
CANADA / JUDGMENT

Malak v. Hanna

2019 BCSC 2257

COURT

Supreme Court of British Columbia

DECIDED

30 December 2019

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2019 BCSC 2257 Malak v. Hanna

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Malak v. Hanna,

2019 BCSC 2257

Date: 20191230

Docket: S133981

Registry: Vancouver

Between:

Raoul Malak, Ansan Traffic Group Ltd., Ansan Industries Ltd.

d.b.a. Ansan Traffic Control, Lanetec Traffic Control Inc. ,

Western Traffic Inc. d.b.a. Flaggirls Traffic Control, and

Island Traffic Services Inc.

Plaintiffs

And

Remon Hanna, Philip Keith Jackman, Valley Traffic Systems Inc.,

John Doe, Jane Doe, Richard Roe, Chris Sloe

and Trevor Paine

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraphs 7 and 8 on July 16, 2020.

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the Plaintiffs:

A. McConchie

Counsel for the Defendant, Remon Hanna:

D.W. Burnett, Q.C.

Counsel for the Defendants, Philip Keith Jackman, Valley Traffic Systems Inc. and Trevor Paine:

T.J. Delaney

P. Bruce, Article Student

Place and Date of Trial/Hearing:

Vancouver, B.C.

December 2, 2019

Place and Date of Judgment:

Vancouver, B.C.

December 30, 2019

Introduction

- [1] This claim, commenced in May 2013, is brought by the plaintiffs for damages against the defendants arising from the publication of defamatory statements on internet sites and by email in June of 2012 which the plaintiffs say resulted in their not obtaining lucrative traffic control services contracts.
- [2] In this application the plaintiffs seek an order allowing them to amend the Third Amended Notice of Civil Claim filed December 21, 2015 to include the amendments summarized below:
- 1) An allegation that a "contingency agreement" was made regarding a BC Hydro proposal seeking traffic control services under which the defendant Remon Hanna would be paid a percentage of the price paid to the defendant Valley Traffic Systems Inc. if the contract was obtained by that company; and
 - 2) A claim for disgorgement of profits by the defendants related to profits earned on the BC Hydro traffic control services contract (the "BC Hydro contract").

Background

- [3] The corporate plaintiffs are in the traffic control industry. The plaintiff Raoul Malak was at all material times the principal of the corporate plaintiffs.
- [4] The defendant Valley Traffic Systems Inc. ("Valley") is a competitor of the corporate plaintiffs. The defendant Philip Jackman is the principal of Valley and the defendant Trevor Paine is Valley's Vice President of Finance. The defendant Remon Hanna is a former subcontractor of the corporate plaintiffs.
- [5] This defamation action was commenced by notice of civil claim filed May 31, 2013. The notice of civil claim has been amended three times already - in June 2014, November 2014 and December 2015. In December 2015 the plaintiffs sought to amend their pleadings a fourth time to include a claim remedy that the defendants disgorge any profits resulting from the award of the BC Hydro contract.
- [6] The December 2015 amendment application came on for hearing before Justice Leask in February of 2016. Justice Leask postponed a ruling on the application for the requested amendment as a result of its late filing (the trial was set to commence in May 2016) and his belief that it would be preferable if the complicated questions relating to liability were decided first (*Malak v. Hanna*, 2016 BCSC 315, at paras. 16-18). In an order that went by consent Justice Leask severed the issue of liability from damages.
- [7] A 24 day trial on the issue of liability only commenced on May 30, 2016 before Justice Funt and reasons for judgement were released on September 28, 2017 (2017 BCSC 1739). Justice Funt found that Mr. Hanna was the party who drafted the defamatory materials and that Mr. Hanna, Mr. Jackman and Mr. Paine were, in essence, involved in a conspiracy to publish the defamatory materials. Valley was found to be vicariously liable.
- [8] In a decision released April 1, 2019 the Court of Appeal overturned the findings of liability against Valley, Mr. Jackman and Mr. Paine. The Court of Appeal found that Mr. Hanna had authored and was liable for numerous defamatory statements posted to the internet with respect to the plaintiff Raoul Malak, but ordered a new trial to determine: the liability of Mr. Jackman and Mr. Paine for participating in a "common design" with Mr. Hanna to vilify Mr. Malak; liability of Mr. Hanna for publishing a defamatory poem regarding Mr. Malak; and vicarious liability of Valley.
- [9] A new trial date has not been set at this time and I am advised by counsel for the plaintiffs that the parties intend to set down a new trial in March of 2021. By agreement between the parties all remaining issues, both with respect to liability and damages, will be tried at the same time.

Issues

- [10] The defendants object to the proposed amendments primarily on the basis that the proposed pleading seeking disgorgement of profits constitutes a new cause of action - waiver of tort - which should not be allowed for reasons of delay and the resulting prejudice, including the loss of a limitation defence and the dramatic increase in the scope of this litigation.

Analysis

Amendment of Pleadings

- [11] Rule 6-1(1)(b)(i) provides that a party may amend the whole or any part of a pleading after notice of trial is served with leave of the court.
- [12] A generous approach is typically taken to the granting of leave to amend a pleading. So long as the proposed amendments are necessary in order to determine the real question and issues between the parties in the absence of actual prejudice or injustice to the opposing party the amendments should be allowed: *Langret Investments S.A. v. McDonnell* (1996), 21 B.C.L.R. (3d) 145.
- [13] Prejudice means prejudice associated with the delay in seeking the amendments and must affect the ability to respond to the amended claim. *Dawe et al v. B.C. Children's Hospital et al*, 2003 BCSC 443 at para. 37.
- [14] Absent prejudice, and except in the case of "useless" amendments or amendments that violate specific pleading rules, an amendment should be refused only in the clearest cases where they disclose no reasonable claims: *Victoria Grey Metro Trust Co. v. Fort Gary Trust Co.*, (1989) 30 B.C.L.R. (2d) 45 (S.C.) at para. 2, reversed on other grounds [1982] B.C.J. No. 2357 (C.A.).
- [15] When a proposed pleading sets up a new cause of action after the expiry of a limitation period the court must presume prejudice to the defendant: *Med Finance Co. S.A. v. Bank of Montreal* (1993), 79 B.C.L.R. (2d) 222, 1993 CarswellBC 128 (C.A.) (C.A.) [Med Finance].
- [16] In considering in allowing an amendment, where a limitation defence exists, the court will consider the presence or absence of prejudice to the parties and the extent of the connection between the existing claim and the proposed new cause of action: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282, 1996 CarswellBC 254 (C.A.)

- [17] The overriding concern is whether it is just and convenient to allow the proposed amendment. Consideration may be given only to those matters that affect a defendant's ability to defend the case under the rubric "prejudice", such as the disappearance of documents and the unavailability of witnesses. Mere inconvenience and annoyance does not amount to prejudice: *Chouinard v. O'Connor*, 2011 BCCA 161 [Chouinard], at paras. 20, 23.
- [18] Factors to be considered in deciding whether to allow an amendment that sets out a new cause of action include the extent of the delay, the reasons for the delay, any explanation put forward to account for the delay, the extent of prejudice caused by the delay and the extent of the connection, if any, between the existing claims and the proposed new cause of action: *Chouinard* at para. 20, referring *Letvad v. Fenwick*, 2000 BCCA 630.

Do the proposed new pleadings disclose a new cause of action?

- [19] The first question to be answered is whether the proposed new pleadings disclose a new cause of action. If they do then this new claim may be subject to a limitation defence. If they do not then the court's analysis is more circumspect and primarily involves a high level assessment of whether, on the material facts pleaded, the amendments are necessary to determine the real question and issues between the parties and the potential prejudice arising from an amendment.
- [20] As set out earlier in my reasons the defendants say that the proposed amended pleading sets out a new cause of action, waiver of tort. The plaintiffs say they are not seeking to rely on waiver of tort as a cause of action but seek an accounting and disgorgement of profits as a restitutionary remedy after a determination of their claims for the tort of defamation.
- [21] When the application in this proceeding for a substantially similar amendment came before him in 2015 Justice Leask referred to the comment of Neilson J.A. in *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 [Koubi] stating that "The precise nature and scope of the doctrine of 'waiver of tort' has been the subject of much academic and jurisprudential debate. It is not settled whether waiver of tort is an independent cause of action or merely an alternative remedy once the plaintiff has established an actionable wrong": *Malak v. Hanna*, 2016 BCSC 315, at para. 12, referring to *Koubi*, at para. 18.
- [22] The doctrine of waiver of tort provides the victim of certain types of tortious wrongdoing with the option of foregoing (waiving) tort compensation measured by the damages suffered by the victim in favour of claiming instead, disgorgement of the tortfeasor's ill-gotten gains: *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at para. 297, *aff'd* 2013 ONCA 657, leave to appeal refused.
- [23] Neilson J.A. in *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 defined waiver of tort as follows: "waiver of tort is a restitutionary doctrine that permits a plaintiff to recover benefits a defendant has obtained by its wrongdoing instead of damages, measured by the plaintiff's loss": *Koubi*, at para. 18.

[24] A recent decision of the Newfoundland and Labrador Court of Appeal in *Atlantic Lottery Corporation Inc.-Société des loteries de l'Atlantique v. Babstock* 2018 NLCA 71 [Babstock] provides further useful guidance with respect to the nature of doctrine of waiver of tort. In that case the claimant in a class action sought different forms of monetary penalties against the defendant, including a disgorgement of profits and an accounting on the basis of waiver of tort or a constructive trust over profits.

[25] At paras. 83 and 86 of Babstock Chief Justice Green discussed the principles relating to restitution, unjust enrichment, waiver of tort and restitution by wrongdoing. He stated as follows:

83 The principles relating to restitution and unjust enrichment (there is no universal agreement as to how those two terms should be employed) have been subcategorized in recent years into two broad fields: (i) the restitution of benefits conferred on someone who has been unjustly enriched at the claimant's expense (restitution for enrichment); and (ii) the restitution or disgorgement of benefits acquired as a result of the commission of a wrong (restitution or disgorgement for wrongdoing).

86 The cause of action supporting the second category is not the unjust enrichment itself but the existence of a wrong (such as a tort, breach of contract, breach of fiduciary duty or perhaps even a crime) against the claimant which has the result of enabling the defendant to acquire a gain (sometimes described as an unjust enrichment), not necessarily from the claimant, that justifies the court in ordering the disgorgement of the wrongdoer's gains.

[Emphasis added.]

[26] Chief Justice Green after reviewing the history of the doctrine of waiver of tort concluded that as follows:

139 "waiver of tort" is now a misnomer which is productive of much confusion in the current jurisprudence on the subject. It does not depend on an artificial concept of "waiver", i.e. a giving-up of a fully independently-actionable tort in favour of another claim, but on separate wrongful conduct leading not to injury to the claimant but to the unjust acquisition of a benefit.

144 I am satisfied that, viewed from a historical perspective, waiver of tort could not be said to be an independent cause of action; it was permitted as an election of an alternative means of achieving a different remedy in certain limited circumstances. . Historically it was an election of remedies by waiving an underlying tort.

[27] I adopt the findings of the Newfoundland and Labrador Court of Appeal at paras. 139 and 144 in Babstock which were summarized at para. 149 of the reasons as follows: "waiver of tort is now regarded as 'archaic language for the simple idea that some forms of wrongdoing exceptionally allow the successful plaintiff to demand disgorgement of the defendant's gain as an alternative to compensation for loss". This is precisely the nature of the relief sought by the plaintiffs in their proposed amendments.

- [28] One dictionary definition of "cause of action" includes the following: " Facts which give rise to one or more relations of right-duty between two or more persons. Failure to perform legal obligation to do, or refrain from performance of, some act. Matter for which action may be maintained. Unlawful violation or invasion of right": Black's Law Dictionary, 6th Ed., 13th Reprint - 1998. It is clear that the remedy of disgorgement of profits does not fall within any of these definitions.
- [29] In this case I find that the proposed pleading concerning the remedy of disgorgement of profits is not a new cause of action but, as the plaintiff contends, a restitutionary remedy arising from the plaintiffs' tort (defamation) claim.

Are the amendments necessary to determine the real questions in issue between the parties?

- [30] The essential cause of action remains in play - whether or not tort of defamation has been committed. In addition the plaintiffs' claim that the personal defendants are jointly liable for the publication of the defamatory statements by reason of common design and whether Valley is vicariously liable remains in issue.
- [31] The alternative remedy sought by the plaintiff, disgorgement of profits, puts at issue the amount of profit earned by the defendants as a result of the alleged defamatory conduct.
- [32] Counsel for both parties are not aware of any case authority where a disgorgement of profits order has been made in a defamation action. Although a claim for the remedy of disgorgement of profits may be novel in the context of a defamation claim, this does not mean that this remedy will be found to be unavailable at the end of the day. The fact that there is uncertainty whether a disgorgement of profits order will be made as a result of the novelty of this claim does not in my view justify a refusal to grant the amendments: See *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42; *Mohl v. University of British Columbia*, 2006 BCCA 70 referring to *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.
- [33] In *Babstock* Chief Justice Green described the nature of an analysis to be carried out where a remedy of disgorgement of profits is sought. He stated as follows:

That sort of analysis must, of necessity, take place once all the facts are known and at the point where a determination is being made as to whether the enrichment that occurred is 'unjust'. At the pleading stage, all that would be necessary, to avoid a 'plain and obvious' pre-emptive striking out would be a pleading of facts supporting tortious wrongful conduct, a plea of an enrichment acquired as a result of the wrong together with such surrounding circumstantial facts from which a plausible submission could be made that the deterrence/disincentive rationale should be applied to achieve disgorgement in favour of the claimant, thereby making the enrichment unjust unless disgorgement were made: [*Babstock*, at para. 166.]

[34] I agree with the comments in Babstock that when seeking a remedy of disgorgement of profits "the [underlying] wrong need not be limited to particular classes of torts, such as those involving interference with the plaintiff's property or personal rights such as rights to protection of reputation. The key is the effect of the commission of the tort on the ability of the defendant to acquire a benefit.": Babstock at para. 170.

[35] I have little difficulty finding that the proposed amendments are necessary to determine the amount of the profit, if any, earned by the defendants as a result of alleged defamatory conduct.

Have the defendants shown that the defendants will suffer actual prejudice if the amendments are allowed?

[36] Given my finding that the proposed amendments do not raise a new cause of action the question of whether prejudice arises as a result of the loss of a limitation defence does not arise. In this case the plaintiffs seek to add a new remedy - not a cause of action. Limitation periods have no application to amendments to add a new remedy: Jennings v. Cumming Signs of Canada Ltd., [1983] O.J. No. 2103 (H.C.J.) per Master Peppiat. Accordingly, there is no presumption of prejudice arising from the proposed amendments: see Med Finance, supra.

[37] In this case the parties agree that the delay in seeking the proposed amendments is approximately the time between the filing of the original notice of civil claim in May 2013 and the date of the decision of Justice Leask in 2015 that liability be decided first and then damages. The delay is not significant. The plaintiffs contend that it was only relatively recently that they first learned of the existence of the alleged contingency agreement, in part hand-written on a scrap of paper by Mr. Hanna. This provides some explanation why the claim for an accounting and disgorgement of profits was not made earlier.

[38] The defendants have not filed any specific evidence setting out actual prejudice that they will suffer if the proposed new pleadings are allowed. In their application response they contend that the amendments sought will expand the scope of litigation years after the cause of action first arose.

[39] During argument it became apparent that counsel for the defendants Valley, Mr. Jackman and Mr. Pain misunderstood that the plaintiff was seeking disgorgement of profits beyond those earned from the BC Hydro contract. It appears that this misunderstanding formed the basis for his view that the proposed amended pleading would unreasonably expand the scope of litigation. Counsel for the plaintiff confirmed during argument that his pleading is only intended to deal with potential disgorgement of profits arising from the BC Hydro contract.

- [40] Although it is likely that additional document discovery will be required concerning profits earned by the defendants from the award of the BC Hydro project, given that a trial date has not been set any further disclosure requirements are unlikely to result in delay in going to trial.
- [41] There is no evidence that the defendants have suffered prejudice associated with the delay in seeking the proposed amendments affecting their ability to respond to the amended claim: see Dawe, *supra*. For example, there is no evidence that as a result of the passage of time documents have disappeared or witnesses are no longer available: Chouinard, *supra*.
- [42] In the result I consider it just and convenient in all of the circumstances to allow the proposed amendment.

"Mayer J."

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