
CANADA / JUDGMENT

LeRoy v. TimberWest Forest Corp.

2015 BCSC 2005

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 2005 LeRoy v. TimberWest Forest Corp.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

LeRoy v. TimberWest Forest Corp.,

2015 BCSC 2005

Date: 20151002

Docket: S14836

Registry: Duncan

Between:

Rebecca LeRoy and Ted LeRoy

Plaintiffs

And

TimberWest Forest Corp., TimberWest Holdings Ltd.,

TimberWest Forest Company, David Whiteley,

Paul McElligott and Beverlee Park

Defendants

Before: The Honourable Mr. Justice Thompson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

A. LaCroix

Counsel for the Defendants:

W. Milman

K. Macdonald

Place and Date of Hearing:

Nanaimo, B.C.

September 9, 2015

Place and Date of Judgment:

Victoria, B.C.

October 2, 2015

- [1] THE COURT: This is an application by the defendants to summarily dispose of the plaintiffs' claims. The defendants' application invokes R. 9-5(1)(a) [striking pleadings], R. 9-6 [summary judgment], and R. 9-7 [summary trial].
- [2] The background facts can be briefly stated. Ted LeRoy Trucking Ltd. ("TLT") contracted with the defendant TimberWest Forest Company and one of its subsidiaries. By the terms of these TimberWest contracts, TLT was paid to haul and sort timber at various places on Vancouver Island. The plaintiff Ted LeRoy is the principal of TLT. The personal defendants are current and former employees of the corporate defendants. I will refer to the corporate defendants collectively as TimberWest.
- [3] The crux of the plaintiffs' case is that the defendants, in order to advance their own economic interests, conspired to destroy TLT and also conspired to cause Ted LeRoy economic harm. The plaintiffs' case is that the defendants succeeded in their goals by adopting deceitful and nefarious means, and that TLT was driven into insolvency in December 2007. By September 2008, TLT was in bankruptcy. In due course, the trustee in bankruptcy assigned to the plaintiff Rebecca LeRoy all rights and interests in choses of action that TLT had or has against the defendants.
- [4] On 19 August 2008, while TLT was in a state of insolvency, TLT entered into a compromise agreement with the defendants TimberWest Forest Corp. and TimberWest Forest Company. Ted LeRoy executed the document for TLT. This compromise agreement provided for disposition of rights under certain of the TimberWest contracts as follows: it terminated four contracts, it provided for a \$3 million payment to TLT in exchange for the extinguishment of certain rights under other contracts, and it allowed for the assignment by TLT of its interest in one contract to a new company controlled by Rebecca LeRoy.

- [5] The compromise agreement contains a mutual release (the "Release") which states, in relevant part:

... the parties hereby release each other and their respective predecessors, subsidiaries, affiliated and related companies, and their respective successors, administrators, directors, officers, employees, servants, agents and assigns, and each of them, of and from any and all actions, causes of action, claims, complaints, demands, damages, interest, costs, expenses and compensation of whatsoever kind and howsoever arising, whether known or unknown . . .

- [6] Approval of the compromise agreement was one term of an order made in Companies' Creditors Arrangement Act proceedings on 3 September 2008. The order also provides that the compromise agreement is binding on TLT and any trustee in bankruptcy appointed in respect of TLT.
- [7] The defendants' position on this application, in a nutshell, is that the plaintiff Rebecca LeRoy's claims are barred by the Release, and that the plaintiff Ted LeRoy's claims cannot succeed because of the rule in *Foss v. Harbottle* (i.e. that a shareholder of a company does not have a personal cause of action for a wrong done to the company).

Rebecca LeRoy's Claims

- [8] Ms. LeRoy claims damages arising out of the insolvency of TLT, which she pleads was caused by conspiracy to injure and by deceit. Ms. LeRoy pleads that the defendants caused TLT's insolvency by administering TimberWest contracts deceitfully: in one situation (Johnstone Strait) by refusing to permit TLT to harvest timber on the false pretense that economic conditions did not permit timber harvest, and in another situation (Nanaimo Lakes) by initially proposing payment rates for TLT harvesting that were known to be less than TLT's cost to harvest and subsequently by refusing to permit TLT to harvest regardless of the rate. Ms. LeRoy also pleads that TLT's lender was informed that an important TimberWest contract had no commercial value when the defendants knew this information to be false; in the result, it is alleged that the lender called its loans to TLT resulting in TLT's insolvency.
- [9] Since the Release was entered into, another TimberWest contractor's case has come to trial: 0856464 B.C. Ltd. v. TimberWest Forest Corp., 2014 BCSC 2433. The contracts in issue in that case are some of the very same contracts that are central to the issues in the matter at hand. Mr. Justice Sigurdson found that TimberWest's strategic goals could not be achieved through negotiation, and that TimberWest specifically contemplated terminating contracts via contractor business failure. This finding was based in part on a passage from a 30 October 2007 report of Paul McElligott, TimberWest's president and chief executive officer, setting out a strategy whereby the company would attempt to achieve its goal -- of subdividing certain important contracts and then meting them out to smaller outfits -- "operation by operation, as commercial agreements with stump-to-dump contractors are terminated (as a result of rate disputes with contractors or contractor business failures)." This 30 October 2007 report, which came to Mr. LeRoy's attention long after he signed the Release, is

material to the application before me.

[10] In the case at bar, the defendants argue that Mr. LeRoy knew most of what the plaintiffs now complain of before he signed the Release. The defendants submit that Mr. LeRoy knew that:

- a) TimberWest had refused to permit TLT to harvest in the Johnstone Strait operation, and that TimberWest based its refusal on what it considered to be the prevailing economic conditions;
- b) TimberWest had proposed a harvest rate for the Nanaimo Lakes contract that Mr. LeRoy believed was significantly below TLT's costs to harvest, and that TimberWest subsequently refused to permit TLT to harvest regardless of rate; and
- c) TLT's lender ascribed no value to a key TimberWest contract (over which there was a disagreement as to value between TLT and TimberWest), and that the demand loan had been called by the lender rendering TLT insolvent.

[11] The defendants rely on the Release and apply for dismissal of Ms. LeRoy's claims under the summary judgment and summary trial rules:

9-6(5) On hearing an application under subrule (2) or (4), the court,

- (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly . . .

9-7(2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:

- (a) an action in which a response to civil claim has been filed . . .

9-7(15)(a) On the hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application . . .

[12] The defendants submit that a valid release can and should be enforced summarily -- otherwise the defendants are deprived of a significant part of the benefit that they bargained for: *Robertson v. Walwyn Stodgell Cochrane Murray Ltd.*, [1988] B.C.J. No. 485 (C.A.); *Roumanis v. Hill*, 2013 BCSC 1047. Further, the defendants submit that the compromise agreement of which the Release formed a part was approved by court order and that the present action is an impermissible collateral attack on that order.

- [13] The question on a R. 9-6 summary judgment application is whether, on the pleadings and evidence presented, the plaintiff is bound to lose: *J.A Brink Investments Inc. v. B.C.R. Properties Ltd.*, 2015 BCSC 144. Ms. LeRoy's short answer to the summary judgment application is that there are genuine issues for trial with respect to both the validity and interpretation of the Release. I agree with her submission. In explaining why, I will endeavour to be as brief as possible in order to avoid embarrassing the trial of these issues.
- [14] First, if the plaintiffs succeed in proving a conspiracy to destroy TLT by deceitful means, the Release may not assist the defendants. The Release is a contract. Fraud vitiates a contract and every clause in it: *Ballard v. Gaskill*, [1955] 2 D.L.R. 219 (B.C.C.A.). While it is certainly true that TLT had serious and ongoing disputes with TimberWest at the time the Release was executed, a genuine issue arises from previously undisclosed facts from which it might be inferred that these disputes were engineered by TimberWest as part of a corporate strategy to subdivide important contracts by terminating its agreements with TLT via rate disputes or the failure of TLT as a business. It is open to the plaintiffs to argue that the complexion on the earlier facts, the known facts, changed in a critical way with the emergence of the 30 October 2007 report. On the issue of whether the Release is valid, I conclude that the defendants have not shown that Ms. LeRoy is bound to lose.
- [15] My opinion is not altered by the fact that the compromise agreement was approved by court order. The defendants submit that Ms. LeRoy's argument (that the release is invalid) is a collateral attack on the CCAA order, citing *Samos Investments Inc. v. Pattison et al.*, 2000 BCCA 412; *Taylor Ventures Ltd. (Trustee of) v. High Meadow Holdings Ltd.*, 2006 BCSC 1095 at paras. 51-54; and *Sturm v. Sprott Resource Lending Corporation*, 2014 BCSC 190 at paras. 71-107.
- [16] The following passage from Madam Justice Fitzpatrick's reasons in the Sturm case explain that a party may not make a "direct and collateral attack" on this sort of order:
- [71] The defendants argue, with some force, that Mr. Sturm's present complaints represent a collateral attack on the Final Order approving the plan of arrangement. In *Garland v. Consumers' Gas Co.*, 2004 SCC 25, the court described the doctrine of collateral attack in that it:
- [71] . . . prevents a party from undermining previous orders issued by a court or administrative tribunal . . . Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).
- [Citations omitted]
- [72] In *Samos Investments*, the court also addressed arguments that the plaintiff's claim represented a collateral attack on the final order approving the arrangement. The majority of the court allowed the tort action to proceed to the extent that such claims, representing

actionable wrongs which arose pre-arrangement, did not represent "a direct attack on the [arrangement] order": paras. 54, 64-68. Certain claims which sought to vary the final order to the extent of allowing a claim for damages and to challenge certain resolutions which were the underpinning of the arrangement itself were disallowed: paras. 69-71, 92-95.

...

- [107] In my view, the inescapable conclusion is that these other claims of Mr. Sturm and Arroyo, if successful, would undermine the binding effect of the plan of arrangement under the Company Act. As such, these other claims of Mr. Sturm and Arroyo constitute a direct and collateral attack because they directly question the validity of the Final Order approving the plan of arrangement.
- [17] I cannot conclude that Ms. LeRoy is bound to lose on the basis of this collateral attack argument. As in Samos Investments, her claims are based on alleged wrongs that arose pre-arrangement, and she has open to her a reasonable argument that her claims are not an attack on the binding effect of the CCAA arrangement. Moreover, it seems to me that if the Release would otherwise be vitiated by the alleged conspiracy or fraud, the fact that there is a court order in place may not avail the defendants in circumstances where the conspiracy or fraud was not disclosed to the court. I understood Ms. LeRoy's argument in this respect to be a form of estoppel argument -- i.e., that if she proves her allegations of conspiracy or fraud, the court would not countenance its previous order being used as a shield, where the order was obtained (insofar as the Release is part of the compromise agreement approved by the order) in the context of an undisclosed conspiracy or fraud. Because this argument was not fully developed and no authority was cited, and because I have found that Ms. LeRoy has other viable arguments to avoid the Release, it is not necessary or advisable that I say more on this point.
- [18] Second, Ms. LeRoy submits that there is room for interpreting the Release such that it does not encompass her claims. The rule in *London and Southwestern Railway v. Blackmore* (1870), 39 L.J. Ch. 713 (H.L.) holds that a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given. Ms. LeRoy argues that a trier of fact is unlikely to find that it was in the contemplation of Mr. LeRoy, as TLT's operating mind, that the Release captured claims against TimberWest based in conspiracy and fraud.
- [19] The defendants submit that the Release is drafted in very broad terms. They point to the fact that the Release specifically refers to claims of "whatsoever kind and howsoever arising, whether known or unknown", and cite *Gwininitxw v. British Columbia (Attorney General)*, 2013 BCSC 1972, and *Privest Properties Ltd. v. Foundation Company of Canada Limited* (1997), 31 B.C.L.R. (3d) 114 (C.A.) in support of the proposition that hitherto "unknown" claims can be barred by such a release. That may be so, but as broadly as the Release may appear to be drafted, as was explained by La Forest J.A., as he then was, in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236 (N.B.C.A.), the rule in *London and Southwestern Railway*

requires consideration of a broad range of evidence to ascertain the relevant circumstances at the time the Release was executed. The context often provides a limiting background to a release worded in a broad and general fashion: *The Owners, Strata Plan BCS 327 v. IPEX Inc.*, 2014 BCCA 237 at para. 26. On this contractual interpretation point, I cannot conclude that Ms. LeRoy is bound to lose.

- [20] Turning from the question of summary judgment to the issue of suitability for summary trial, the centrality of the conspiracy and deceit allegations to the Release validity question, and the need for context to properly interpret the Release in the event it is not wholly invalid, drive me to the conclusions that:
- a) I am unable on the whole of the evidence before the court on this summary trial application to find the facts necessary to decide the issues of fact and law; and
 - b) I am of the opinion that it would be unjust to decide the issues on a summary trial.
- [21] In reaching this latter conclusion, I have kept in mind the following paragraphs from *Gichuru v. Pallai*, 2013 BCCA 60:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [22] The amounts involved in this case are large, and are unlikely to make a conventional trial process disproportionately expensive. The facts and issues are fairly complex; one of the bases of attack on the Release is that it is vitiated by fraud -- this case, like most arguable cases in fraud, is unsuited to being tried summarily. There is no prejudice that will arise from delay. There would be litigation in slices if the defendants lost on a summary trial restricted to the Release issues. I conclude that it will not be possible to find the facts

necessary to properly decide the Release issues on affidavit material, and that it would be unjust to conduct the "consideration of a broad range of evidence to ascertain the relevant circumstances" at the time of execution of the release or the assessment of whether fraud vitiates the Release, other than by the hearing of viva voce evidence following the parties' access to document and oral discovery.

- [23] In making these findings against summary trial suitability, I have not lost sight of Justice Karakatsanis' exhortation in *Hryniak v. Mauldin*, 2014 SCC 7. She urged chambers judges to act boldly in deciding questions of whether procedures short of a full conventional trial might be sufficient. However, I conclude that a summary trial in this case will not provide a process that allows for the making of the necessary findings of fact. Being able to make necessary findings of fact is, needless to say, a precondition to achieving a just result.

Ted LeRoy's Claims

- [24] The notice of civil claim alleges that the defendants entered into an agreement to cause economic harm to Ted LeRoy personally, and the defendants knew that in order to achieve their goal of destroying TLT they would have to render Ted LeRoy personally insolvent. The notice of civil claim alleges various overt acts in furtherance of this conspiracy, including slanderous statements made to union leaders and TLT's lender. In oral argument, counsel for the plaintiffs made it clear that Mr. LeRoy is not advancing a stand-alone defamation claim. That is, the allegations of slander in the notice of civil claim are alleged means by which the defendants carried out the alleged conspiracy to injure Mr. LeRoy and TLT, and are not the underpinnings for a separate cause of action in defamation.
- [25] Mr. LeRoy's damages pleading is that the defendants' deceitful conduct caused him "personal damages, such damages including injury to his reputation, loss of repayment of shareholder loans from TLT, loss of income, and loss of value in TLT shares."
- [26] The defendants submit that the notice of civil claim discloses no reasonable claim and, therefore, that part of the plaintiffs' pleadings that advance claims by Mr. LeRoy ought to be struck out pursuant to R. 9-5(1)(a). In the alternative, the defendants argue that the material before the court on this application, in relation to the claims of Mr. LeRoy, discloses no genuine issue for trial under R. 9-6(5)(a).
- [27] Rule 9-5(1)(a) 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 . . .

- [28] The question on this application under R. 9-5(1)(a) is whether the defendants have satisfied the onus of establishing that there is no reasonable claim. As was established by *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 21 and 70, the test is whether, assuming the facts pleaded are true, there is any reasonable prospect of establishing a claim.
- [29] The defendants submit that there is no independent relationship or duty between Mr. LeRoy and TimberWest that could support his claims. Further, it is argued that his alleged losses are all derivative or a consequence of the losses incurred by his company and cannot support the causes of action set up in the notice of civil claim: *Robak Industries Ltd. v. Gardner*, 2006 BCSC 1538, aff'd 2007 BCCA 61; *Rogers v. Bank of Montreal* (1985), 64 B.C.L.R. 63 (S.C.), aff'd (1986), 9 B.C.L.R. (2d) 190 (C.A.); *Garneau v. Kozub*, [1989] B.C.J. No. 1224 (S.C.).
- [30] In *Robak Industries*, the chambers judge held that a shareholder may have a cause of action when two conditions are both met: (1) where the shareholder suffers a loss separate from that suffered by the company; and (2) where the loss is caused by a breach of a duty independently owed to the shareholder. She decided that the plaintiffs had not shown that they have a cause of action for an independent loss in respect of the wrongs done to the company. This finding was upheld by the Court of Appeal.
- [31] If the defendants conspired to injure Mr. LeRoy and took steps to carry out their agreement, in addition to whatever they may have done in furtherance of their alleged goal of destroying TLT, then it seems to me that Mr. LeRoy has a reasonable claim that any losses he has suffered were caused in the context of an independent relationship with the alleged tortfeasors. However, the statement of losses alleged in the notice of civil claim, as it stands, do not set out a reasonable claim that Mr. LeRoy has suffered a loss separate from that suffered by his company. In particular, the loss of repayment of shareholder loans from TLT, the loss of income, and the loss of value in TLT shares all appear to be allegations of losses reflective of a loss suffered by TLT. The allegation of injury to Mr. LeRoy's reputation cannot be relied upon as an independent loss where Mr. LeRoy is not advancing a defamation claim.
- [32] If Mr. LeRoy has suffered losses that are separate from those incurred by the company and that are arguably maintainable in the face of the rule in *Foss v. Harbottle*, he will have the opportunity to so plead by amending the notice of civil claim: *Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.*, 2007 BCSC 426. In the meantime, Mr. LeRoy's claims for damages set out in paragraph 4 of Part 3 of the notice of civil claim are struck. If Mr. LeRoy intends to amend his notice of civil claim he must do so within 30 days, failing which the defendants are at liberty to apply to dismiss his claims.

The Claims Against TimberWest's Officers

- [33] The defendants submit that, in any event, the claims against the defendants Whiteley, McElligott, and Park ought to be dismissed on the basis that the plaintiffs' claims against them personally are bound to fail. This argument was not pressed with any vigour and, in my opinion, for good reason. If it is proved that these defendants were parties to a conspiracy or fraud, personal liability may attach: B.G. Preeco (Pacific Coast) Ltd. v. Bon Street Holdings Ltd. (1989), 37 B.C.L.R. (2d) 258 (C.A.).
- [34] Counsel, that concludes my reasons. With respect to costs, it is my tentative view that, success being mixed, each party ought to bear their own costs, but my ears are open to any submissions. Mr. Milman?
- [35] MR. MILMAN: I have none, subject to what my friend says.
- [36] THE COURT: Mr. LaCroix?
- [37] MR. LaCROIX: No, My Lord.
- [38] THE COURT: Very well. Anything required for clarification?
- [39] MR. MILMAN: Not from my end.
- [40] MR. LaCROIX: No, My Lord.

"Thompson J."

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