

CANADA / JUDGMENT

Johnston v. Rykon Construction Management Ltd.

2020 BCSC 572

COURT

Supreme Court of British Columbia

DECIDED

14 February 2020

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2020 BCSC 572 Johnston v. Rykon Construction Management Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johnston v. Rykon Construction Management Ltd.,

2020 BCSC 572

Date: 20200214

Docket: S-124358

Registry: Kelowna

Between:

Megan Elizabeth Johnston and Christian Harrol Johnston

Plaintiffs

And:

Rykon Construction Management, Ken Pennington, Kolby Barnstable, Ryan Kuchma and Ryan Kuchma doing business as RK Studio Design and Drafting, Glenwest Properties Ltd., Wilden Construction Corp., Blenk Development Corporation, Russ Foster, Robinson Design Inc., Randy J. Wiebe and Wiebe Engineering Ltd., Beacon Geotechnical Ltd., Chris Wallis, Heather N. Wilkie, Graciela Margaret Turner, and The City of Kelowna

Defendants

Before: The Honourable Madam Justice Adair

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

A. Prior

Counsel for the Defendants Rykon Construction Management Ltd. and Ken Pennington:

M. Danielson

No other appearances

Place and Date of Hearing:

Kelowna, B.C.

February 14, 2020

Place and Date of Judgment:

Kelowna, B.C.

February 14, 2020

[1] THE COURT: This, then, is my ruling.

[2] This action concerns a dispute over the construction of a new house. The plaintiffs are the homeowners. The defendant Rykon Construction Management Ltd. is alleged to be the construction contractor. The defendant Ken Pennington is alleged to be the managing partner of Rykon. Other named defendants (including the City of Kelowna, but excluding Graciela Turner) are alleged to have had some involvement in the problems concerning construction of the house, and to have liability to the plaintiffs on that basis, including (with respect to at least some of them) as co-conspirators. Ms. Turner is alleged to be the owner of a neighbouring property, and is alleged to be liable in nuisance.

[3] The defendants Rykon and Mr. Pennington now apply to strike the whole of the amended notice of civil claim with leave to the plaintiffs to file a further amended notice of civil claim within 30 days of any order made. In the alternative, those defendants seek to have the parts listed in the schedule to their notice of application struck. The application is supported by the defendants Robinson Design Inc. and the City of Kelowna, who consent to the relief sought. The remaining defendants who have filed application responses take no position.

[4] Rykon and Mr. Pennington rely on all of Rule 9-5(1) sub-rules (a), (b), (c) and (d).

[5] The plaintiffs say that the notice of application should be dismissed. They say that they have sufficiently pleaded causes of action in civil conspiracy, negligence, defamation and interference with contractual relations. That is presumably in addition to the claims for breach of contract that they make against Rykon.

- [6] For the reasons that follow, I am striking the amended notice of civil claim with leave to the plaintiffs to apply to amend. Although the main argument today was based on Rule 9-5(1)(a), I prefer to ground my decision in the other subsections of Rule 9-5(1).
- [7] The ultimate 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 relied upon by the plaintiff. That process is begun by the plaintiff stating, for each claim, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action. A notice of civil claim must plead the causes of action in such a way that the defendant may know the case it has to meet and that clear issues of fact and law are presented for the court. See Mr. Justice K. J. Smith's often-cited decision in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), at paras. 5 to 11.
- [8] Pleadings are intended to define and limit the issues in order to promote fairness, judicial economy and exposition of the truth. The rules governing pleadings exist to support and facilitate that end. Defining and limiting the issues must be done so that the court understands the dispute, and the parties have fair notice of the case to be met and the remedies to be sought. Pleadings are the foundation on which the case rests, and they shape the scope of relevance for both discovery and trial.
- [9] Rule 3-1(2) requires that a notice of civil claim must set out "a concise statement of the material facts giving rise to the claim," [underlining added] and "a concise summary of the legal basis for the relief sought" [underlining added], and must otherwise comply with Rule 3-7.
- [10] The requirements in Rule 3-1(2) that a notice of civil claim set out a concise statement of the material facts giving rise to the claim and set out a concise summary of the legal basis for the relief sought are mandatory and directed to promoting clarity. The word "concise" is defined in *The Oxford English Dictionary*, (11th ed. Revised) as "giving information clearly and in a few words." Thus, both brevity and clarity are important in a pleading.
- [11] The requirement that the statement of material facts and the summary of the legal basis be "concise" emphasizes the importance of stating clearly everything that is necessary, but not more. Going beyond a concise statement or summary creates the risk that what is essential will get lost in the superfluous. It is not conducive to defining and limiting the issues in the case. It is incompatible with the goal of the efficient resolution of issues on their merits: see Rule 1-3. The court or the adverse party should not have to hunt through many paragraphs to find the concise statement of the essential elements of a claim.
- [12] Rule 3-7(1) brings home the point that a material fact is different than evidence and that evidence must not be pleaded.
- [13] A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not sufficiently pleaded and liable to be struck out. See *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500, at para. 9.

- [14] The distinction between a material fact and an evidentiary fact is discussed by K. J. Smith J.A. in *Jones v. Donaghey*, 2011 BCCA 6. A material fact is a disputed fact that, when resolved, will have legal consequences as between the parties to the dispute (para. 9). Mr. Justice Smith continued, at para. 18:
- [18] . . . [A] material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts.
- [15] A necessary pleading of material facts is not to be left to inference to be deduced from the form in which the pleading is framed. The defendant is entitled to know the case it is being called upon to meet. See *Wyman and Moscrop Realty Ltd. v. Vancouver Real Estate Board* (1957), 8 D.L.R. (2d) 724 (B.C.C.A.).
- [16] Rule 9-5(1) provides:
- (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.
- [17] A claim may only be struck under Rule 9-5(1)(a) if it is plain and obvious, assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or is certain to fail: see *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17. No evidence is admissible on an application under Rule 9-5(1)(a). A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Imperial Tobacco*, at para. 22.
- [18] While the power to strike a claim that has no reasonable prospect of success is a very valuable tool, it must be used with care. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. See *Imperial Tobacco*, at paras. 20-21. However, it is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim: *Imperial Tobacco*, at para. 22. A failure to plead a material fact necessary to state a complete cause of action means that no reasonable claim has been pleaded.

- [19] I make these comments because the plaintiffs are now going to be preparing a proposed further amended notice of civil claim. The Rykon defendants have already challenged the legal sufficiency of the existing pleadings under Rule 9-5(1)(a). Although my decision to strike is not based on that Rule, the legal sufficiency of the plaintiffs' claims, as well as compliance with the Rules respecting pleadings, will be issues on any application to amend, given the test that applies.
- [20] A motion to strike will be considered on the basis of the pleading as it stands or as the pleading may be amended: see *Minnes v. Minnes* (1962), 39 W.W.R. 112 (B.C.C.A). Here, in the face of Rykon's application, the plaintiffs filed an amended notice of civil claim. However, as of the hearing date, no further amendments were proposed.
- [21] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous, or vexatious. An application under this subrule, as well as the other subrules (c) and (d), may be supported by evidence.
- [22] An "embarrassing" pleading, as contemplated by Rule 9-5(1)(c), is one that is so irrelevant that to allow it to stand would involve useless expense and would also prejudice the trial of the action by involving the parties in a dispute apart from the issues: see, for example, *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (C.A.).
- [23] Abuse of process under Rule 9-5(1)(d), or the court's inherent jurisdiction, is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice.
- [24] In a case that involves multiple defendants and multiple causes of action, it remains necessary for the plaintiffs to identify with precision what material facts (not evidence), what causes of action, and what relief they are advancing against which defendant(s). Neither a defendant nor a trier of fact should have to parse through a notice of civil claim and either cobble together or speculate about what cause of action is being advanced against which defendant.
- [25] It is well established that a plaintiff has an obligation to clearly plead the material facts on which the plaintiff relies in making the claim. Pleadings must enable the court, within a reasonable time and review of the pleading, to find the cause of action and the material facts on which the cause of action is based. It is not for the court to articulate for a litigant a comprehensible and legally recognizable cause of action. Pleadings that do not meet these minimum requirements fail to satisfy the requirements of the Rules and are an abuse of the court's process.

- [26] I turn, then, to the amended notice of civil claim here, which I have reviewed.
- [27] Part 1, the Factual Basis, is 155 paragraphs. There are a number of defendants named and a number of causes of action advanced, so some length must be expected as a result. However, to describe the amended notice of civil claim as prolix would be an understatement. It goes far, far beyond a concise statement of the material facts. Indeed, I would describe it as the antithesis of what the Rules require. It pleads evidence, argument and legal conclusions. It includes rhetorical statements. As a result, it contains a great deal of material that is unnecessary. In my view, because of its fundamental failure to comply with the Rules, the amended notice of civil claim is therefore also a pleading that may prejudice, embarrass or delay a fair trial of this action, and amounts to an abuse of process.
- [28] Although in the overall scheme of things these are small points, I will note a few things in particular.
- [29] In a number of places (and I note paragraphs 79, 84, 106, 114, 121, 133 and 153), the amended notice of civil claim breaches the prohibition in Rule 3-7(14) against pleading the amount of general damages claimed. Counsel for the plaintiffs conceded this in oral submissions.
- [30] Often, defined terms are used, but the definition does not appear until later in the pleading. An example is found in para. 76, where the plaintiffs say the term "New SWO" will be "as defined below." I was unable to locate where that definition was, although I did locate a definition of "SWO" in para. 117.
- [31] Based on the oral submissions from plaintiffs' counsel, allegations relevant to the conspiracy allegations appear in many places in the amended notice of civil claim. However, I note that in the section beginning at para. 91 (titled "The Conspiracy and Wrongful Interference With Contract"), that section says that the relevant defendants will be "as particularized below" but excluding certain parties. I was unable to locate where the plaintiffs, in fact, "particularized" the relevant defendants. Paras. 91, 92, 93 and 94, all of which say that the necessary information is "particularized below," provided no help to locate where. In a pleading of this length, that is unacceptable.
- [32] Paras. 70 and 80 allege "contractual duties" owed to the plaintiffs by the defendants Wiebe (defined collectively as the individual Randy Wiebe, and the company Wiebe Engineering Ltd.), and Beacon (also defined as a company and two individuals). However, I was not able to locate in the Factual Basis where any contract between these defendants and the plaintiffs was pleaded. If it was there somewhere, it was unhelpfully buried in a mass of unnecessary material. During oral submissions, counsel for the plaintiffs confirmed that it was not pleaded. There is, therefore, no foundation for the plea of "contractual duties." In that context, the pleading is vexatious and embarrassing.

- [33] In para. 67, the second sentence pleads, confusingly: "The Defendants, other than Robinson, Beacon, Turner and the City, breached the Select Builder Program requirements by abandoning the construction in breach of the Construction Contract on the part of Rykon" Only Rykon is alleged to be party to the Construction Contract, and persons not alleged to be party to that contract could not be in breach of it. The same problem is seen in the last sentence in para. 69.
- [34] Para. 24 pleads that the defendant Glenwest "is the Vendor of the Property" to the plaintiffs. The allegation in para. 25 that "Glenwest was the vendor of the Property" is completely unnecessary.
- [35] The "Construction Contract" with Rykon is defined in para. 3 of the Factual Basis. However, by para. 142, in a section (titled "Breach of Contract Action Against Rykon") where amendments were done for the amended notice of civil claim, a different term, "the Contract," is used. This illustrates one of the real dangers of the failure to comply with the mandatory requirement to set out a concise statement of the material facts, as well as the difficulty of following the allegations in the amended notice of civil claim generally. Even the drafter has lost track of what was pleaded at the beginning.
- [36] The result, in my view, is that the amended notice of civil claim does not meet the minimum requirements of a pleading as set out in the Rules and in the authorities I have reviewed above, and must be struck out.
- [37] I note (as I did during submissions) that the claim for unlawful interference with contractual or economic relations has not been properly pleaded in accordance with the law set out in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, at paras. 23, 26 and 76.
- [38] There is no doubt that the claims the plaintiffs apparently wish to advance are not novel claims. Provided they are properly pleaded, they are reasonable claims. However, in my view, it is neither in the interests of justice, nor consistent with the object of the Rules, to allow this action to go forward with the amended notice of civil claim in its current form.
- [39] The plaintiffs should therefore have leave to apply to amend, so that the notice of civil claim, as further amended, clearly and concisely sets out the material facts required to state complete causes of action (without pleading evidence) and sets out a concise summary of the legal basis for the relief sought.
- [40] Accordingly, I order that the amended notice of civil claim be struck out, with liberty to the plaintiffs to apply to the court for leave to amend. The application seeking leave to amend must be filed within 30 days of these reasons. I am not seized of any such application.
- [41] If no application for leave to amend is made within 30 days of today's date, any of the defendants have leave to apply to have the action dismissed.
- [42] That concludes my ruling.

- [43] Is there anything else we need to deal with?
- [44] MR. DANIELSON: My Lady, I would just like to speak to the issue of costs for a moment.
- [45] THE COURT: All right, briefly.
- [46] MR. DANIELSON: I just would bring to the court's attention that we did give them the opportunity to amend, in fact, invited them to amend these pleadings to accord with the Rules. And what we were met with was this amended notice of civil claim, where instead of actually addressing any of the issues that were raised, typographical errors, issues relating to the plaintiffs and Rykon due to the cut-and-paste nature of the pleadings, those sorts of things were largely addressed, but nothing in terms of addressing the actual substantive issues with the exception of perhaps a few points to address the duty of care and negligence. And I think, as Your Ladyship has picked up, there were a host of issues involved with this pleading and, really, it should have been addressed at that point and this application should not have been necessary.
- [47] THE COURT: So what are you asking for, then, Mr. Danielson?
- [48] MR. DANIELSON: Costs of this application today.
- [49] THE COURT: All right. So you want costs to your clients in any event of the cause?
- [50] MR. DANIELSON: Yes.
- [51] THE COURT: Mr. Prior.
- [52] MR. PRIOR: I would say, My Lady, in the circumstances, costs to the defendant Rykon and Pennington in the cause would be the appropriate costs award.
- [53] THE COURT: All right. I think, in view of my ruling, the appropriate order with respect to costs is that the applicants, Rykon and Mr. Pennington, should have costs of the application in any event of the cause. That will be one set for those defendants.
- [54] MR. PRIOR: My Lady, I would maybe ask this more to help for the purposes of amendment rather than a ruling, and only if my friend would also agree. But one of the issues that will clearly be there in front of the amendment application is the issue of the notion of merger and unlawful act conspiracy. I am not asking for a ruling as much as if the court would be inclined to make the court's views on its impact on sort of the pleadings that are here, really, so that we do not necessarily have an unnecessary component to that application.
- [55] THE COURT: Well, I think the difficulty I have with that request, Mr. Prior, is I see that there are so many problems with the existing pleading that I do not know what the further proposed amended notice of civil claim is going to look like. And it may look quite different from what I had before me and what was the basis of the submissions as far as the conspiracy claims were concerned. So I really do not feel that I am in a position to say much about it.

[56] MR. PRIOR: That is fine. It was just in case there was any comments, I thought that I would ask to assist with the drafting --

[57] THE COURT: Yes.

[58] MR. PRIOR: -- but I understand the court's position, as well, on it. I just put myself in your hands just in case.

[59] THE COURT: Yes.

[60] MR. PRIOR: Thank you, though.

[61] THE COURT: All right. Is there anything else?

[62] MR. DANIELSON: No, My Lady.

[63] THE COURT: All right.

"Adair, J."

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