

CANADA / JUDGMENT

# Gengenbacher v. Smith

2016 BCSC 1164

## COURT

Supreme Court of British Columbia

## DECIDED

24 June 2016

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2016 BCSC 1164 Gengenbacher v. Smith IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Gengenbacher v. Smith, 2016 BCSC 1164 Date: 20160624 Docket: 13-4479 Registry: Victoria Between: Daniel Gengenbacher Plaintiff And: Dennis Emmerson Smith and S & V Planning Corporation Defendants And: Jeremy G. Carr Third Party Before: The Honourable Mr. Justice Johnston Reasons for Judgment Counsel for the Plaintiff: R.S. Margetts, Q.C. Counsel for the Defendants: W. Foley Counsel for the Third Party and Carr Buchan & Associates M.G. Armstrong, Q.C. Place and Date of Hearing: Victoria, B.C. May 26, 2016 Place and Date of Judgment: Victoria, B.C. June 24, 2016

- [1] The plaintiff applies to add his former lawyer, Mr. Carr, and Mr. Carr's law firm, Carr Buchan & Associates (hereinafter the "lawyer"), as defendants to this action, to amend his Notice of Civil Claim, and to appoint a litigation guardian to conduct this action on his behalf.
- [2] The present defendants did not respond to the Notice of Application although counsel attended by telephone.
- [3] The proposed new defendant opposes all relief sought.

## Background

- [4] December 31, 2013, Mr. Gengenbacher sued Mr. Smith and his company S & V Planning Corporation ("S & V"), alleging that he had engaged Smith and S & V to provide investment advice, and that the defendants had advised him to invest in securities offered by Proforma Capital Bond Corporation.
- [5] Mr. Gengenbacher alleged that the defendants represented to him that they had knowledge of and a long-term relationship with someone named Frost and Proforma, and knew them to be highly competent and trustworthy, that the defendants, Frost and Proforma had done the due diligence necessary to advise Mr. Gengenbacher of the sustainability of the investment as a "superb investment", which the defendants told Mr. Gengenbacher was risk-free because of available optional insurance coverage.
- [6] Mr. Gengenbacher pleaded that he relied on the advice, invested \$600,000, and lost it.

- [7] The proposed amendments largely involve allegations against Mr. Gengenbacher's former lawyer.
- [8] In the proposed amendments, Mr. Gengenbacher alleges:
1. The existence of a solicitor-client relationship with his former lawyer;
  2. Through a guardian ad litem, he being a minor at the time, the lawyer and his firm were retained to prosecute a claim for damages for personal injury arising from a motor vehicle accident on his behalf;
  3. At all material times he lacked the capacity to understand and manage his affairs and was incapable of sustaining reasonably continuous gainful employment;
  4. His former lawyer knew this;
  5. He reached his majority on February 10, 2008, and that the lawyer "presumed to take instructions on his behalf" to further the retainer;
  6. Implied terms of the contractual arrangement with his former lawyer included that the lawyer would use all due care, skill and diligence in prosecuting his personal injury claim;
  7. Additionally, the lawyer owed a common law duty of care;
  8. The lawyer breached his contractual and common law duties by:
    - a. failing to fully explore the extent of his losses arising from the accident;
    - b. failing to ascertain the insurance limits available;
    - c. failing to structure a settlement in his best interests;
    - d. advising him to settle his claims for \$1,000,000.00 all-inclusive; e failing to obtain the approval of the proposed settlement from the Public Guardian and Trustee; and,
    - f. advising him to retain the lawyer and his firm to manage settlement funds on his behalf.
  9. In contemplation of settlement, the lawyer had Mr. Gengenbacher sign a new contingent fee agreement that does not comply with the Legal Profession Act, S.B.C. 1998, c. 9, and the Rules of the Law Society;
  10. Shortly afterward the lawyer settled Mr. Gengenbacher's claims for the all-inclusive \$1,000,000.00;
  11. The contingent fee agreement is null and void;
  12. At all times the lawyer knew or ought to have known that Mr. Gengenbacher lacked capacity to instruct counsel, or otherwise exercise judgment in relation to the claims or accounts in issue and possible settlement;

13. At all times Mr. Gengenbacher was vulnerable and put his trust in his lawyer to protect his interests.
  14. The lawyer rendered an account that exceeded the percentage provided in the contingent fee agreement;
  15. The contingent fee agreement and the account were not reasonable in all the circumstances, and in particular the contingent fee agreement was excessive relative to the risk, value and complexity of the work.
- [9] The proposed amendments then turn to allegations arising after settlement of Mr. Gengenbacher's personal injury claim, alleging:
1. The lawyer had Mr. Gengenbacher sign a Power of Attorney appointing the lawyer as his attorney;
  2. The Power of Attorney is null and void;
  3. The lawyer retained \$625,770.59 in trust for Mr. Gengenbacher after deduction of his fees and disbursements;
  4. The lawyer invested \$600,000 of Mr. Gengenbacher's funds in bonds issued by Proforma Capital Bond Corporation;
  5. The investment was made through the existing defendants Smith and S & V;
  6. This was done under the authority of the Power of Attorney;
  7. Mr. Gengenbacher does not know the full particulars of what he terms an "Investment Retainer" between the lawyer and the existing defendants;
  8. At all times the defendants and the lawyer knew or ought to have known of Mr. Gengenbacher's circumstances and the need to exercise all reasonable prudence, care and skill with regard to investing his money;
  9. The defendants Smith and S & V knew or ought reasonably to have known of Mr. Gengenbacher's particular vulnerability and understood and anticipated that Mr. Gengenbacher would repose trust and confidence in the defendants and all of them;
  10. Each of the existing defendants and the lawyer were fiduciaries and owed Mr. Gengenbacher fiduciary duties;
  11. The defendants were not qualified, licensed or capable of advising, managing, investing or otherwise acting in a financial and fiduciary capacity with respect to the settlement funds on Mr. Gengenbacher's behalf;
  12. The defendants and each of them failed to exercise care, skill and diligence in determining to invest in their capacities as barrister and solicitor, Power of Attorney, and/or financial and investment advisor;

13. The defendants failed to obtain appropriate information and consider Mr. Gengenbacher's financial circumstances in investing his funds;
  14. Particulars include but are not restricted to:
    - a. failing to undertake reasonable or any due diligence with respect to the nature of, and risks associated with, investment of Mr. Gengenbacher's settlement money;
    - b. failing to obtain, complete or otherwise consider a "Know Your Client" form;
    - c. failing to provide or otherwise obtain a Risk Acknowledgement form;
    - d. failing to meet an appropriate diversity with respect to the investment;
    - e. investing in market exempt securities.
  15. The defendants, Smith and S & V knew or should have known that Mr. Gengenbacher was incapable, and they failed to exercise reasonable due diligence in acting on the Power of Attorney and in investing his funds without independently evaluating the suitability of the investment in light of his particular circumstances;
  16. In about early 2012 Proforma failed and Mr. Gengenbacher's investment was lost;
  17. In December 2013, the original action was commenced by the lawyer without Mr. Gengenbacher's knowledge or consent;
  18. On or about October 2013 the defendants Smith and S & V filed a Third Party claim against the lawyer;
  19. On or about December 22, 2014 the lawyer informed Mr. Gengenbacher that his money had been lost and the lawyer could no longer act for him.
- [10] Mr. Gengenbacher proposes to claim this relief in the proposed amended Notice of Civil Claim:
1. A declaration that the contingent fee agreement is null and void;
  2. A declaration that the power of attorney is null and void;
  3. General and special damages;
  4. Accounting and disgorgement of profit;
  5. A declaration that any profits of the defendants are held in constructive trust by them for his benefit;
  6. In the alternative, leave for Mr. Gengenbacher to have the lawyer's accounts reviewed by the Registrar;
  7. General damages for breach of contract, breach of fiduciary duty and negligence;

8. Interest at the [contingent fee] contract rate or pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79;
  9. Accounting;
  10. Tracing;
  11. Special or ordinary costs.
- [11] I will deal first with the application to substitute a litigation guardian, a Mr. Evens, on behalf of Mr. Gengenbacher. Mr. Evens has signed a consent stating that he is Mr. Gengenbacher's brother, undertakes to be responsible for the costs of the proceeding, and has no interest in the proceeding adverse to that of Mr. Gengenbacher.
- [12] Counsel for Mr. Gengenbacher has prepared a certificate of fitness, in the terms required by Rule 20-2(8), certifying that Mr. Gengenbacher is a mentally incompetent person, and setting out the bases of that belief. Those bases include meetings and telephone conversations with Mr. Gengenbacher since 2014, and review of medical reports from a psychiatrist, a neurologist and Alberta government employees, all from between 2008 and 2010.
- [13] Counsel for the lawyer points to the age of the medical information on which the certificate is partly based, and is concerned that any order made with respect to appointing a litigation guardian not become either *res judicata* in any later proceedings between Mr. Gengenbacher and his former lawyer, or influence any findings of fact in any later proceedings. The concern is that the order might be taken as a finding of Mr. Gengenbacher's capacity that might somehow be applied retrospectively.
- [14] In my view, the Rules with respect to conducting litigation through a litigation guardian clearly leave any assessment of capacity to counsel: the court does not inquire into capacity, nor does the court rule on capacity. It is enough that a lawyer, as an officer of the court, certify that a person is "a mentally incompetent person," in the words of Rule 20-2(8).
- [15] If this were a fresh action, no order would be required. Sub-rule (2) provides that no action may be by or against a person under legal disability except by his or her litigation guardian. "Person under legal disability" is a necessarily broader term than "mentally incompetent person" so as to permit infants to engage in litigation while minors. In *E.M.E. v. D.A.W.*, 2003 BCSC 1878, the court held at para. 16 that persons under legal disability for the purposes of Rule 20-2 were infants or mentally incompetent persons, based on a reading of the Rule as a whole. I note that sub-rule (12) contemplates a litigant who attains majority during the litigation, and who is "then under no legal disability" of assuming conduct of their litigation on filing an affidavit.
- [16] Sub-rule (10) contemplates court involvement in this question only if a litigant becomes a mentally incompetent person while a party to a proceeding, in which case the court must appoint a litigation guardian if no committee has been appointed or the litigant has not

nominated a representative under the Representation Agreement Act, R.S.B.C. 1996, c. 405. *E.M.E. v. D.A.W.*, does not require an inquiry into mental capacity in every case, as in there it was an opposing party seeking appointment of a litigation guardian for a self-represented litigant, with neither a lawyer's certificate nor consent of a proposed litigation guardian. In my view, the court can accept the certificate of one of its officers, even in the midst of an action, without having to go behind that certificate or requiring evidence to support it. Otherwise, a represented party might be exposed to collateral proceedings or inquiries, additional expense of expert opinions on mental capacity, or, in a worst case, investigation or examination by opposing counsel into capacity in the middle of proceedings.

[17] On filing a signed certificate of fitness, I order the appointment of Mr. Evens as litigation guardian for Mr. Gengenbacher. Joinder

[18] Mr. Gengenbacher relies on Rule 6-2(7)(b) and (c):

(7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),

(b) order that a person be added or substituted as a party if

(i) that person ought to have been joined as a party, or (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and

(c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with

(i) any relief claimed in the proceeding, or (ii) the subject matter of the proceeding that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

[19] The Rule was explored in *Delta Sunshine Taxi (1972) Ltd. v. Vancouver (City)*, 2014 BCSC 2100 at paras. 12-14:

[12] The addition of parties under Rule 6-2(7) is a matter of discretion, to be exercised generously to allow effective determination of the issues, without delay, inconvenience or separate hearings (*Schooff v. Medical Services Commission*, 2009 BCSC 1596 at para. 199 (*Schooff*); *Ipsos S.A. et al. v. Angus Reid et al.*, 2005 BCSC 1114 at para. 107).

[13] Rule 6-2(7)(b) applies when a person "ought" to have been joined as a party or where a person's "participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated on." As stated in *Kitimat* at para. 28, if either of these tests is met, the person should be joined.

[14] "Ought" is a broader concept than "necessary" and includes situations in which joining the person may be more than mere convenience but less than necessity (*Kitimat* at para. 29). Necessary parties are those whose direct interests might be affected by the relief sought

(Canadian Labour Congress v. Bhindi (1985), 61 B.C.L.R. 85 at 94 (C.A.) (Canadian Labour Congress), Kitimat at paras. 30-32). In Kitimat, the petitioners sought to quash a decision of the province that authorized Alcan Inc. ("Alcan") to sell hydro power that it produced for use outside of Kitimat's aluminum industry, without adding Alcan as a party. The Court found that Alcan ought to have been joined and that Alcan was a necessary party because a binding order would limit the instruments held by Alcan, without its participation. In other words, the effect of the petition could be to limit the ability of Alcan to sell the hydro power it produced, so affecting the value of the power and the financial interests of Alcan.

- [20] With respect to Rule 6-2(7)(c), the court said at para. 19:
- [19] Under Rule 6-2(7)(c), the applicants must show that there exists, among themselves and any party to the proceeding, a question or issue connected with either the relief claimed in the proceeding or the subject matter of the proceeding such that it is just and convenient that they be added. In Kitimat at paras. 24 and 35, Saunders J.A. evoked common law theory about the character of this Rule that is neither clearly defined nor founded upon positive and uniform principle, but is responsive to reasoning, considerations of convenience and expediency, and the dictates of natural justice. Because the petitioning District of Kitimat in Kitimat sought remedies that would render invalid provincial instruments in favour of Alcan and that would restrict the range of uses to which Alcan could put the power that it generated, there was an issue between them related both to the relief claimed in the proceeding and to the subject matter of the proceeding. After referring in paragraph 37 to words of Lord Denning quoted in another case to the effect that a third party should be added if he is directly affected "in his legal rights or in his pocket", the learned jurist said at paragraph 38:
- [38] In the same way, it would be most unjust if Alcan were bound to stand idly by watching the District of Kitimat and Mayor Wozney obtain judgment against the Province without its participation in the litigation, when it is Alcan who will directly suffer the consequences.
- [21] Letvad v. Fenwick, 2000 BCCA 630, considered the previous version of the Rule, 15(5)(a)(ii) and (iii), which were in the same terms as present rule 6-2(7). Dealing with former Rule 15(5)(a)(ii), the court said at paras. 17 and 18:
- [17] The leading authority on this rule is Enterprise Realty Ltd. v. Barnes Lake Cattle Co. Ltd. (1979), 13 B.C.L.R. 293 (C.A.), which settled the question whether the rule should be given a broad or a narrow construction. Lambert J.A. for the court held that the narrow construction must continue to prevail. In so doing, he applied the reasoning of Devlin J. (as he then was) in Amon v. Raphael Tuck & Sons Ltd., [1956] 1 Q.B. 357. Lambert J.A. said at 298:
298. I propose to turn first to the English cases. In Amon v. Raphael Tuck & Sons Ltd., [1956] 1 Q.B. 357, [1956] 1 All E.R. 273, in a most thorough historical analysis of the jurisprudence, Devlin J. concluded that the first condition, "ought to have been joined", had its origin in common law, with its relatively simple remedies, and applied to cases such as joint

contractors and that the second condition, "necessary that all matters in the proceeding be effectually adjudicated", had its origin in equity, with its more complex remedies, and that it covered cases where a remedy such as specific performance could not be awarded without additional parties being added to make the remedy effective. Devlin J. then traced the two lines of authority and decided that the narrow construction was to be preferred. He did so for what I consider to be five reasons. That passage illustrates the kind of issues which may be taken into account in deciding whether the application is within subrule (ii). The gist of the matter is that the plaintiff must establish either that the persons sought to be added "ought to have been joined as a party" or that their "participation in the proceeding is necessary" in order to permit the issues between the existing parties to be effectually adjudicated. Here, the issues to the point of the application were, as between the plaintiff and Dr. Finley, whether the latter had been negligent and, as between the plaintiff and the Hospital, whether it was vicariously liable for that negligence and perhaps for the negligence of others. Those issues could have been effectually adjudicated between the original parties.

- [18] That is not to say that if Drs. Fenwick and Evans had been joined as defendants at the outset, that would have been an improper joinder. But that is an entirely different question from that as to whether they ought to have been joined or whether their joinder was necessary in order for the issues between the original parties to be adjudicated upon. The chambers judge having erred in holding that subrule (ii) applied, no element of discretion arises. That finding must be set aside on the basis that there was no jurisdiction to add the parties under subrule (ii).
- [22] And with respect to sub-rule (iii), after pointing out that it had been conceded that there existed between the new defendants and original parties a question or issue connected with the relief claimed in the action or with the subject matter of the action, the court turned to the discretion conferred by the "just and convenient" test, and considered the guidelines set out in its previous decision in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.). It was a factor there that adding a new defendant might deprive that party of an accrued limitation defence, a factor that was developed more fully in *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297. There are no limitation concerns in this case.
- [23] Mr. Gengenbacher points out that Smith and S & V have denied liability, and that they have pleaded:
1. Smith did not meet with or speak to Mr. Gengenbacher directly;
  2. Smith told the lawyer that the Proforma investment was not his considered investment advice for Mr. Gengenbacher;
  3. Smith reasonably and properly rated the lawyer as a sophisticated investor;

4. Smith advised the lawyer, in his capacity as agent or trustee for Mr. Gengenbacher, that the investment was risky and might be completely lost; 5 Prior to purchasing the investment on behalf of Mr. Gengenbacher, the lawyer had purchased the investment on his own account;
  6. Smith and S & V did not intend to, nor did they, create contractual relations with Mr. Gengenbacher;
  7. No valuable consideration passed from Mr. Gengenbacher to Smith and S & V;
  8. There were no terms agreed between Mr. Gengenbacher and Smith and S & V;
  9. That any losses (denied) were caused by the fault of Mr. Gengenbacher, the lawyer, or others;
- [24] Smith and S & V plead that Mr. Gengenbacher and the lawyer were each at fault, for much the same reasons.
- [25] In my view, the lawyer ought to have been joined as a party when the action was brought. On the pleadings, it seems reasonably clear that most if not all of the dealings between Smith and S & V, on the one hand, and Mr. Gengenbacher, on the other, were in fact dealings between Smith and S & V and the lawyer, acting as agent or attorney for Mr. Gengenbacher in the investment of Mr. Gengenbacher's money.
- [26] I am not convinced that the lawyer's participation as a party in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated. It seems to me that Mr. Gengenbacher's claims against Smith and S & V can be as effectually adjudicated with the lawyer as a witness as a party.
- [27] As to sub-rule (c), I conclude that there may exist between Mr. Gengenbacher and the lawyer a question or issue related to Mr. Gengenbacher's claim for relief against Smith and S & V, at least insofar as Smith and S & V plead that the lawyer was a sophisticated investor, and that they advised the lawyer, in his capacity as agent or trustee for Mr. Gengenbacher, of the risks in the investment.
- [28] That finding invokes a discretionary inquiry conferred by sub-rule (c) into the question of whether it would be just and convenient to determine the issues referred to in this litigation.
- [29] The most compelling argument on behalf of the lawyer arises out of the nature of the claims Mr. Gengenbacher seeks to raise against him if he is joined to the action.
- [30] There are two broad categories of amendments sought by Mr. Gengenbacher: the first are those necessary to add Mr. Gengenbacher's claims against the lawyer to those already brought against Smith and S & V; the second are amendments sought to raise claims that are purely between Mr. Gengenbacher and his former lawyer.

- [31] In this category are the allegations that the contingent fee agreement was void or unreasonable, that the Power of Attorney was void, that the settlement of Mr. Gengenbacher's damages claim was improvident, and that the fees and disbursements charged by the lawyer were excessive, unreasonable, or improper.
- [32] These two broad categories are divided at or shortly after the settlement of Mr. Gengenbacher's damages claim, and the deduction from the settlement amount of the lawyer's claimed fees and disbursements.
- [33] Counsel for the lawyer cited *Zymtech Development Inc. v. Sport Central Enterprises Ltd.*, 2004 BCSC 309. In that case the plaintiff sought to add a lawyer retained to draw up documents for the investment deal at the heart of the litigation. In dismissing the plaintiff's application, the court made the following comments at para. 23: In my view, it is only in rare instances that questions of breaches of duty owed by professionals should be joined in other causes of action. Causes of action based on what may be known as professional negligence or breach of duty are so unique that, generally speaking, they ought to be tried separately.
- [34] It is clear that Mr. Gengenbacher seeks to add a number of issues of no concern or risk to Smith and S & V, and that those issues will prolong both the pre-trial processes of discovery and the trial itself.
- [35] Any prejudice flowing from expansion of issues, increase in complexity, or lengthening of trial would accrue to the defendants Smith and S & V, and through counsel, those defendants waived any such prejudice.
- [36] I conclude that it would be manifestly just and convenient to determine the issues between Gengenbacher and the lawyer at the same time as the issues between Gengenbacher and Smith and S & V, as the acts or omissions on the part of the lawyer acting as agent or attorney for Mr. Gengenbacher pleaded by Smith and S & V could defeat Mr. Gengenbacher's claims against Smith and S & V.
- [37] I order that Mr. Carr and the Carr Buchan law firm be added as defendants to this action.
- Amendments
- [38] Amendments to pleadings are governed by Rule 6-1, which states in sub-rule (1):
- (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party
    - (a) once without leave of the court, at any time before service of the notice of trial, or
    - (b) after the notice of trial is served, only with
      - (i) leave of the court, or
      - (ii) written consent of the parties.

[39] As no notice of trial has been served, leave is not required for the amendments sought; indeed, it is not clear that I have anything to say in the matter at this stage. Assuming the plaintiff makes the amendments he has a right to make, the defendants can decide which of the options that will be open to them to pursue.

[40] Ordinary costs will be in the cause. "R.T.C. Johnston, J." The Honourable Mr. Justice Johnston

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