

CANADA / JUDGMENT

Jensen v. Ross

2014 BCCA 173

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 173 Jensen v. Ross

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jensen v. Ross,

2014 BCCA 173

Date: 20140502

Docket: CA040471

Between:

Cynthia Jane Jensen

Appellant

(Plaintiff)

And

Margaret Ross, Dr. Kirstie Overhill,

Ministry of Children and Family Development,

Polly Powley, Janice Pentland-Smith, Paul McKinnon,

Don Fairweather, Blaine Hagedorne, Elaine Hagedorne,

Super Valu Grocery Store, Dr. Ruth Campling,

North Shore Home Support Services, and

RCMP, Gibsons Detachment

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Garson

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated November 29, 2012 (Jensen v. Ross, Fort St. John Docket No. 20551).

The Appellant Cynthia Jane Jensen:

Appearing in Person

Counsel for the Respondent Margaret Ross:

S. Brearley

Counsel for the Respondents

Dr. Kirstie Overhill and Dr. Ruth Campling:

R.D. Irving

Counsel for the Respondent North Shore Home Support Services:

S.L. Hamilton

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Don Fairweather:

J.G. Bye

Counsel for the Respondents

Blaine Hagedorne, Elaine Hagedorne

and Super Valu Grocery Store:

J. Flemming

Counsel for the Respondent Ministry
of Children and Family Development,

Polly Powley, Janice Pentland-Smith

and Paul McKinnon:

P. Manhas

Place and Date of Hearing:

Vancouver, British Columbia

April 7, 2014

Place and Date of Judgment:

Vancouver, British Columbia

May 2, 2014

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Garson

Summary:

The appellant brought proceedings in 2011 concerning events that took place between 1988 and 1990. On an application to amend her style of cause the chambers judge expressed concern that the claims appeared to have been brought out of time, seized herself of the matter and ordered a case planning conference. At the case planning conference the chambers judge struck the appellant's claims as being an abuse of process under Rule 9-5(1) because they were barred by the Limitation Act. The appellant submits the chambers judge erred in making a final order at the case planning conference and in striking her claims without a factual foundation.

Held: appeal allowed, matter remitted to the Supreme Court. The chambers judge should not have determined the matter on her own motion. An application requiring affidavit evidence or leading to a final judgment should not be decided at a case planning conference. Based on the notice of civil claim alone it was not clear and obvious that the plaintiff could not succeed or that the action was an abuse of process. The limitation issue only arises if it is pleaded in defence and cannot be resolved in an evidentiary vacuum because of the 30-year ultimate limitation period.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] This appeal raises for consideration the power of a Supreme Court judge to dismiss a proceeding at a case planning conference ("CPC"); whether a cause of action which on its face appears to be outside the applicable limitation period can be dismissed as an abuse of process; and the appropriateness of a judge deciding a matter on her own motion.

BACKGROUND

- [2] The appellant commenced these proceedings on February 28, 2011. The notice of civil claim makes allegations against the various named defendants concerning events surrounding the birth of her daughter and her daughter's subsequent apprehension by representatives of the Ministry of Social Services and Housing. The events which are the subject matter of the allegations took place between August 1988, and July 1990. There are numerous claims against each of the defendants and the appellant alleges that as a result of their actions she sustained various personal injuries.
- [3] On March 5, 2012, and May 29, 2012, the appellant received orders extending the time to serve the various defendants. By the end of June 2012, she had served all of the named defendants except the RCMP, Gibsons Detachment.
- [4] On June 28, 2012, the appellant filed an ex parte application in which she sought to amend her style of cause to properly name the RCMP as a defendant and to add as defendants several additional individuals who were employees of certain of the organizations already named as defendants in the actions.
- [5] When the application came on for hearing on June 29, 2012, the appellant, who has been self-represented throughout, appeared by telephone. The chambers judge expressed her concern to the appellant that all her claims appeared to have been brought out of time. She urged the appellant to obtain legal advice and warned her that if applications were brought by the named defendants to strike out her claim, the defendants could all get costs against her.
- [6] In the course of the hearing the chambers judge suggested that the proceedings were an abuse of process because they had no hope of succeeding. She told the appellant it would not be appropriate for all the defendants to be troubled with the lawsuit if it was not properly brought and it appeared to her that it was not.
- [7] In the result, the chambers judge adjourned the application to add additional parties, seized herself of the proceeding and directed that no further steps be taken in the action until a CPC could be convened.
- [8] On September 4, 2012, the appellant wrote to trial scheduling to arrange the CPC that the chambers judge had ordered. The conference was ultimately scheduled for 9:15 a.m. on November 29, 2012. By that time seven responses to the notice of civil claim had been filed by six separate law firms on behalf of the various defendants who had been served. Six of the responses pled that the claims were barred pursuant to the Limitation Act, R.S.B.C. 1996, c. 266. Four of the responses pled that some or all of the claims did not disclose a cause of action. One response pled that the claims were frivolous and vexatious. None of the defendants pled that the claims were an abuse of process.

- [9] In advance of the CPC all of the parties, including the appellant, filed case plan proposals. Under the heading "Other" the appellant raised for consideration scheduling for service of the notice of civil claim on amended parties, amending her pleadings and arguments regarding postponement of limitation. The defendants in their case plan proposals indicated under the heading "Other" that they intended to seek an order that the plaintiff's claims be struck given the expiry of the limitation period, an order for security for costs, and an order that the action which was set in the Fort St. John registry be transferred to the Vancouver registry. The defendants did not, however, file any applications seeking the relief set out in their CPC briefs.
- [10] The defendants attached to their case plan proposals a written argument that the claim should be struck out under the Limitation Act. In their written submissions the defendants suggested, in the alternative, that it was plain and obvious that the claims could not succeed and the action should be dismissed pursuant to Rule 9-5(1)(a) as disclosing no reasonable claim or as an abuse of process within the meaning of Rule 9-5(1)(d).
- [11] On November 16, 2012, the appellant wrote to trial scheduling concerning the case planning conference. She inquired as to whether or not she could be allowed to file affidavit evidence.
- [12] In response the appellant was advised in an email of November 19, 2012, from trial scheduling that:

You should come prepared with an argument as to why the claims you are asserting are not out of time. You do not need to have affidavits, but a brief written outline of your argument (just a page or two) would be helpful. You should describe in a general way what amendments you intend to make to the pleading. This should be sent to the Court and the other lawyers two days before the CPC. The rest of the questions can be addressed at the case planning conference.

- [13] On November 28, 2012, the appellant filed a 17-page submission setting out her factual and legal arguments in regards to the postponement of the limitation period. In explaining the reasons why the action had been delayed she indicated that she had been under severe stress and a dissociative state after her daughter was taken from her, that she could not get the documents she needed and that she had received inadequate legal advice. She also indicated that she feared suing the Ministry of Children and Family Development and others earlier because she had reason to believe that they would retaliate by taking her daughter away from her again. In addition the submission dealt with the need to amend her pleadings, add certain parties, and whether her notice of civil claim was an abuse of process. In regards to the latter she submitted that the notice of claim was not an abuse of process because the 30-year ultimate limitation period exists to protect claims that have been commenced after the apparent expiry of the limitation period.

THE CASE PLANNING CONFERENCE

- [14] At the CPC the appellant again appeared by telephone as did counsel for two groups of the defendants. The remaining four counsel were in the courtroom with the judge. At the outset the chambers judge advised that the purpose of the CPC was for her to address the question as to whether the claims that the appellant had brought should be dismissed or struck because of the time it had taken for the action to be commenced. She indicated that she had read the appellant's argument and complimented her for articulating the reasons why the limitation period should be postponed. She then asked the appellant if there was anything she wished to add to her written argument. The appellant indicated that she had provided an explanation in a general way and could probably make a few more specific formal arguments. In response the chambers judge indicated that she considered it to be a very good argument and she did not think there was anything more that could be said.
- [15] The chambers judge then indicated she was going to give her reasons for judgment and in doing so she would assume that the appellant could prove all of the facts set out in her argument. Before giving the judgment the chambers judge indicated she had received material from other counsel which she had read but she did not need to hear from any of them because her decision was based on the argument made by the appellant.
- [16] In her reasons for judgment the chambers judge set out the history of the proceeding and how it had first come before her on the application that the appellant had brought to add parties. She noted that at the time of that first application she had pointed out to the appellant that her claims were brought 11 to 20 years after the incidents described and were therefore on their face barred by the provisions of the Limitation Act. She stated that at the time of the initial application she had adjourned the application to add parties and directed that a CPC be convened to revisit the question as to whether the claim should be struck out under Rule 9-5(1)(d) as an abuse of process.
- [17] The chambers judge then set out certain of the arguments that the appellant had made in regards to a postponement of the limitation period. She then indicated that assuming all of the facts set out in the appellant's submission were true, the appellant had waited too long to bring these proceedings and they were barred by the Limitation Act. In reaching this conclusion she made reference to the decision of this Court in *Vance v. Peglar* (1996), 22 B.C.L.R. (3d) 251 (C.A.) in which the rules to be applied in determining when a limitation period begins to run are set out. The chambers judge concluded in her reasons as follows:
- [39] Having considered all of the submissions and the statement of claim, the claims in my view are barred, and they have no prospect of success. As I said to you, Ms. Jensen, last day, it is not in your interest for the Court to permit you to carry on with a case that will only cause you more stress and anxiety and at the end of the day could result in you being faced with a large award of costs against you, costs of the other parties' legal expenses.

- [40] I have concluded, therefore, that it is just and right, and indeed necessary for me to strike out your statement of claim under Rule 9-5(1). That means that no further action can be commenced in relation to those claims that you have described in that statement of claim.
- [18] Following the delivery of the reasons there was some further discussion between the appellant and the chambers judge. The appellant indicated that there was much more evidence that she could lead to substantiate her claim that the limitation period could be postponed.
- [19] The chambers judge ended the CPC by saying that because the appellant was impecunious and had been acting on her own she was not inclined to award costs.
- [20] The entered order contains the following provisions:
1. The plaintiff's claim is struck pursuant to Rule 9-5(1);
 2. The plaintiff is barred from commencing any further actions based on the claims described in the notice of civil claim; and
 3. Each party is to bear their own costs.

THE APPEAL

- [21] The appellant now challenges that decision. She submits that the chambers judge erred in striking out the action at a CPC because a judge cannot make a final order at such a conference. She further submits that the chambers judge erred in striking out the action under Rule 9-5(1)(d) as an abuse of process without evidence or a factual foundation for doing so.
- [22] The various groups of respondents have all filed nearly identical factums supporting the judgment below. They submit that the order below was a "final order", not a final judgment and accordingly could be made at a CPC. They further submit that Rules 5-3 and 9-5 should be read together in determining the powers of the Court to make an order respecting abuse of its process and that a judge has the power at any stage of the proceedings to strike an action as an abuse of process. They submit that even if an incorrect process was followed, it was an irregularity but can be cured by Rule 22-7. In that regard they submit that the chambers judge's analysis of the postponement provisions of the Limitation Act was correct and that the appellant suffered no prejudice because the chambers judge proceeded on the basis that the appellant could prove the truth of the contents of her submission.

DISCUSSION

A. Overview

- [23] In this matter the chambers judge acted from the very best of intentions. She was trying to spare a self-represented appellant from the costs of what she considered a doomed proceeding. Judges, however, cannot always do what they want. In this case, in her well-

meaning attempt to do what she considered right, the chambers judge fell into procedural and substantive error. The procedural errors concern her acting on her own motion and deciding the matter at a CPC. The substantive error concerns the application of the test for striking pleadings under Rule 9-5(1).

B. Acting On Own Motion

- [24] Civil litigation is an adversarial process. The judge is the referee. Judges must leave it to the parties to determine the court processes that they wish to engage to resolve a proceeding. Absent extraordinary circumstances such as those facing Chief Justice McEachern when picketers threatened to shut down the courthouse (*Re British Columbia Government Employees Union et al. and Attorney General of British Columbia et al.* (1982), 2 D.L.R. (4th) 705; *aff'd* (1985) 20 D.L.R. (4th) 399; *aff'd* [1988] 2 S.C.R. 214), judges should not act on their own motion. To do so compromises their role of impartial arbitrator.
- [25] The chambers judge quite properly brought to the self-represented appellant's attention the provisions of the Limitation Act and the cost consequences to her if the defendants brought an application to have her claim dismissed on that ground. Having taken those steps, the chambers judge should not have gone further. It was not her role to save the appellant from potential folly.
- [26] It was for the parties to decide how they wished this action to be determined. The various defendants all pled the Limitation Act. Some pled that certain of the claims did not disclose a cause of action. None suggested the claim was an abuse of process. If some or all of the defendants wished to have the matter determined in a summary fashion it was for them, not the chambers judge, to set down a motion.
- [27] The chambers judge decided the case on her own initiative in the absence of any application by the parties. For the chambers judge to act on her own motion was a clear error. She took from the parties their right to control the proceedings and determine for themselves the battleground upon which they wanted the proceedings resolved.

C. The Case Planning Conference

a. The Rule

- [28] Rule 5 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, governs the conduct and procedures at a CPC. Rule 5-3 sets out a broad range of orders that a judge or master can make at a CPC. Rule 5-3(2) limits the applications that can be heard and orders that can be made at a CPC. The relevant portion of the Rule reads:
- (2) A case planning conference judge or master must not, at a case planning conference,
 - (a) hear any application supported by affidavit evidence or
 - (b) make an order for final judgment,

[29] Rule 12-2(11) similarly limits the nature of applications and orders that can be heard and made at a trial management conference ("TMC").

[30] In this case the procedure followed by the chambers judge violated both prongs of Rule 5-3(2).

b. Rule 5-3(2)(a) - Affidavit Evidence

[31] The Court at a CPC or a TMC can hear contested applications which can be determined on the basis of representations of counsel: *Gill v. A & P Fruit Growers Ltd.*, 2011 BCSC 1421. If an application requires affidavit evidence it cannot be heard: *Vernon v. British Columbia (Ministry of Housing and Social Development, Liquor Distribution Branch)*, 2010 BCSC 1688.

[32] The chambers judge directed a CPC to determine whether the action should proceed. In advance of the conference she gave no indication as to the Rule upon which she intended to rely. The chambers judge appears to have based her decision on Rule 9-5(1). That Rule, as did its predecessor Rule 19(24), reads:

(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.

(2) No evidence is admissible on an application under subrule (1)(a).

[33] In her reasons the chambers judge indicated that the question before her was whether the proceeding brought by the appellant should be struck out as an abuse of process. While evidence is not admissible under Rule 9-5(1)(a) it is admissible under Rule 9-5(1)(d) which deals with abuse of process. The appellant in advance of the CPC sought clarification as to whether she would be able to file affidavit evidence. She was advised that she need not file affidavits but should come prepared to argue why the claims were not out of time.

[34] The limitation issue cried out for affidavit evidence. The applicability of the postponement provisions is a fact-intensive question. It could only be decided on a proper factual foundation. It was not the type of question that could be decided on the basis of counsel's representations. It was an error to hear the application at a CPC.

c. Rule 5-3(2)(b) - Order for Final Judgment

- [35] The respondents submit that there is a distinction between an order and a judgment, and that what occurred in this case was not a judgment of the issues raised by the appellant in her pleadings. In support of that position they cite *Stroub v. Kazakoff* (1977), 2 B.C.L.R. 262 (S.C.) and *First City Trust Co. v. Triple Five Corporation Ltd.* (1989), 94 A.R. 106, 57 D.L.R. (4th) 554 (C.A.).
- [36] In *Canadian Imperial Bank of Commerce v. Bury* (1979), 103 D.L.R. (3d) 560, 11 Alta. L.R. (2d) 93 (S.C.), Stephenson J. (as he then was) explained the distinction between an "order" and a "judgment" at pp. 561-62:

Williston & Rowles, *The Law of Civil Procedure* 1970, vol. 2, pp. 1020-21, refer to authorities that distinguish between judgments and orders. One of the references is to *Loring v. Illsley* (1850), 1 Cal. 24, and the following quotation from that case is included:

What then is the distinction between an order and a final judgment?... The former is a decision made during the progress of the cause, either prior or subsequent to final judgment settling some point of practice or some question collateral to the main issue presented by the pleadings and necessary to be disposed of before such issue can be decided upon by the Court, or necessary to be determined in carrying the execution into effect.

The authors say that where the controversy between the parties is determined it is a judgment and every other decision is an order.

- [37] In this case, the decision of the chambers judge determined the controversy between the parties. It brought the appellant's action to an end. It was an order for final judgment. It was an order that cannot be made at a CPC.

D. Striking the Claim

- [38] Turning to the point of substance I would first note that because there was no application before the Court it is not entirely clear what Rule the chambers judge relied on. While she made specific reference in her reasons to Rule 9-5(1)(d), the order states that the action was struck pursuant to Rule 9-5(1).
- [39] In *Chapman v. Canada*, 2003 BCCA 665, this Court set out at paras. 12-13 the criteria for applications brought under the then Rule 19(24); it must be plain and obvious that the impugned pleading has the fault alleged:
- [12] The criteria for application of all provisions of Rule 19(24) are established in authorities considered by the chambers judge: *Hunt v. Carey Can. Inc.*, [1990] 2 S.C.R. 959; *Berscheid v. Ensign*, [1999] B.C.J. No. 1172 (B.C.S.C.); *Babavic v. Babowech*, [1993] B.C.J. No. 1802, *World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1996), 17 B.C.L.R. (3d) 187 (B.C.C.A.), and *Kripps v. Touche Ross & Co.* (1990), 48 B.C.L.R. (2d) 171 (B.C.C.A.). The test is whether it is plain and obvious that the impugned pleading has the fault alleged. Otherwise the party whose pleading is challenged is entitled to a trial of the issue.

- [13] The orders in this case were made under Rule 19(24)(a) and (d). Thus in order to succeed the applicant is required to establish that it is plain and obvious that the pleadings disclose no cause of action (Rule 19(24)(a)) or that the proceedings are an abuse of process (Rule 19(24)(d)). Otherwise the litigation will be allowed to proceed.
- [40] In *Babavic v. Babowech*, [1993] B.C.J. No. 1802, 42 A.C.W.S. (3d) 447 (S.C.), Baker J. in an oft-cited passage commented on the principle of abuse of process at paras. 17-18:
- [17] ... The principle of abuse of process is somewhat amorphous. The discretion afforded courts to dismiss actions on the ground of abuse of process extends to any circumstance in which the court process is used for an improper purpose.
- [18] The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression. ...
- [41] The chambers judge held that the action brought by the appellant should be struck because it was brought outside of the time set out in the Limitation Act for bringing the proceedings and had no prospect for success. She cited no authorities in support of her conclusion.
- [42] There are numerous cases which have held that Rule 9-5 is not the appropriate mechanism to determine a limitation issue. The cases include: *Canadian Pacific Ltd. v. British Columbia Hydro and Power Authority* (1979), 10 B.C.L.R. P 6 (S.C.); *Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784; *Fuoco Estate v. Kamloops (City)*, 2001 BCCA 325 [Fuoco]; *Border Enterprises Ltd. v. Beazer East, Inc.*, 2003 BCSC 49; *Rain Coast Water Corp. v. British Columbia*, 2008 BCSC 1182; *Mattson v. Remus*, 2009 BCSC 836; and *Hughes v. Hughes*, 2011 BCSC 1569.
- [43] In *Fuocu* this Court noted at para. 15:
- [15] Counsel have been unable to direct us to any cases in which Rule 19(24)(a), standing alone, has been used to resolve a limitation issue. That may be because statements of claim do not raise limitation issues, as is the case here. The statutory limitations is a defence pleading. It is an issue that does not arise until it is pleaded in defence. ...
- [44] Those words resonate in this case. The notice of civil claim, in and of itself, does not raise a limitation issue. The limitation issue only arises if it is pleaded in defence. Even then, the issue cannot be resolved in an evidentiary vacuum. The Limitation Act contains provisions pursuant to which the running of time is postponed. Pursuant to s. 8(1)(c) of the Limitation Act the ultimate postponement is 30 years from the date on which the right to bring the action arose.

- [45] In this case the events which are the subject matter of the litigation commenced approximately 22 years prior to the issuance of the writ. The respondents have now raised the Limitation Act as a defence to the claim. The appellant has indicated that she intends to rely on the postponement provisions to escape the consequences of the Act. Whether she can or cannot do so successfully will undoubtedly be determined in a properly brought application. Based on the appellant's pleading alone it is not plain and obvious that her action cannot succeed.
- [46] Similarly it is not plain and obvious that the action is an abuse of process. While the action may ultimately fall on the limitation issue it cannot be said that the court's process is being used for any improper purpose. The fact that a claim arises outside the initial limitation period does not in itself allow a claim to be struck out as an abuse of process. Different considerations might arise if a claim is brought outside the ultimate limitation period. In such a case it may be plain and obvious that the action cannot succeed and such a claim can be properly resolved pursuant to Rule 9-5(1): *Chisamore v. Cumis Life Insurance Co.*, 2006 BCSC 462.
- [47] What occurred in this case was more than an irregularity. It cannot be cured under Rule 22-7. The limitation issue is one which must be determined on a proper application with a full evidentiary foundation. It cannot be determined pursuant to Rule 9-5(1). It cannot be determined at a CPC. It matters not whether the chambers judge's analysis of the Limitation Act ultimately proves to be correct.

DISPOSITION

- [48] For all the above reasons I would allow the appeal, set aside the order dismissing the action and remit the action to the Supreme Court. It is clear from the case planning briefs that there are numerous procedural matters to be resolved. These include the appellant's desire to file a reply, amend her pleadings and add new parties. The defendants in turn wish to schedule applications to strike the claim under the Limitation Act or as disclosing no cause of action. They also wish to seek security for costs.
- [49] The timing of these applications is a matter best determined at a CPC. Accordingly, I would direct that no steps be taken in the action by any party before a CPC is convened in the Supreme Court to determine how matters shall proceed further, save and except the appellant will have liberty to file a reply to plead the postponement provisions in advance of the CPC.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Garson"

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