

CANADA / JUDGMENT

Hodgins v. British Columbia

2022 BCSC 1152

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1152 Hodgins v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hodgins v. British Columbia,

2022 BCSC 1152

Date: 20220708

Docket: S190346

Registry: Victoria

Between:

Bonnie Hodgins, Litigation Representative on behalf of

David John Hunt, Deceased and Bonnie Hodgins, in her Personal Capacity

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia,

Mainroad South Island Contracting Ltd., Mainroad South Island Contracting Limited Partnership,
Telus Communications Inc., and Emcon Services Inc.

Defendants

Before: Master Harper

Reasons for Judgment

In Chambers

Counsel for the Plaintiff, appearing via video conference:

R. Margetts, Q.C.

J. Aiyadurai

Counsel for the Defendant, Her Majesty the Queen in Right of the Province of British Columbia,
appearing via video conference:

H.G. Campbell

No other appearances

Place and Date of Hearing:

Victoria, B.C.

June 14, 2022

Place and Date of Judgment:

Victoria, B.C.

July 8, 2022

Introduction

[1] The plaintiff alleges against the defendant, Her Majesty the Queen in Right of the Province of British Columbia (the "Province"), that property in Mill Bay, British Columbia (the "Property") registered in the name of the plaintiff's late spouse, David John Hunt, was damaged due to the Province's mismanagement of surface water. The claims against the Province are based in negligence, nuisance, and the doctrine of Rylands v. Fletcher.

[2] The Notice of Civil Claim has been amended several times.

[3] In her Amended Notice of Civil Claim filed June 25, 2021, the plaintiff advances additional claims. These claims arise from a site visit to the Property in March, 2019 conducted by 3D Geomatics Inc. ("3D"). Paragraph 4 of the Legal Basis ("Paragraph 4") states as follows:

The Province has acted in bad faith and is liable for trespass, misfeasance of [sic] public office, abuse of public office, abuse of process, and for making a willfully negligent misrepresentation by entering, or causing its agents to enter, onto the Lands and disturb the Lands under the purported authority of the Expropriation Act and the guise of a stated purpose unrelated to the court action when the Province knew that stated purpose was false and it had no authority under [the] Expropriation Act to enter onto the Lands for litigation purposes.

[4] The Province applied for an order for particulars. In her November 17, 2021 reasons for judgment (indexed at 2021 BCSC 2231), Master Bouck ordered the plaintiff to provide further and better particulars of the new claims set out in Paragraph 4. Further background about the litigation and the nature of the new claims are contained in Master Bouck's reasons and will not be repeated here.

- [5] In granting the order for particulars, Master Bouck said at para. 16:
- [16] Having considered the amended NOCC as an objective outsider, I find that the Province's position on this application must, for the most part, prevail. I agree with the Province's submissions that the amended NOCC does not adequately identify the who (especially the "who"), when, where and how of the new causes of action. By way of example, if 3D's actions are indeed the impetus for the amendments, then it behooves the plaintiff to identify what public office 3D purports to hold and/or how the defendant Province, rather than any individual, can be found liable for abuse of public office or making wilfully negligent misrepresentations to the plaintiff. As the amended NOCC presently stands, the gaps in the factual and legal basis require an order for particulars in order for the defendants to know the case to be met and evidence to be gathered. Absent those particulars, the Province might be in a good position to bring an application to strike the amended NOCC pursuant SCCR 9-5(1)(a) or indeed, seek dismissal of the new claims at trial. As to the essential elements of some of the new causes of action, reference might be had to *Costello v. Hornby Island Local Trust Committee*, 2009 BCSC 1334 and *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619.
- [6] The plaintiff has responded to the order for particulars.
- [7] The Province now seeks an order striking the claims set out in Paragraph 4 pursuant to Rule 9-5(1) of the Supreme Court Civil Rules. The Province takes the position that the facts alleged do not support the legal conclusions set out in Paragraph 4, and that the particulars do not solve the inadequacies of the pleading.
- [8] The plaintiff concedes that the opening words of Paragraph 4, "The Province has acted in bad faith", should be removed because an allegation of bad faith conduct is about facts and is not a cause of action.
- [9] The plaintiff has attached a proposed fourth amended notice of civil claim (the "Proposed Fourth Amended Claim") to her application response. The plaintiff says that if the Third Amended Claim is defective, the Proposed Fourth Amended Claim cures the defects. The Proposed Fourth Amended Claim adds four additional paragraphs to the Statement of Facts section numbered 13.1, 13.2, 14.1, and 14.2. Including the previously pleaded paragraphs, the factual claims regarding the March 2019 3D site visit are now proposed as follows:
13. On or about March 27, 2019, the Plaintiff David John Hunt received a hand-delivered March 27, 2019 Notice of Survey or Geotechnical Investigation (the "Notice") on the Province's letterhead, but purportedly authored by 3D Geomatics Inc., and authorizing a representative of 3D Geomatics the right of entry onto the Lands for the stated purpose of a "study for highway improvement.." "undertaken by 3D Geomatics Inc. staff who are responsible for survey or sub-surface investigations for new or remedial highway construction purposes."
- 13.1 At all material times 3D Geomatics Inc, was an authorized agent of the Province acting within their actual or ostensible authority.

13.2 The Notice cited the Expropriation Act RSBC 1996, c. 125, and the Right of Entry onto Private Land policy as the legal basis for 3D Geomatics Inc, to enter onto the Lands.

14. Pursuant to the Notice, representatives of Province and/or its agent 3D Geomatics Inc. entered onto the Lands and disturbed the Lands.

14.1 At all material times, the Province had no intention of undertaking highway improvements or expropriation but rather intended to gather information pertaining to the subject matter of this lawsuit, being the flow of waters onto the Lands, and, by reason thereof, the instructions to 3D Geomatics to enter the Lands under the guise of the Expropriation Act or for highway improvement or expropriation purposes were misleading or deceptive.

14.2 The entry upon the Lands was not consented to by the Plaintiff David John Hunt and was otherwise improper and unlawful, and constitutes a trespass upon the Lands and is actionable per se.

15. On October 21, 2019, the Plaintiff David John Hunt, by his counsel, demanded that the Province serve an amended list of documents listing, inter alia, various documents relating to the said Notice.
16. On November 8, 2019, the Province wrote to the Plaintiffs David John Hunt's solicitors declining to serve an amended list of documents stating that "The documents are privileged documents involving the engagement of persons with the firms 3D Geomatics and R.F. Binnie to inspect land, search professional resources, and report on the plaintiff's claim. The persons were engaged by or on the direction of the province's solicitors to provide expert advice to the Province's solicitors who have been retained to advise on and defend the claims made by the plaintiff. The documents were dealt with in Part 4 of the Province's list of documents."
- [10] In addition to the proposed amendments to the facts, the Proposed Fourth Amended Claim adds the word "reckless" to the "willfully negligent misrepresentation" claim in Paragraph 4, but otherwise, Paragraph 4 remains as currently drafted.
- [11] I will take the Proposed Fourth Amended Claim into account in considering the application to strike because the court may grant a plaintiff the opportunity to file an amended pleading if the impugned pleading is found to be defective.
- [12] I agree with the Province's position. For the reasons that follow, Paragraph 4 of the Third Amended Claim is struck.

Legal Framework

[13] Rule 9-5(1) states:

- (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 may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

- [14] A court will strike a claim under Rule 9-5(1)(a) where it is plain and obvious, assuming the facts pleaded are true, that the claim discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17. If there is a chance that the plaintiff might succeed, then they should not be "driven from the judgment seat": *Willow v. Chong*, 2013 BCSC 1083, at para. 18.
- [15] The parties agree that the 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. That process is begun by the plaintiff stating for each cause of action, the material facts giving rise to the claim (Rule 3-1(2)(a)), but not the evidence by which that facts alleged are to be proved (Rule 3-7(1)). Material facts are those facts necessary for the purpose of formulating a complete cause of action: *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), at para. 5. Where material facts are missing, the claim has no prospect of success.
- [16] Bare allegations of wrongdoing, supported only by assumptions and speculation, are not material facts that support a claim: *Willow*, at para. 19.
- [17] Defendants should not be required to divine the claims being made against them: *Sahyoun v. Ho*, 2013 BCSC 1143, at paras. 18-22.
- [18] A court will strike a claim under Rule 9-5(1)(b) where it is unnecessary as it does not establish a claim known in law, or it is so confusing that it is difficult to understand what is pleaded: *Willow*, at para. 20.
- [19] A court will strike a claim under Rule 9-5(1)(c) where the pleading does not state the real issue in intelligible form, or has the effect of confusing a defendant, making it difficult, if not impossible, to answer: *Virk v. Brar*, 2012 BCSC 1004, at para. 75.
- [20] The plaintiff argues that because the Province has filed a response to civil claim, the Province understands the case it has to meet. However, the Province was required to file a response to civil claim. The response to civil claim responds to the claims as pleaded, but the Province's pleading does not operate to rectify the defects in the Third Amended Claim, or excuse the plaintiff from the requirements of proper pleading.

Discussion

[21] The plaintiff says that the facts pleaded support the claims set out in Paragraph 4. I start with a general observation: Paragraph 4 is confusing because so many disparate concepts are stuffed into a single sentence. There are six separate claims as far as I can tell:

- 1) trespass;
- 2) misfeasance in public office;
- 3) abuse of public office;
- 4) abuse of process;
- 5) willfully negligent misrepresentation; and
- 6) reckless misrepresentation.

[22] The pleading fails to clearly define the issues of fact and law to be determined by the court, and is drafted in a manner that makes it difficult to answer. The reader is required to work very hard to discern what the writer is trying to convey. In order to analyze whether any of the claims set out in Paragraph 4 can survive, it is necessary to break the sentence down into its component parts and re-write it. Such efforts should not be required.

[23] The particulars do identify the date of the entry onto the land as being March 2019. As for any new loss or damage arising from the new causes of action, the plaintiff concedes in the particulars that the alleged trespass did not cause any physical damage to the Property, but claims "additional loss and damages, including non-pecuniary and punitive damages". These claims of loss and damages are adequate for pleadings purposes (whether they are supported by evidence is another matter), and were contemplated by Master Bouck in her reasons (para. 19).

Claims Requiring the Establishment of an Agency Relationship between the Province and 3D

[24] The claims in trespass, abuse of process, and willfully negligent misrepresentation (and the proposed new claim of reckless misrepresentation) are contingent on an agency relationship being found between the Province and 3D, the party who is alleged to have trespassed on the Property or improperly entered the Property. The Province argues that the Third Amended Claim does not plead the material facts required to establish an agency between the Province and 3D. The Proposed Fourth Amended Claim adds a paragraph in the Statement of Facts section, alleging that 3D was an authorized agent of the Province acting within their actual or ostensible authority.

[25] The Province argues that whether or not an agency relationship arises out of a factual context is a conclusion of law: *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744, at para. 126, citing *Gardner v. Ontario* (1984), 45 O.R. (2d) 760 (H. Ct. J.).

- [26] The law of agency is not a single legal concept. There are different types of agency which can arise out of different factual scenarios. The plaintiff argues that agency is a matter of mixed fact and law, and cites *Silver Campsites Ltd. v. Pulham*, 2010 BCSC 1990 in support of this proposition. *Silver Campsites Ltd.* was a judicial review of a dispute resolution officer's decision under the Manufactured Home Park Tenancy Act, S.B.C. 2002, c. 77. The agency issue arose in a context specific to the facts of that case. The facts of *Silver Campsites Ltd.* are far removed from the facts of the present case. However, even if the plaintiff's position is correct, and agency is a question of mixed fact and law, the bald pleading of fact that 3D is the Province's agent is a deficient pleading.
- [27] The pleader must plead the facts carefully and precisely so as to fit within the type of agency that the pleader seeks to establish. Here, the plaintiff advances various claims that require a finding of agency in different contexts (trespass, abuse of process, willfully negligent and reckless misrepresentation). The pleading in the present case as set out in proposed paragraph 13.1 is bare bones and vague. The bare assertion that "at all material times 3D was an authorized agent of the Province acting within their actual or ostensible authority" is insufficient to set out the material facts specific to each claim that requires a finding of agency in order to succeed. The reader is required to guess at the meaning the plaintiff intends to convey. I agree with the Province that the claims which depend on a finding of agency are not adequately pleaded and should be struck pursuant to Rules 9-5(1)(a) and (c).

Misfeasance in Public Office/Abuse of Public Office

- [28] The Court of Appeal in *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 [Rain Coast], citing *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 at para. 150, addressed the tort of misfeasance:
- [150] [] the tort of misfeasance in public office is based on the premise that public officers must exercise their power only for the public good and not deliberately and unlawfully for ulterior or improper purposes. The underlying rationale of the tort is the protection of every citizen's reasonable expectation that those who hold public office will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of their public functions. Its ambit is narrow and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious misconduct []
- [29] The plaintiff, in her application response, says "the Province has engaged in egregious intentional misconduct", but does not identify in her pleading which public official engaged in the alleged misconduct.
- [30] Misfeasance in public office is an intentional tort. The actions and motivations of each individual actor involved must be considered separately. A claim of misfeasance in public office must be pleaded and advanced against the individual public office-holder who allegedly committed the wrongdoing in question: *Rain Coast*, at para. 151. It is crucial that

the pleading give notice to the alleged tortfeasors so that they know the case against them and have the opportunity to defend themselves. The Court of Appeal in *Rain Coast* emphasizes throughout the reasons the importance of properly pleading misfeasance in public office.

[31] To establish misfeasance in public office, a plaintiff must prove four elements:

- a) the defendant is a public officer who acted deliberately and unlawfully in their capacity as a public officer;
- b) the defendant was aware that their conduct was both unlawful and likely to injure the plaintiff;
- c) the tortious conduct was the legal cause of the plaintiff's injuries; and
- d) the injuries suffered are compensable in tort law.

See: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 32

[32] The Third Amended Claim does not adequately set out the material facts in support of a claim of misfeasance in public office. The plaintiff has failed to identify the individual or individuals who has alleged committed the tort. All the plaintiff says in the particulars is that they may be employees of the Ministry of Transportation and Infrastructure or the Attorney General (referred to simply as "AG"). The only reference to an employee of the AG is by inference at paragraph 16 of the Third Amended Claim which references a letter written by "the Province" wherein a claim of privilege is made regarding certain documents. The author of the letter can only be counsel for the Province.

[33] In submissions, counsel for the Province (who is not counsel for the Province referenced in the Third Amended Claim) submitted that the plaintiff was "dancing around" the allegation she was intending to make that it was counsel for the Province who was the public official who committed the tort of misfeasance in public office, or who acted on the instructions of another official. I agree with counsel for the Province on this point. If the plaintiff is going to level serious accusations against public officials, she must have the courage of her convictions and do so in a plainly stated way in her pleading so that the individuals accused know the case against them. If the individuals' names are not currently known to the plaintiff, she should identify them as "John Doe" or "Jane Doe" (or some other moniker) and describe specifically what they did, when they did it, and in what way their actions constituted the intentional tort of misfeasance in public office, given the required elements of that tort.

[34] In the present case, the particulars of the claim of misfeasance in (or abuse of) public office are set out as particulars of bad faith. It is not clear to me how the words in parentheses add to, or differ from, the previous words. Is "misfeasance in" a different claim from "abuse of"? Are the phrases synonymous? At the very least, the drafting needs to be clearer, especially since misfeasance is such a serious claim. The plaintiff concedes that bad faith should not

be included in the Legal Basis as bad faith is not a stand-alone tort. Therefore, it is not possible based on the particulars to discern the facts on which a claim for misfeasance in public office is based.

- [35] If the basis for alleging misfeasance in public office is the claim of privilege over a document, there is no such authority for that proposition. I agree with the Province's position that unfounded claims of privilege are properly dealt with by an application to court pursuant to Rule 7-1 for an order that the opposing party disclose the document. The claim of privilege can then be dealt with on affidavit evidence. A claim that a lawyer acting for the Province can be guilty of misfeasance in public office for making a claim of privilege on behalf of a client cannot succeed.
- [36] No other facts are pleaded against counsel for the Province. Assuming this one fact is true, it fails to establish any of the four elements of misfeasance.
- [37] A claim in misfeasance requires more than a "bald pleading" that a public official acted for an improper purpose. There must be material facts about specific officials and their specific unlawful purpose in acting as they did.
- [38] The facts alleged against other employees of the Province for misfeasance are unfounded as they fail to establish any of the requisite four elements:
- a) Retaining a survey company is not an unlawful act;
 - b) No facts are pleaded that could establish they were aware that their conduct was both unlawful and likely to injure the Plaintiffs;
 - c) No facts are pled that could establish how the tortious conduct was the legal cause of the Plaintiffs' injuries; and
 - d) There is no law supporting or setting out how any such injuries are compensable in tort law.
- [39] In the result, the claims for misfeasance in public office must be struck under Rule 9-5(1)(a) for disclosing no reasonable cause of action.

Conclusion

- [40] Paragraph 4 is struck. The question now is whether the plaintiff should be given an opportunity to file an amended notice of civil claim that rectifies the defects. The Proposed Fourth Amended Claim does not adequately rectify the defects. I think it is appropriate to give the plaintiff another chance to file an adequate notice of civil claim that meets the required level of specificity, especially given the serious nature of the claims advanced.
- [41] Neither counsel referred to *FORCOMP Forestry Consulting Ltd. v. British Columbia*, 2021 BCCA 465 in their written or oral submissions. This case addresses, among other things, the requirements of pleadings in claims of misfeasance in public office. The Court of Appeal in *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at paras. 319

through 331, describes the elements of the tort of misfeasance in public office. It might be useful for counsel for the plaintiff, when drafting the revisions to the Third Amended Claim, to refer to FORCOMP and J.P., in addition to the authorities mentioned by Master Bouck at paragraph 16 of her reasons.

[42] Costs will be to the Province in the cause.

"Master Harper"

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