
CANADA / JUDGMENT

Litt v. Grewal

2012 BCSC 202

COURT

Supreme Court of British Columbia

DECIDED

9 February 2012

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2012 BCSC 202 Litt v. Grewal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Litt v. Grewal,

2012 BCSC 202

Date: 20120209

Docket: S78961

Registry: New Westminster

Between:

Karmandeep Kaur Litt, an infant, by her Litigation Guardian

Satinder Kaur Litt

Plaintiff

And

Harpal Kaur Grewal, Tarsem Singh Grewal,

Garnet Arthur Wall and Leigh-Ann Wall

Defendants

Before: Master Caldwell

Reasons for Judgment

Counsel for Plaintiff:

M.A. McDonald

Counsel for Defendants:

K. Jones

Place and Date of Hearing:

New Westminster, B.C.

November 15, 2011

Place and Date of Judgment:

New Westminster, B.C.

February 9, 2012

- [1] The plaintiff's application to extend the time for filing a Notice Requiring Trial by Jury came on for hearing last May. I dealt with part of the application in reasons dated August 5, 2011 and adjourned the matter for further evidence and submissions on the important issue of what actual information the plaintiff, by way of her guardian ad litem, possessed at the time that a jury election was to have been made.
- [2] I now have that further evidence and it is clear to me that the litigation guardian, and therefore the plaintiff herself, had no information at all that the election of a trial by judge with jury was available to the plaintiff. This was due in part to the extreme language and translation difficulties; it was also due in large part to the failure of previous counsel to at any point discuss this option with the guardian ad litem.
- [3] The defendant cites the case of *Hoare v. Firestone Canada Inc.*, [1989] B.C.J. No. 2362 (B.C.C.A.) and the general proposition that the plaintiff here must satisfy the court that the wish or intention to have a jury trial must have existed during the period when the election could have been made and the notice delivered.
- [4] This same thread was approved by Neilson J. in *Ngai v. Cho et al*, 2001 BCSC 333 where she said that it was not enough for the party to show negligence on the part of the solicitor and that the other parties have not suffered prejudice, it was also necessary to prove that the party wished or intended to elect a jury trial during the 21 day period following the delivery of the Notice of Trial.
- [5] The question arises however, how can someone be required to form a wish or intention to elect a thing which that person does not know exists or is available to him or her?
- [6] The defence relies on the decision of Macaulay J. in the case of *A.D. v. Tadros*, [2005] B.C.J. No. 2218 as authority for the proposition that such ignorance simply does not matter. In that case the defendant in a civil action for sexual assault had not been told by his lawyers that he had a right to a trial by judge and jury. In his decision, Macaulay J. said at para. 22:

The time period in this case ran from May 15 to June 5, 2003. Mr. Tadros cannot show that he had any wish or intention to seek a trial by jury during this period because he did not know of his right to do so....At best, in order to succeed, Mr. Tadros would have to fit within a narrow category of exceptions to the Hoare test arising out of solicitor's negligence.

[7] Following an adjournment of the trial in the Tadros case, the defendant reapplied before Fraser J. alleging that because of the adjournment, there was no longer any prejudice to the other parties and the application could be considered afresh. At para. 18 onward, Fraser J. says:

I conclude that it was argued to Macaulay J. that it was open to him to distinguish Ngai. The contention would have been that because there is affirmative evidence demonstrating that Mr. Tadros had had no opportunity to make a decision one way or the other, his situation differs from that of the plaintiff in Ngai, where there was no such evidence.

The responsive contention would have been that the difference only goes to the reason that Mr. Tadros did not form an intention and that, in functional terms, the situation in the two cases was the same: the applicant could not show that he formed the intention to seek a jury trial during the requisite time limit.

It is implicit in the reasons of Macaulay J. that he saw no distinction between Ngai and this case.

Had these contentions been put before me as ones of first impression, I would have had to consider whether Mr. Tadros' lack of knowledge made a difference. But it is not a matter of first impression: Macaulay J. has already held that the ignorance of Mr. Tadros does not help him.

[8] In my view, unless the present case can be distinguished on its facts from the Ngai and Tadros cases, I am absolutely bound by the decisions of Neilson J. and Macaulay J. in those cases.

[9] In Ngai the plaintiff was an infant, suing by way of his guardian ad litem; that is precisely the situation before me.

[10] In Tadros, the evidence was clear that the reason for the defendant's failure to file and serve a jury notice was that his lawyers had never told him that such an option was available to him; again that is precisely the situation before me.

[11] In Ngai the court commented on the fact that the evidence as to the plaintiff's intention at the relevant time was poor at best and found it insufficient to establish such intention. In the present case, that cannot be said. The guardian ad litem herself swore an affidavit saying that previous counsel never advised her that the plaintiff was entitled to a jury trial and that had she known that such an option existed she would most certainly have made the election. The evidence of the original lawyer for the plaintiff confirms that he never advised the guardian ad litem of the plaintiff's right to a jury trial.

- [12] The result is that we are left to speculate as to what Neilson J. might have done in the case of an infant plaintiff, being a person under a legal disability and represented by a guardian ad litem, where there was clear and unequivocal evidence that counsel had never provided any information as to the right to a jury trial.
- [13] Macaulay J. found in Tadros that ignorance of the right to a jury trial, arising from the failure of counsel to advise the client on the issue, is not a basis to extend the time for filing a jury notice. It is however, important to note that in paras. 24 and 25 of his decision, Macaulay J. focuses in on the issue of prejudice to the opposing party; he had already dismissed the defendant's application to adjourn the trial which was to commence in less than 30 days on the basis that the weighing of prejudice favoured the plaintiff and he determined that to allow the late election of a jury would force such an adjournment.
- [14] I am satisfied that the present case is distinguishable on the facts from both the Ngai and Tadros decisions.
- [15] The Ngai decision dealt with the evidence to establish intent during the relevant time period; that is not the case before me. The case before me deals with a party who had no intention at the relevant time solely because they were not told of the right about which they had to form an intention.
- [16] In Tadros, Macaulay J. comments on the defendant's allegations that he had been "kicked around" by his previous lawyers and had received poor representation due to conflicts of interest.
- [17] I note in particular that at paras. 28 and 29 he comments that:
- I note that none of the lawyers who had day-to-day carriage of the matter in the past provided affidavits on this application....It is certainly possible that Mr. Tadros has been prejudiced by having to change counsel at least twice through no choice of his own. However, this hardship must be balanced against the prejudice and hardship the plaintiff would suffer if I were to permit the filing of a jury notice and the trial were adjourned.
- [18] I take these comments to confirm that a discretion exists to extend the filing of a jury notice where:
1. a party has not been advised of their right to a jury trial; and
 2. that assertion is supported by cogent evidence; and
 3. there is no prejudice to the other party.
- [19] This is particularly the case where the party seeking relief is, as here, an infant and person under a legal disability. In *Howe v. City of Vancouver*, [1957] 9 D.L.R. (2d) 78 (BCSC), Sullivan J. said at para. 81:

(4) The rights of the infant plaintiff as against defendant are his own; and immediately this action was launched, the Court became obliged to take on the responsibility of protecting his rights. The next friend, therefore, may not settle nor compromise nor release the claim of his infant son without this Court's approval.

[20] This is not a settlement approval case but in my view the same principle applies. The order sought by the plaintiff is granted; there will be an extension of the time to file and serve a jury notice to February 15, 2012.

[21] In the unusual circumstances of this case, costs will be in the cause.

"Master Caldwell"

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