

CANADA / JUDGMENT

Gichuru v. Smith

2010 BCCA 352

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 352 Gichuru v. Smith COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Gichuru v. Smith, 2010 BCCA 352 Date: 20100719 Docket: CA037946 Between: Mokuu Gichuru Appellant (Plaintiff) And Howard Smith and Howard Smith Personal Law Corporation, both doing business as "Howard Smith & Company" Respondents (Defendants) Before: The Honourable Madam Justice Newbury The Honourable Madam Justice Bennett The Honourable Madam Justice Garson On appeal from the Supreme Court of British Columbia, (Gichuru v. Smith 2010 BCSC 234, New Westminster Registry, Docket S123626) Acting on his own behalf: M. Gichuru Counsel for the Respondents: V. Milne K. Paul Place and Date of Hearing: Vancouver, British Columbia June 18, 2010 Place and Date of Judgment: Vancouver, British Columbia July 19, 2010 Written Reasons by: The Honourable Madam Justice Newbury Concurred in by: The Honourable Madam Justice Bennett The Honourable Madam Justice Garson Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The plaintiff/appellant is now a practicing lawyer, but in 2002, he was a law student and sought articles with Howard Smith & Company. He was hired by Howard Smith & Company but since Mr. Smith was at the time legally unable to act as a principal, another lawyer practising in nearby premises, Mr. Beuhler (now deceased) agreed to become Mr. Gichuru's principal. (There is reference in the evidence to some type of "Assignment of Principal" document, although it is not in evidence.) Notwithstanding this arrangement, Mr. Gichuru began his articles in the offices of Howard Smith & Company and worked only at Mr. Smith's direction.
- [2] On April 30, 2002, Mr. Smith advised Mr. Gichuru by letter that "we have decided that we cannot keep you for the completion of your articles at Howard Smith & Company, articulated to Mr. Beuhler." The following day, Mr. Smith wrote to the Law Society, to advise that "With some reluctance and regret we have found it necessary to discontinue Dr. Gichuru's articles at this firm." In accordance with its articling guidelines, the Law Society requested a report from both parties and eventually pressed Mr. Smith for full details of the reason for the termination.

- [3] On April 25, 2008 - very nearly six years later - Mr. Gichuru filed a notice of claim against Mr. Smith and Howard Smith, Personal Law Corporation in the Provincial Court of British Columbia, seeking "damages for breach of employment contract/breach of fiduciary duty" and "damages for delayed entry into the legal profession." Hearings were held on three separate days in 2009. Ultimately, his Honour Judge Chen granted the plaintiff's application to transfer his claim to the Supreme Court pursuant to R. 7.1(1) of the Rules of the Provincial Court on the basis that his claim might exceed the \$25,000 jurisdictional limit of the Court at that time.
- [4] On November 17, 2009, Mr. Gichuru filed a statement of claim in the Supreme Court of British Columbia, a copy of which I have attached to these reasons.
- [5] In December, 2009, the defendants filed a notice of motion seeking an order that:
1. the trial of this matter, scheduled for three days commencing March 30, 2010, be adjourned to a new date mutually acceptable to all parties;
 2. paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 of the Statement of Claim of the Plaintiff are struck out;
 3. the claim for compensation for loss of employment income between April 30, 2002, and April 11, 2003 is struck;
 4. the claim for compensation for breach of fiduciary duty by the Defendant Smith be struck;
 5. the claim for compensation for delayed entry into the legal profession be struck;
 6. the claim for punitive damages be struck;
 7. all claims against Howard Smith are dismissed, and Howard Smith is removed as a Defendant; and
 8. costs payable forthwith in any event. The defendants relied on Rules 18(6), 18(7), 19(24), 39(9) and 57 of the Rules of Court. The application came before Madam Justice Bruce on February 9, 2010. She issued reasons dated February 24 which are indexed as 2010 BCSC 234.
- [6] The defendants approached their application under three separate rubrics. They argued that paras. 15-28 of the statement of claim disclosed no cause of action and should be struck pursuant to R. 19(24); second, that all claims against Mr. Smith in his personal capacity should be dismissed under either R. 19(24) or 18(6); and third, that the claim for punitive damages should be struck because the plaintiff had failed to plead material facts that, if presumed true, could support such a claim.
- [7] With respect to paras. 15-20 of the statement of claim, the chambers judge observed, correctly, that it was "difficult to determine the reasoning behind the plaintiff's decision to include these facts as part of his claim for breach of fiduciary [duty]. Based on the pleadings alone, there is no connection between the plaintiff's dismissal as an articulated student and Mr. Smith's decision to hire another articulated student and an associate." (Para. 35.) However, the

plaintiff submitted that the disputed paragraphs should be interpreted to mean that Mr. Smith had terminated his employment in order to hire a new student (with whom he was alleged to be previously acquainted) and a new associate. The chambers judge concluded that it was "conceivable" that paras. 15-20 could disclose a cause of action "if pleaded in conjunction with the claim for breach of fiduciary [duty]." Noting that a party should generally be permitted to amend pleadings if, as amended, they raise a triable issue, she declined to strike out paras. 15-20.

- [8] Similarly, the chambers judge found that paras. 21-28 of the statement of claim disclosed a triable issue in respect of Mr. Gichuru's claim for special costs. In her analysis: Paragraphs 21 to 28 of the statement of claim clearly relate to the defendants' actions leading up to and during the litigation. Further, it is conceivable that some of the alleged misconduct, if true, may be worthy of rebuke. While the facts pleaded in the plaintiff's statement of claim may show only a weak case or little likelihood of succeeding, this is not a ground for striking the pleadings under Rule 19(24) or granting summary judgment under Rule 18(6). Thus I must dismiss this portion of the defendants' application. [At para. 38.]
- [9] The defendants did not appeal these rulings.
- [10] With respect to the defendants' application to strike the plaintiff's claim for breach of contract as against Mr. Smith, the chambers judge was of the view that the application must succeed, under either R. 19(24) or R. 18(6). She noted that Mr. Gichuru had admitted he was employed "by the defendant, Howard Smith & Company" and that a contract of employment with Mr. Smith personally had not been alleged. Further, she said: ... the plaintiff has not pleaded any basis for concluding that Mr. Smith, in his personal capacity, had a separate identity or interest from the corporate defendant in the employment contract. In addition, the plaintiff admits that he was articulated to Mr. Beuhler rather than to Mr. Smith. Thus there is no contractual relationship between the plaintiff and Mr. Smith stemming from the articulated student agreement that could support a claim based upon breach of contract. Further, and in any event, it is apparent that the original articulated student agreement wherein Mr. Smith agreed to act as the plaintiff's principal was either void for illegality or superseded by the subsequent articulated student agreement signed by Mr. Beuhler. [At para. 43.]
- [11] The chambers judge also rejected Mr. Gichuru's assertion that the claim against Mr. Smith personally could be justified on the ground that he was the sole operating mind of his law corporation. This had not been pleaded and no affidavit evidence had been filed to this effect. Even if it had been pleaded, the chambers judge said, it was insufficient to support a claim against Mr. Smith personally given that none of the circumstances in which a court will lift the corporate veil to make an officer or director personally liable was present in this case. She noted *ScotiaMcLeod Inc. v. People's Jewelers Ltd.*, (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711, in which the Ontario Court of Appeal had stated that in the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, cases involving personal liability are "rare" and usually involve transactions where the use of the corporate structure was a sham from the outset or was an "afterthought to a

deal which had gone sour." As well, the Court had noted, there are cases in which injured parties to actions for breach of contract have attempted to extend liability to the principals of corporations by pleading that the principals were privy to the tort of inducing breach of contract. The Court of Appeal continued: ... In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. [At 720, quoted by the chambers judge at para. 44; emphasis added.]

- [12] The chambers judge was of the view that none of the circumstances referred to in ScotiaMcLeod was present in this case and that the mere fact Mr. Smith is the sole principal of his law corporation did not provide a proper basis for piercing the corporate veil. Accordingly, she granted the motion to dismiss any claim for breach of contract against Mr. Smith in his personal capacity, pursuant to R. 18.
- [13] With respect to Mr. Gichuru's allegations of breach of fiduciary duty against Mr. Smith personally, however, the chambers judge found that it was not "plain and obvious" that no reasonable cause of action existed or that the cause of action was bound to fail. As she interpreted the statement of claim, Mr. Gichuru was alleging that a fiduciary relationship existed between himself and Mr. Smith as his de facto principal. The chambers judge explained: ... Mr. Smith acknowledges in his affidavit dated December 18, 2009, that during the plaintiff's articles the plaintiff only worked for his law corporation and under his direction. Further, by implication, the plaintiff claims the abrupt termination of the articulated student relationship violated the fiduciary duties owed to him by Mr. Smith. While Mr. Smith deposes that he knows of no facts to support a claim for breach of fiduciary duties, the statement of claim, when given the interpretation most favourable to the plaintiff, contradicts this position. In particular, paragraphs 15 to 20 appear to suggest the plaintiff was terminated to facilitate the hiring of another articulated student and, generally, the statement of claim may be inferred to mean that any termination of an articulated student prior to completion of the articling year is a breach of the principal's fiduciary duties. The authorities are clear that in an application for summary judgment under R. 18(6) a judge should not weigh the evidence to determine issues of fact; the judge should only determine whether there is a bona fide triable issue on the material facts pleaded. ... [At para. 48.] The plaintiff was directed to amend his pleadings to "clearly set out the fiduciary duty as a cause of action and to identify its legal components and the material facts supporting the claim."
- [14] The third part of the defendants' application was to have the claim for punitive damages struck. On this issue, the chambers judge referred to *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29, which reversed a trial judgment that had awarded punitive damages and special costs to a plaintiff who had been wrongfully dismissed by the defendant. The punitive damages and special costs had been awarded on the basis that shortly after the

termination, the defendant had given an incorrect explanation for the termination and had advanced that explanation unsuccessfully at trial. This court ruled that the award of punitive damages should not have been made. In the words of Chiasson J.A. for the Court: In breach of contract cases, punitive damages flow out of egregious conduct of a defendant at the time of the breach. In this case, when dismissing the claim for moral damages, the judge held that the appellant's "conduct at the time of termination was not unfair, unfaithful, misleading or unduly insensitive". He also held that Mr. Marchen did not suffer undue distress. On these findings of fact, punitive damages are not available. [At para. 67; emphasis added.] As well, the chambers judge in the case at bar quoted the leading authority on punitive damages, *Whiten v. Pilot Insurance Co.*, 2002 S.C.C. 18, [2002] 1 S.C.R. 595, where Binnie J. for the majority stated that punitive damages are "imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." (Para. 94, quoted by the chambers judge at para. 40.)

- [15] The chambers judge was of the view that the plaintiff had not alleged any conduct at the time of the alleged breach of contract that could be characterized as coming within the description in *Whiten*. She found additional support for this conclusion in the fact that Mr. Smith had filed an affidavit (as permitted by R. 18(6)) deposing that he could not recall any occasion in which he had treated the plaintiff in a "callous, high-handed or malicious manner". This statement was not contradicted by any affidavit evidence from the plaintiff. In the result, the chambers judge dismissed the claim for punitive damages.
- [16] Finally, the chambers judge noted that although the parties had had divided success in the application, the defendants' application had been made necessary by the "woefully inadequate drafting" of the statement of claim. Since the plaintiff was a lawyer and should be expected to prepare proper pleadings, she ruled that he should bear the defendants' costs of the application in any event of the cause, and she awarded lump sum costs of \$1,800, inclusive of disbursements, to the defendants pursuant to R. 57(13.1).
- [17] Following issuance of the chambers judge's reasons, the plaintiff filed an amended statement of claim; but since it was not before the chambers judge, I am of the view that this court should not consider it. I gather that Mr. Gichuru paid over the \$1,800 to the defendants before filing the amended pleading. On Appeal
- [18] In his factum, Mr. Gichuru submits that the chambers judge: A) erred in law in striking the Appellant's claim for punitive damages; B) erred in law in dismissing the Appellant's claim for wrongful dismissal against the personal defendant Howard Smith; C) erred in law in restricting the Appellant from amending the Statement of Claim; D) erred in law in ordering costs in any event of the cause against the Appellant; E) erred in law in awarding special costs against the Appellant; and F) breached the principles of natural justice by ordering the Appellant to pay costs in any event of the cause and to pay special costs without providing the Appellant the opportunity to be heard.

- [19] I turn first to the alleged error regarding the claim for breach of contract against Mr. Smith personally. Did the chambers judge err in stating that Mr. Gichuru had not alleged a contract of employment with Mr. Smith? On any proper pleading, this question should not be difficult to answer. But this statement of claim is contradictory and confusing: Mr. Gichuru alleges in para. 2 that Mr. Smith practised "as a law corporation" but in para. 3 that Mr. Smith and his corporation practised under the name "Howard Smith & Company". Mr. Gichuru submits that if one proceeds on the basis that he was employed by Howard Smith & Company (as pleaded at para. 6) and that Mr. Smith and his corporation practised under that name, it follows that the plaintiff was employed by Mr. Smith personally.
- [20] With respect, this does not follow. If in fact Mr. Smith practised law through his corporation, then Mr. Smith was not practising personally and the corporation (alone) was practising under the name "Howard Smith and Company". I am not persuaded the plaintiff did plead a contract of employment between himself and Mr. Smith personally. Further, the statement of claim makes no reference to a wrongful termination of the contract of employment - although it does claim for compensation for loss of employment income and for delayed entry into the profession. The focus is instead on the alleged fiduciary duty said to have been owed by Mr. Smith to the plaintiff.
- [21] However, several facts militate in favour of a less draconian order than that made by the chambers judge in this instance. First, the defendants stated in their statement of defence at para. 4 that Mr. Smith practised law under the name "Howard Smith and Company". In addition, the plaintiff would have been entitled to amend his pleading following the hearing below to clarify the cause he is asserting and against whom he is asserting it - indeed, s.4(1) of the Limitation Act, R.S.B.C. 1996,c. 266, allows a person to be added as a defendant notwithstanding the lapse of a limitation period. Implicit in this provision is a policy that parties should be permitted to amend their pleadings rather than lose them altogether where a viable cause may exist. Considering also the fact that under R. 8A(3), Mr. Gichuru's notice of claim from Provincial Court (which was more explicit about a claim for breach of contract) is deemed to become the writ of summons in Supreme Court, I conclude that the chambers judge erred in striking the breach of contract claim against Mr. Smith personally, rather than permitting him to make the appropriate amendments to his pleading. I would allow the appeal to that extent.
- [22] Turning next to the issue of punitive damages, I note first the difference between R. 19(24), under which the case is taken at the highest for the plaintiff and only the pleadings are considered (see *Canadian Bar Ass'n. v. British Columbia* 2008 BCCA 92, 290 D.L.R. (4th) 617 (C.A.)) and R. 18, under which the question is whether the material facts necessary to support a cause of action have been pleaded and whether, assuming the facts most favourable to the plaintiff, he or she is "bound to lose": see *Carnaham v. Coates* (1990) 71 D.L.R. (4th) 464 (B.C.S.C.); *Pitt v. Holt* 2007 BCSC 1555; *Lougheed v. Wilson* 2009 BCCA 537, at para. 8. In the case at bar, the chambers judge struck the claim for punitive damages pursuant to R.18.

- [23] The plaintiff conceded before us that the allegation at para. 24 of his pleading could not form the basis for an award of punitive damages, based on *Marchen*, supra. I understood his submission to be that there were three remaining items that could qualify for punitive damages - the (inferred) allegation that the contract of employment was terminated so that Howard Smith & Company could hire someone else known to Mr. Smith; the allegation that Mr. Smith had falsely stated in his reply that the date of Mr. Gichuru's termination was before April 22, 2002 and had not withdrawn this "false statement" until the first day of trial in Provincial Court; and the statement that Mr. Smith had "taunted" the plaintiff outside the courtroom on the first day of trial in Provincial Court. In my opinion, only the first allegation could be regarded as conduct that took place at the time of breach or was sufficiently connected in time as to be regarded as part of the alleged breach of contract or fiduciary duty on Mr. Smith's part. Like the chambers judge, however, I am of the view that even if this conduct supported a finding of breach of fiduciary duty, it could not support an inference that the alleged fiduciary duty was breached in a manner that could be regarded as high-handed, malicious or arbitrary. I would therefore dismiss this ground of appeal.
- [24] This leaves the chambers judge's award of lump sum costs of \$1,800 pursuant to R. 57(13.1). That rule states: The court may award lump sum costs of an interlocutory application and may
- (a) fix those costs, either inclusive or exclusive of disbursements, or
 - (b) order that the costs amount be in accordance with Schedule 3 of Appendix B and fix the scale of those costs in accordance with section 2(2), (4.1) and (4.2) of that Appendix. Also relevant are sub-rules 57(3) and 57(34), which provide:
 - (3) Where the court orders that costs be assessed as special costs, the registrar shall allow those fees that the registrar considers were proper or reasonably necessary to conduct the proceeding to which the fees relate, and, in exercising that discretion, the registrar shall consider all of the circumstances, including
 - (a) the complexity of the proceeding and the difficulty or the novelty of the issues involved,
 - (b) the skill, specialized knowledge and responsibility required of the solicitor,
 - (c) the amount involved in the proceeding,
 - (d) the time reasonably expended in conducting the proceeding,
 - (e) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding,
 - (f) the importance of the proceeding to the party whose bill is being assessed, and the result obtained, and
 - (g) the benefit to the party whose bill is being assessed of the services rendered by the solicitor. ...

- [34] A bill for special costs or a bill under the Legal Profession Act may be rendered on a lump sum basis.
- [25] The chambers judge did not refer to "special costs" in her reasons, nor make any finding that Mr. Gichuru had carried on his action in a reprehensible way or in a manner deserving of rebuke. Nevertheless, Mr. Gichuru submits that since the sum awarded was two or three times greater than what party-and-party costs would have been, one can infer she intended to award special costs. Proceeding on this assumption, Mr. Gichuru relies on a judgment of a Supreme Court justice in chambers in *Jackpine Forest Products* (Ruling #1) 2004 BCSC 20, in which it was said that the ability to fix lump sum costs under R. 57(13.1)(a) is limited to fixing costs on a party and party basis - even though R. 57 (13.1) refers simply to "lump sum costs" and clause (a), unlike clause (b), does not refer to any particular schedule or tariff. (See also *Pringle v. Pringle* 2009 BCSC 1446.)
- [26] I do not find the reasoning in *Jackpine* to be entirely persuasive, but it is unnecessary for me to determine the matter in this case. In my view, if the chambers judge below intended to award special costs, she was not justified in doing so by any conduct on the part of Mr. Gichuru that could be described as reprehensible or deserving of rebuke. Mr. Gichuru's pleadings were indeed woefully inadequate, but in my opinion, that fact could not have justified an award of special costs. Having said this, I do not agree with the plaintiff's characterization of the costs award as "publicly humiliating".
- [27] Since the amount awarded was far in excess of what party and party costs would have been, I would allow the appeal from this part of the order and substitute an award of party-and-party costs to be assessed and paid in the usual way. (I would not interfere with the chambers judge's discretionary conclusion that costs of the motion should be paid to the defendants in any event of the cause.) The defendants shall return the \$1,800 paid to them by Mr. Gichuru. Summary
- [28] In the result, I would set aside the dismissal of the breach of contract allegation against Mr. Smith personally, on condition that the statement of claim be amended immediately to state the cause of action clearly and to clarify which defendant(s) is or are being sued for that cause. I would set aside the lump sum costs award and substitute therefor an award of party and party costs in any event of the cause. In all other respects, I would dismiss the appeal.
- [29] Finally, I would order that the parties bear their own costs of this appeal. "The Honourable Madam Justice Newbury" I Agree: "The Honourable Madam Justice Bennett" I Agree: "The Honourable Madam Justice Garson" Schedule A

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