

CANADA / JUDGMENT

Holman v. Leung

2022 BCSC 1047

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1047 Holman v. Leung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Holman v. Leung,

2022 BCSC 1047

Date: 20220622

Docket: M182559

Registry: Victoria

Between:

Melissa Lee Holman

Plaintiff

And

Ngan Kum Leung and Li-Kai Chen

Defendants

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiff:

S. Missaghi

Counsel for the Defendants:

R.W. Parsons

Place and Date of Hearing:

Victoria, B.C.

May 4, 2022

Place and Date of Judgment:

Victoria, B.C.

June 22, 2022

- [1] I gave judgment in this matter on June 15, 2021, awarding damages for injuries arising from an accident on July 11, 2016 (the "Accident"). My reasons for judgment are indexed at 2021 BCSC 1168. The judgment included an award for cost of future care (the "Care Award") totalling \$104,400.
- [2] In September 2021, the defendants applied for an order that the Care Award be reduced on the basis that specific items of care included in my judgment will be covered by benefits payable to the plaintiff under Part 7 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 (the "Act"). On November 30, 2021, I issued reasons for judgment which are indexed at 2021 BCSC 2328 (the "Section 83 Judgment"). In the Section 83 Judgment, I ordered that the Care Award be reduced by \$26,050, pursuant to s. 83 of the Act.
- [3] I also stated at para. 35 that:
- [35] I would adopt the approach of Smith J. in Sodhi at para. 29 and direct that ICBC's "irrevocable, unequivocal and unconditional" commitment to pay these benefits be recited in the formal order.
- [4] That was a reference to Kim v. Sodhi, 2020 BCSC 2023, where Justice N. Smith stated at para. 29 that:
- [29] In order to obtain the benefits that are the subject of that deduction, the plaintiff will likely be required to deal over the years with a series of ICBC employees, who may or may not be aware of the commitments and waivers Mr. Cumberbatch has made on behalf of ICBC. In an effort to reduce future confusion, ICBC's "irrevocable, unequivocal and unconditional" commitment to pay these benefits should be recited in the formal order.
- [5] In the present case, the plaintiff (like Mr. Kim in Kim) was relatively young, and the Care Award contemplated physiotherapy and massage therapy continuing for several decades.
- [6] In the Section 83 Judgment, I described at some length the commitments made on behalf of ICBC by its claims specialist, Mr. Robirtis. Those commitments are set out at paras. 17-22 under the heading "ICBC's Commitments". The Section 83 Judgment makes clear that those commitments provided an appropriate degree of certainty for a deduction to be made from the award pursuant to s. 83.

- [7] The parties requested a brief appearance before me in order to "settle the order" - specifically in terms of how best to reflect the direction in para. 35 that:
- [35] ICBC's "irrevocable, unequivocal and unconditional" commitment to pay these benefits be recited in the formal order".
- [8] Each of the parties submitted their proposed form of order. The plaintiff's order contained a two-part recital as follows:

WHEREFORE the Insurance Corporation of British Columbia has represented to this Court, through the affidavit of Dustin Robirits, the following waivers and commitments:

- a) ICBC irrevocably, unequivocally and unconditionally waives (i) the need for continued certification under section 88(1.01) and 98 of the Regulation to the Insurance (Vehicle) Act, (ii) the power to require the Plaintiff to undergo treatment under section 90 of the said Regulation, and (iii) the power to require the Plaintiff to submit to a medical examination under section 99 of the said Regulation for the treatment items awarded by this Court; and
- b) in respect of the amount awarded to the Plaintiff by the Court for physiotherapy, massage therapy and kinesiology (the "Rehabilitation Items") as set out in the Reasons for Judgment indexed *Holman v. Leung*, 2021 BCSC 1168, ICBC accepts the amounts the Court has awarded for those items as reasonable and necessary, and waives the need for continued certification under section 88(1.01) with respect to the Rehabilitation Items and will irrevocably, unequivocally, and unconditionally pay, under Part 7 of the Regulation to the Insurance (Vehicle) Act, up to \$36,611.27 in total for the Rehabilitation Items as incurred and submitted to ICBC by the Plaintiff for reimbursement up to the amounts set out in the Reasons for Judgment indexed *Holman v Leung*, 2021 BCSC 1168, at paragraphs 149-150.
- [9] The defendants' proposed form of order contained no specific reference to ICBC's commitments, or to ICBC at all. Instead, it proposed that the introductory paragraph, after reciting appearances at the September 2021 hearing, state:

AND ON READING the affidavit of Dustin Robirtis made on 01 September 2021, filed on behalf of the defendants

- [10] Counsel for the defendants provided a 10-page submission asking, in effect, that I reconsider the direction set out in para. 35 on the basis that the inclusion of such a provision in a former order of the court is contrary to established practice and binding Court of Appeal authority. While the defendants submitted that I did not necessarily have to conclude that N. Smith J. should not have made the order he did in *Kim*, they alternatively argued that I can do so on the basis of the second of the three grounds listed in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at 592, 1954 CanLII 253 (B.C.S.C) - that is, that N. Smith J. failed to consider binding authority.

- [11] The foundation of the defendants' argument is an assertion that the commitments given by ICBC are merely a matter of evidence. The submission defines the commitments as "ICBC's Evidence" and uses that defined term throughout the submission.
- [12] The defendants referred me to several legal authorities which are said to be inconsistent with the direction that I gave in this matter.
- [13] In *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267, various disputes with respect to pleadings and certification as a class action had been before both the Supreme Court and the Court of Appeal. The formal order from an initial appeal provided that:

AND THIS COURT FURTHER ORDERS that the application for certification of these proceedings as class proceedings be remitted back to the Supreme Court of British Columbia for disposition in accordance with the Reasons for Judgment of this Court.

- [14] With respect to the underlined words, Smith J.A. commented at paras. 18-19 that:
- [18] It is the responsibility of the parties, with the assistance of the registrar, if necessary, to prepare orders that give definitive expression to the decisions of the courts. Court orders should be clear, complete, and intelligible on their face so that those who are affected by them or must act on them will readily see what rights have been declared and what directions have been given. They must be susceptible of enforcement. Thus, they should not require resort to extrinsic sources, such as to the pleadings or the evidence or the reasons for the decision, as aids to interpretation in order resolve uncertainties or ambiguities and to arrive at an understanding of their provisions.
- [19] The formal order in this case was not drawn up in that conventional fashion. Rather, the phrase I have emphasized, which was merely plucked from the last paragraph of the reasons for judgment, is vague and uncertain and has led to unnecessary difficulties in the renewed proceedings in the trial court.

[Emphasis added.]

- [15] In *JEL Investments Ltd. v. Boxer Capital Corporation*, 2011 BCSC 1767, the Court had allowed an appeal from the award of an arbitrator. The parties could not agree as to the proper form of order. As noted by Justice Goepel (as he then was) at paras. 10-11:
- [10] I do not accept Mr. Harbottle's submission that the order should amend the award of the arbitrator by adding a provision that sets out my interpretation of the agreement. I have found that the arbitrator erred in his interpretation of the agreement. As a result of that error, I have set aside the arbitrator's award insofar as it concerns the payment of the capital adjustment.
- [11] My order, like the original order of the arbitrator, should be restricted to the result. My reasons for reaching that conclusion should not form a part of the order

[Emphasis added.]

[16] In *Law v. Cheng*, 2016 BCCA 120, the appellant sought to appeal a finding reflected in a recital to the formal order, which stated:

AND UPON THE COURT finding that the respondent [the mother] has willfully disobeyed paragraph 5 of the order pronounced by the Honourable Mr. Justice G.C. Weatherill on October 31, 2014 by repeatedly removing the Child from his permanent residence in the Lower Mainland of British Columbia without the written consent of the claimant [the father] and without court order, and contrary to the expressed non-consent of the claimant, the Child's joint guardian.

[17] The Court quashed the appeal, finding that it had no jurisdiction to hear an appeal from a recital to an order. The reasoning of Justice MacKenzie, for the Court, is set out at paras. 14-16:

[14] The recital in this case consists of a finding from the reasons for judgment of the chambers judge. The difficulty is that a recital of argument or reasons has no place in an order: *Bishop of Victoria v. Victoria (City)*, [1933] 4 D.L.R. 524, [1933] 3 W.W.R. 332 (B.C.C.A.); *Attorney General of B.C. v. Lindsay*, 2009 BCCA 159 at para. 12; *Knapp v. Town of Faro*, 2010 YKCA 7 at para. 6; *Warde v. Slatter Holdings Ltd.*, 2016 BCCA 63 at para. 53.

[15] Although *Bishop* is generally accepted for the above principle, it is worth noting that only two of the four judges on the division addressed the issue of the appropriateness of the insertion into the order of the recital at issue there. Macdonald C.J.B.C. found the inclusion of the recital in the order to be justifiable in the circumstances. Martin J.A. found: "That it is contrary to the established jurisprudence of the Courts of this Province to recite or include arguments or reasons in their judgments is beyond controversy." (p. 533). However, he did not go as far as to disregard the recital on appeal (p. 534):

But though the said recitals (while inserted doubtless with the best intentions) have unfortunately, though unwittingly, brought, to me at least, additional difficulty and, indeed, embarrassment, in the determination of the present important question, yet I feel that we cannot go to the length of disregarding the positive statement by the learned trial Judge of his reasons for his decision, even though that reason should have been given in the proper way

The other two judges did not address the issue or expressly prefer one analysis over the other.

[16] *Bishop* has been interpreted for the now settled principle that an order ought not to recite argument or reasons.

[Emphasis added.]

[18] There are situations where it is appropriate for the formal order to express more than just the result. In *Rainbow Country Estates Ltd. v. Resort Municipality of Whistler*, [1994] B.C.W.L.D. 1488, 1994 CanLII 1996, in the context of an application in chambers to settle appeal books, Justice Southin commented at para. 4 that:

- [4] The first problem is that the order of Mr. Justice Thackray does not recite what affidavits were before him or what other evidence. I appreciate that orders are frequently drawn this way and this kind of way of drawing an order causes plainly trouble. It is a much better practice of assistance to this Court for any order made in the court below to recite what affidavits and other materials if any were before the judge.
- [19] Similar sentiments were expressed more briefly in *Kongrecki v. Rafael* (1993), 81 B.C.L.R. (2d) 378, 1993 CanLII 1931 (C.A.) at para. 2. Both *Rainbow Country Estates Ltd.* and *Kongrecki* involved chambers applications and I read them as applying to applications heard in chambers (rather than trials involving viva voce evidence). The defendants point to these authorities as supporting their proposed reference to the affidavit of Mr. Robirtis in the formal order in this proceeding.
- [20] The plaintiff argues that ICBC, in its capacity as the provider of Part 7 benefits, has voluntarily injected itself in this proceeding in order to give a sworn promise to make certain payments over a period of many years. The plaintiff says that where the Court relies on commitments like those given by ICBC in this case, and those commitments are a key part of the foundation for the Court's decision, it is appropriate to require that they be reflected in a recital to the order.
- [21] The plaintiff notes that the approach in *Kim* of giving of a direction as to inclusion of ICBC's commitments in a formal order has been followed in at least three other reported decisions of this Court, including:
- a) *Kingston v. Mann*, 2021 BCSC 426 at para. 25, where Justice Duncan said:
- [25] the order should contain the language noted above about the irrevocable nature of ICBC's commitment to pay the amounts I have deducted from the tort award. Smith J. required the same in *Kim* on the basis that different Claims Specialists in the future should have notice of the terms under which the deductions have been made.
- b) *Rix v. Koch*, 2021 BCSC 1526 at para. 78, where Justice D. MacDonald said:
- [78] I agree with Smith J. that it is appropriate to include ICBC's "irrevocable, unequivocal and unconditional" commitment to pay the deducted benefits, to the limits set out in Mr. Tam's affidavit, in the formal order to avoid any concerns Ms. Rix may have regarding ongoing benefit payments: *Kim* at para. 29.
- c) *Purewal v. Uriarte*, 2021 BCSC 1935 at para. 77, where Justice Baker said:
- [77] In addition, I order the commitments and waivers made by Ms. Perry in her affidavit in support of this application to be included in the formal order entered in this case, as was done in *Kim v. Sodhi*, 2020 BCSC 2023.

- [22] I am advised that counsel were unable to locate entered orders in any of these three cases. The only entered order they were able to find was an order of Justice Thompson reflecting an oral judgment given October 21, 2021 in *Valand v. Campbell*, No. M76068, Nanaimo Registry, that has not been transcribed but as to which a formal order has been entered. The plaintiff's proposed wording in this case is based on the wording used in Thompson J.'s order.
- [23] As I noted above, the defendants' submissions are premised on ICBC's commitments as being merely a matter of evidence. I do not see them that way. The commitments are of course drawn to the attention of the Court through an affidavit, but in my view the commitments bear more in common with the undertaking as to damages typically given in connection with an interlocutory injunction. An undertaking in those circumstances is also typically brought to the court's attention through the filing of an affidavit, but is usually reflected in a recital to the court's formal order.
- [24] The historical roots of the practice of including undertakings as to damages in interlocutory injunction orders, now codified in Rule 10-4(5) of the Supreme Court Civil Rules, are reflected in the comments of C.C.M. Dale & W. Clowes, *Seton on Decrees*, 5th ed. (London: Stevens & Sons London, 1891) at 4-5:

In point of form, a judgment or order of the Court, as ultimately drawn up, consists usually of two parts: one, preliminary or introductory, and the other containing the actual adjudication or pronouncement of the Court.

The function of the first or preliminary part of the order is to show the circumstances attending the making of it. Accordingly, in this part is stated briefly the form of the application to the Court, who are the parties appearing, and any consents, waivers or undertakings given by them, and reference is made to the evidence adduced before the Court upon which the order is based

[Emphasis added.]

- [25] The purpose of specifically reciting an undertaking was described by Justice Twaddle in *T-W Insurance Brokers Inc. v. Manitoba Public Insurance Corp.* (1997), 115 Man. R. (2d) 305, 1997 CanLII 22870 (C.A.) at para. 13:
- [13] Where an interlocutory injunction is granted, it should recite the undertaking as to damages given by the plaintiff as required by Queen's Bench Rule 40.03. It was suggested in argument that this undertaking is to be implied in every interlocutory injunction by reason of Rule 40.03. That may be -- I do not so decide - but, at least for greater certainty and to make sure that the plaintiff knows the price of obtaining such an injunction, the undertaking should be expressed.

[Emphasis added.]

- [26] The court, in granting an interlocutory injunction, relies upon the undertaking to ensure fairness to the defendant who may be harmed if it turns out the injunction was wrongly granted. In reducing an award for treatment listed in the Schedules to the Act pursuant to s. 83, the court may rely on a commitment given by ICBC to provide certainty that the plaintiff's Part 7 benefits will in fact cover all or some of those costs: *Del Bianco v. Yang*, 2021 BCCA 315 at para. 67.
- [27] I do not see the reference to ICBC's commitment as being an impermissible and unclear reference to an extrinsic source (Halvorson) or a recital of argument or reasons (JEL Investments; Law). I see the comments of Southin J.A. in *Rainbow Country Estates Ltd. and Kongrecki* as confirming and reflecting a discretion in the court to require additional text to be included in a formal order where necessary or appropriate to serve a specific purpose.
- [28] In my view, the practice of directing that such commitments be referenced in the formal order is consistent with established practice in comparable areas (i.e., interlocutory injunction) and does not run afoul of any of the established authorities to which I was directed by the defendants.
- [29] As a result, I would not vary the order that I made at para. 35 of the Section 83 Judgment.
- [30] That does not mean that I accept the wording put forward by the plaintiff in this case. I recognize that it is based on that used in *Valand*. However, I find it wordy and duplicative and am uncomfortable with the use of the word "Wherefore" in a formal order of the court.
- [31] I note that in *McLachlin & Taylor*, British Columbia Court Forms, 2nd ed., looseleaf (Markham, ON: Butterworths, 2005) at s. 15F3, the proposed wording for the first part of the formal order for an interlocutory injunction includes the following:

AND the plaintiff by the plaintiff undertaking to abide by any order this court may make as to damages in case this court shall be of the opinion that the defendant shall have sustained any damages by reason of this order which the plaintiff ought to pay

- [32] In my view, the appropriate wording in this case would be along the following lines:

AND on the Court receiving the irrevocable, unequivocal and unconditional commitment of the Insurance Corporation of British Columbia:

- (a) to pay, under Part 7 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, up to \$12,852.27 for massage therapy, \$22,349.00 for physiotherapy, and \$1,410.00 for kinesiology, as the plaintiff incurs and then submits to ICBC for reimbursement, and up to the amounts allowed pursuant to s. 88(1.2) and to Schedule 3.1 of the Insurance (Vehicle) Regulation, BC Reg 447/83, as amended; and

(b) to waive, for the items and to the limits set out in (a) above, (i) the need for continued certification under s. 88(1.01) of the Regulation, (ii) the need for continued certification under s. 98 of the Regulation, (iii) the power to require an insured to undergo treatment under s. 90 of the Regulation, and (iv) the power to require an insured to submit to a medical examination under s. 99 of the Regulation.

[33] I see that wording as consistent with standard forms and adequately reflecting the specific commitments relied upon by the Court.

"Veenstra J."

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