

CANADA / JUDGMENT

Lowe v. Sidhu

2020 BCSC 1475

COURT

Supreme Court of British Columbia

DECIDED

10 August 2020

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2020 BCSC 1475 Lowe v. Sidhu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lowe v. Sidhu,

2020 BCSC 1475

Date: 20200810

Docket: S213223

Registry: New Westminster

Between:

Alison Mei-Ching Lowe

Plaintiff

And

Geoffrey Sidhu

Defendant

Before: Master Cameron

Oral Reasons for Judgment

Counsel for the Plaintiff

appearing by teleconference:

J. R. Shewfelt

Counsel for the Defendant

appearing by teleconference:

E.G. Wong

Place and Date of Hearing:

New Westminster, B.C.

August 10, 2020

Place and Date of Judgment:

New Westminster, B.C.

August 10, 2020

- [1] This application is brought for the production of additional documents and for answers to requests left for information and particulars at an examination for discovery.
- [2] The action was commenced by way of notice of civil claim on April 2, 2019. The plaintiff alleges that in reliance upon the defendant's representations and due to the failure of the defendant to disclose fully all of the terms of an agreement that they had reached orally, but had not been accurately reduced to writing that the plaintiff was persuaded to provide the defendant with the sum of \$100,000. The terms of the agreement are clearly in dispute. The plaintiff expected that, for this investment, she would receive a 20 percent share interest in a software venture. The defendant said the agreement was effectively for the defendant to introduce the plaintiff to a third party and, upon that introduction being made, the plaintiff would pay \$100,000.
- [3] The matter proceeded to examinations for discovery after documents were disclosed by both parties and, on the examination for discovery of the plaintiff on October 11, 2019, counsel for the defendant left a number of requests with counsel for the plaintiff. They were twenty one in number and, in follow-up to that discovery, defendant's counsel wrote letters to the plaintiff's counsel as follows, the first dated October 22, 2019:

I write in regards to the outstanding requests and refusals from Ms. Lowe's discovery on October 11, 2019. I assume you have received a copy of Ms. Lowe's transcript to confirm the requests and refusals. Please advise me when I may expect to receive Ms. Lowe's answers to the outstanding requests, your position on the refusals, and when Ms. Lowe is available to continue her discovery.

- [4] A follow-up letter dated November 8, 2019, was sent and it said:

Further to my letter of October 22, 2019, I write to ask, again, when will I receive Ms. Lowe's answers to the outstanding requests, your position on the refusals and Ms. Lowe's available dates to continue in her discovery.

- [5] Lastly, on January 28, 2020, counsel for the defendant wrote and said:

I write to request the following:

1. Ms. Lowe's answers to the outstanding requests and your position on the refusals from her discovery on October 11th, 2019.
 2. Ms. Lowe's available dates in February 2020 to continue her discovery.
 3. Payment of my account for photocopying in the amount of \$101.80 that was included with my letter dated October 4, 2019 enclosing Mr. Sidhu's documents. Thank you.
- [6] Not having received a response to that correspondence, counsel for the defendant filed this application on February 20, 2020. The orders sought include that:
1. Ms. Lowe produce the documents or other information Mr. Sidhu requested from her at her examination on October 11, 2019, through requests listed as Items 1 through 21 under "Index of Requests" in Schedule A of this notice of application within five days;
 2. that Ms. Lowe attend a further examination for discovery to be set for a date within 10 days and answer questions arising from the documents or other information produced in response to requests referenced in paragraph 1.1.
 3. further, alternatively, that Ms. Lowe provide answers in writing to questions referenced in paragraph 1.1; and
 4. costs of the application to Mr. Sidhu.
- [7] In response to the application, counsel for the plaintiff by letter dated February 20, 2020, said in part:

This letter addresses the requests made on the record at the examination for discovery of the plaintiff Alison Lowe on October 11, 2019.

- [8] Counsel continued to set out the objections that are made to providing answers to some of those requests either for information or further particulars. In respect of the additional documents that were requested, counsel said the following:

Third, the proper procedure for demanding further documents is set out under Rule 7-1(10) and (11). A party may not circumvent those subrules (including the important requirement under subrule (11) that the demanding party indicate "the reason why such additional documents or classes of documents should be disclosed") by requesting documents on an examination for discovery. That form of procedure ended on July 1, 2010.

- [9] In his response to the application, plaintiff's counsel reaffirmed that position and said:

The defendant has not followed the mandatory procedure for demanding further documents under Rule 7-1(10) and (11). The purpose of those sub-rules is to allow the parties to debate and narrow the issues before embarking on an application.

- [10] The leading authority on the application of those two subrules in this context is the decision of Mr. Justice Fitch, as he then was, in *Lit v. Hare*, 2012 BCSC 1918, and I refer to paras. 57 and 58:
- [57] In addition, *Lit* takes the position that the applications should be dismissed for failure to comply with the rules. In support of this argument he relies on R. 7-1(10) - (14) of the SCCR which require a party seeking additional document production to make a written demand for the listing of additional documents before making application to the court requiring the listing party to comply with that demand. A similar procedural regime is set out in R. 9-1(7) - (11) of the SCFR. It is common ground that the procedure prescribed by the rules was not followed in this case.
- [58] Counsel for the applicant has not specifically sought relief from strict compliance with the Rules, but responds to this procedural objection by arguing that a demand of the sort contemplated by the Rules was effectively made in this case through document disclosure requests made in the course of examinations for discovery and by the filing of the application itself. In support of her position on this issue she cites *Przybysz v. Crowe*, 2011 BCSC 731 where, in a similar context, Master Bouck said:
- [54] There was never a formal request in writing from the defendants for production of these unedited records. The only request for unedited records is with respect to Dr. Egan's records. On that basis alone, I might be inclined to refuse the order sought pending completion of the process stipulated by Rule 7-1(11) and (12). Relief from strict compliance of the Rules is not specifically sought.
- [55] However, I am mindful of the principle that the SCCR are the servants, not the masters of the court. The object of proportionality is lost if a party is sent away to do a task when the outcome is entirely predictable. Having said that, litigants would be wrong to ignore the SCCR processes simply out of expediency.
- [11] Mr. Shewfelt was clear that the objection that he made in respect of the procedure not followed is one that he relied to for the purpose of this application.
- [12] Mr. Justice Fitch went on to say as follows in paras. 65 to 67:
- [65] Compliance with R. 9-1(7) and (8) of the SCFR (and its equivalent in the SCCR, R. 7-1(10) and (11)) is not optional and failure to observe its requirements will not readily be forgiven. I do not read *Przybysz* as suggesting otherwise, nor do I think that it particularly assists the applicant in this case. In fact, the case sounds a clear cautionary note about the failure to observe the requirements of this Rule. While I note that in *Balderston v. Aspin*, 2011 BCSC 730 a similar application for document production was entertained on its merits in the face of non-compliance with the companion civil rule, that was a case where no objection was taken by the party from whom additional documents were sought. The parties in that case essentially agreed to proceed on the basis that the request for the listing and/or production of additional documents had been made and declined.

- [66] Further, I do not accept the applicant's contention that requests for documents made in the context of examinations for discovery or the filing of the application itself should be regarded as sufficient substitutes for compliance with the terms of the Rule itself. While granting relief from non-compliance may, at first blush, seem expedient, doing so without good cause may also work to undermine the important objectives the Rule is designed to foster.
- [67] The Rule is designed to promote dialogue between the parties, informal resolution of document production disagreements where that is possible and, where it is not, targeted litigation that focuses on those well-defined issues that remain contentious. The Rule operates to restrain the impulse to litigate document production issues as a course of first resort where those issues might be resolved through discussion, including by requiring the parties to articulate and defend their respective positions. In my view, the Rule is also designed to facilitate the adjudicative process by narrowing the issues and argument and particularizing, to the extent possible, the documents or categories of documents sought before an application is made. As Master Bouck observed in Balderston, at para. 29, in the context of the SCCR:

The intent of Rule 7-1(11) is to inform the opposing party of the basis for the broader disclosure request in sufficient particularity so that there can be a reasoned answer to the request. The Rule allows the parties to engage in debate or discussion and possibly resolve the issue before embarking on an expensive chambers application.

- [13] In this case, it is unfortunate that the parties did not engage in the debate and discussion that is referred to by Mr. Justice Fitch. I observe that, on the return of this application of the twenty-one requests that were left on the examination for discovery, as many as ten of them have now been resolved. While it may be that a formal demand was not required for that to happen, it is, as I observe, simply what does happen when parties do engage in some frank discussion about what is in dispute before the matter comes on for hearing in chambers.
- [14] Mr. Wong, on behalf of the applicant, encouraged me to distinguish the Lit v. Hare case that was a multifaceted multi-million-dollar civil case that engaged issues of trust and other complex factual disputes over interests in properties and shares of companies. While the case may well have been complex, there is in my view no reason to limit a rule that is well designed for the purposes that have been referred to to only apply where the case is more complicated. This being a more straightforward case if that is an apt description of it would suggest that a short and succinct exchange of correspondence setting out the positions the parties took with respect to further document production could have and should have occurred before the application was filed.
- [15] For those reasons, the application for disclosure and production of further documents is dismissed. The balance of the application respecting outstanding requests otherwise from the examination for discovery is adjourned by consent. If necessary, what remains of this application should be heard together and will require a fresh notice of application in that

respect., Mr. Justice Fitch concluded that the appropriate result was costs to the successful party on the application in any event of the cause. That would be the order I would be inclined to make, but I would not be inclined to make those costs payable forthwith.

[16] MR. WONG: I say that the costs should be in the cause and I say that respectfully, Your Honour, and I say that I have heard the court's reasons now and, with all due respect, I say that there was effort made. The application itself may have been dismissed, but that does not preclude the fact that even today, two weeks or three weeks after the written submissions, the parties have not moved and it is not an issue of counsel not engaging in dialogue. The parties did have different positions on that production and I saw, on behalf of my client, that the opportunity to come before the court having written submissions, organizing the submissions, that the matter could be dealt with in a straightforward manner. So I say that the costs should be in the cause or, alternatively, that my friend, his client should only have the costs if she is successful at a trial. These are the types of procedural issues that sometimes get lost in a matter before it goes to trial and every effort had been made on behalf of the defendant to try to focus them, and I am not excusing the non-compliance with the rule, I hear what Your Honour's position is. I, respectfully, saw it in a different light on behalf of my client. So those are my submissions on costs.

[17] THE COURT: Mr. Shewfelt?

[18] MR. SHEWFELT: Your Honour, I would say that the Lit decision is not distinguishable in any way that would be helpful to Mr. Wong's costs disposition that he is asking for. The one thing that is different from Lit is that there was no clear statement like there is in the February 20 letter here advising counsel of, "This is the procedure to follow and you are required to follow it," and if Mr. Wong had spent just a fraction of the time writing a letter that he spent trying to find reasons not to write a letter, then we would not be in this situation. So I would say costs in any event of the cause is well justified.

[19] THE COURT: As Mr. Justice Fitch said in the Lit decision, the dismissal of the applications -- I am reading from paragraph 70, "The dismissal of these applications is based on non-compliance with the Rules," and he goes on to say:

and on the deficiencies in the materials presented in support. I would grant the applicant leave to make a further application for document production, should that be necessary, under either the SCFR or SCCR upon complying with the applicable Rules.

[20] The same will follow on this application and the costs of this application are payable by the applicant in any event of the cause, but not payable forthwith.

[21] I would encourage the parties to have some further dialogue. Should you need to come back, I am not seized of the matter.

"Master Cameron"

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