragraph in the order that there is "no sustainable claim" remains unclear. Are claims dismissed? Which claims? Against whom? How can that paragraph be reconciled with the third paragraph and with the reasons in para. 94?
- [8] In my opinion, there could be no effective appeal from the order as entered. It is not sufficiently clear to be appealable at all. What is more, having regard to para. 94, I am not satisfied that there is any final order to appeal. If this is an interlocutory appeal, I would refuse leave on the ground that the issues cannot be isolated without clarification. I would set aside the order as entered.
- [9] I would refer this matter back to Mr. Justice McEwan who should be asked to settle his own order and work out its terms so that either the inquiry and accounting may take place or alternatively, there is an order in which it is possible to decide whether it is final or interlocutory, or partly one and partly the other, and in which it is possible, if the parties wish, to raise and argue on appeal issues of fact or law or both. I would dispose of this appeal in that way.
- [10] RYAN, J.A.: I agree.
- [11] OPPAL, J.A.: I agree.
- [12] LAMBERT, J.A.: The entered order is set aside. The matter is referred back to Mr. Justice McEwan for clarification and for settlement of a revised form of order.

"The Honourable Mr. Justice Lambert"

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