

CANADA / JUDGMENT

# Keddy-Waldie v. Lawson

2014 BCSC 1711

## COURT

Supreme Court of British Columbia

## DECIDED

11 September 2014

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2014 BCSC 1711 Keddy-Waldie v. Lawson IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Keddy-Waldie v. Lawson, 2014 BCSC 1711 Date: 20140911 Docket: 1344042 Registry:

Prince George Between: Sheila Keddy-Waldie Plaintiff And Ian Lawson Defendant Before: The

Honourable Mr. Justice Tindale Reasons for Judgment In Chambers Counsel for the plaintiff: H.L.

Gansner Counsel for the defendant: G. Ritchey Place and Date of Hearing: Prince George, B.C.

September 8, 2014 Place and Date of Judgment: Prince George, B.C. September 11, 2014

## INTRODUCTION

- [1] The plaintiff claims damages from the defendant for breach of contract and breach of fiduciary duty. The plaintiff has selected a trial by jury. The defendant applies to have the jury notice struck pursuant to Rule 12-6 (5) (a) (ii) of the Supreme Court Civil Rules, B. C. Reg. 168/2009 ("Rules").

## BACKGROUND

- [2] The defendant is a Barrister and Solicitor who practices in Smithers, British Columbia. In the summer of 2010 the plaintiff retained the defendant to represent her with her outstanding matrimonial claim.
- [3] The plaintiff had been in a common-law relationship for more than 16 years and had separated from her common-law partner by the end of December 2009 and before January 15, 2010.
- [4] The plaintiff wished to advance a claim for spousal support. The plaintiff's claim was subject to the Family Relations Act, R.S.B.C. 1996, Chapter 128, and in particular the one year limitation period to advance a claim for spousal support.
- [5] The plaintiff alleges that the defendant failed to commence a court action for spousal support on her behalf within the one-year immediately following separation.
- [6] The plaintiff's claim for spousal support was dismissed on December 21, 2011 in the Provincial Court of British Columbia as being statute barred.

- [7] The plaintiff appealed the decision of the Provincial Court of British Columbia to the Supreme Court of British Columbia. On June 15, 2012 that appeal was dismissed.
- [8] The plaintiff claims that her lost entitlement to spousal support is \$25,000 per year for 20 years.
- [9] The plaintiff is currently employed with Canada Post. POSITION OF THE PARTIES The Defendant
- [10] The defendant submits that this proceeding should not be heard by a judge and jury as the issues are of an intricate or complex nature. In particular the defendant submits that a trial within a trial would be needed to determine the question of lost spousal support.
- [11] The defendant concedes that the action in breach of contract and breach of fiduciary duty is not specifically excluded by the Rules. However the defendant argues that a jury would be required to determine what would have happened in the matrimonial proceedings in relationship to the plaintiff's claim for spousal support.
- [12] The defendant points to the fact that a claim for spousal support in the first instance cannot be heard by a jury; Rule 14-6 (1) of the Supreme Court Family Rules, B.C. Reg. 169/2009.
- [13] Finally, the defendant argues that a determination of the issues in this proceeding would require findings of mixed fact and law. The Plaintiff
- [14] The plaintiff argues that this proceeding is simple in nature. The plaintiff says that the defendant missed a limitation period and is therefore liable to the plaintiff in damages. In terms of damages the plaintiff argues that all that has to be determined is the net present value of the plaintiff's claim for spousal support.
- [15] The plaintiff further argues that a jury would only have to determine the underlying facts of the case which they could then input into a software program to determine the lump sum of spousal support that the plaintiff lost.
- [16] The plaintiff argues that this case is not too intricate or complex for a jury. It is a routine case of counsel "dropping the ball" with regard to their professional obligations to a client. The plaintiff says that a jury can easily calculate any damages owing to the plaintiff.
- [17] The plaintiff argues that the fact that there may have to be a trial within a trial does not in itself preclude a jury from hearing this matter. DISCUSSION
- [18] Rule 12-6 (2) of the Rules exclude certain matters from being heard by a jury. The Rule reads as follows:
- (2) A trial must be heard by the court without a jury if the trial relates to
- (a) the administration of the estate of a deceased person,
- (b) the dissolution of a partnership or the taking of partnership or other account,

- (c) the redemption or foreclosure of a mortgage,
- (d) the sale and distribution of the proceeds of property subject to any lien or charge,
- (e) the execution of trusts,
- (f) the rectification, setting aside or cancellation of a deed or other written instrument,
- (g) the specific performance of a contract,
- (h) the partition or sale of real estate,
- (i) the custody or guardianship of an infant or the care of an infant's estate, or
- (j) a proceeding referred to in Rule 2-1 (2).

[19] In this case the plaintiff's claim does not relate to any of the above noted exclusions.

[20] Rule 12-6 (5) (a) (ii) reads as follows:

- (5) Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply
  - (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that . . . (ii) the issues are of an intricate or complex character, or

[21] Paragraph 5, Part 1, of the Amended Notice of Civil Claim reads as follows:

- 5. The retainer agreement was oral. The implied conditioners were that the Defendant would represent her in a conscientious, diligent, and efficient manner, and to provide a quality of service at least equal to that expected of a competent family lawyer in a similar situation. With regard to his fiduciary duty to her, he had assumed a duty of care with respect to her financial interests with an obligation of strict fairness and openness towards the Plaintiff as his client to make full and frank disclosure.

[22] In this case the trier of fact will have to determine whether there was a contract and, if so, what the conditions of the contract were. The trier of fact will have to determine what the standard of care expected of a competent family lawyer is. The trier of fact will also have to determine whether or not the defendant owed a fiduciary duty to the plaintiff.

[23] There will be a trial within a trial if the defendant is found to have breached his obligations to the plaintiff. A notional matrimonial trial involving a determination of entitlement and quantum of spousal support will have to be undertaken to determine the plaintiff's damages.

[24] In *Oliver v. Gothard*, 10 O.R. (3d) 309, [1992] O.J. No. 1821, the court, in determining whether to strike out a jury notice in a solicitor's negligence claim relating to a matrimonial action, stated the following at page 5: In my view, because the substance of a major portion of the trial will be matters which in the normal course would not be determined by a jury and involve judicial discretion and mixed questions of fact and law, it is inappropriate for those

issues to be tried by a jury in this action. I believe that this case falls within the principle of the decision of Krever J. (as he then was) in *Fulton v. Fort Erie (Town)* (1982), 40 O.R. (2d) 235, 142 D.L.R. (3d) 487 (H.C.J.), where he said that p. 236 O.R., p. 488 D.L.R.: I have come to the conclusion that the reasons for dispensing with a jury in this case are cogent. In my view, the case raises questions, some of which may be properly categorized as mixed questions of fact and law and one, at least, of which may be fairly characterized as a question of law of some difficulty

- [25] In *Singleton v. Mackenzie Fujisawa LLP*, 2014 BCSC 1543, the court, at paras. 13-16, summarized a number of solicitor's negligence cases where jury notices were struck as follows:
- [13] The defendants rely on *Cederland v. Bilkey*, 2001 BCSC 1152, *Persall v. Buxton*, 2012 BCSC 347 and *Lopushinsky v. Spraggs*, 2000 BCSC 222. All were solicitor's negligence cases.
- [14] In *Cederland*, at para. 17, the court rejected the argument that solicitor's negligence cases are not appropriate to be heard by a jury and held that each case has to be considered on its own facts and on the basis of the pleadings in the action. In that case, a jury notice was set aside in the context of a settlement that was argued to be improvident. There the court considered that the complexities inherent in a recommendation to settle and in determining whether that was negligent were best considered by a judge alone.
- [15] The *Persall* case was a solicitor's negligence case that involved a trial within a trial, the plaintiff's potential contributory negligence, the impact of that on joint versus several damages and the approach counsel would take in negotiating a settlement in the circumstances. The court accepted that a jury was capable of determining the original personal injury action and whether there was a breach of duty by the solicitor, but held the other factors involved made the matter too complex and ordered the jury notice struck.
- [16] In *Lopushinsky*, the court held:
- [20] I have concluded that the facts and issues in this case are such that it is not appropriate for determination by a judge with a jury. From Mr. Lopushinsky's statement of claim, it appears that the trier of fact, to decide this case, will have to consider the original trial that ended in 1987, the reasons for judgment, and then form a reasoned opinion of the prospect of success on appeal. Against that backdrop, the trier of fact must consider such legal matters as negligent and fraudulent misrepresentation, economic duress, negligence and fiduciary duties. The trier of fact will also have to consider whether the application for a stay of execution was appropriate and may have to consider whether there existed a conflict of interest. A particularly complex issue is whether in all of the circumstances the contingency fee agreements were fair and reasonable and whether they should be set aside. This summary does not touch all of the issues, but it is sufficient, in my view, to demonstrate that the issues are of sufficient complexity and intricacy to require an order that the trial be heard by judge alone.

[26] In my view this is not an appropriate case to be heard by a jury given the complex legal issues that will have to be decided such as: · whether there was a contract; · what the conditions of the contract were; · what is the reasonable standard of care of a competent family lawyer; · issues relating to any fiduciary duty owed by the defendant to the plaintiff; · the trier of fact will have to determine questions of mixed fact and law; and taking into account that if the defendant is found liable for damages to the plaintiff there will have to be a trial within a trial in which the trier of fact will have to consider a matrimonial claim for spousal support which involves a 16 year relationship.

## CONCLUSION

[27] The defendant's application that this action proceed before a judge sitting without a jury is granted. The jury notice is struck.

[28] The defendant will have its costs in the cause. "R. S. Tindale, J."

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