

CANADA / JUDGMENT

Morriss v. Cuttler

2009 BCSC 1219

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1219 Morriss v. Cuttler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Morriss v. Cuttler,

2009 BCSC 1219

Date: 20090904

Docket: S121068

Registry: New Westminster

Between:

Sean Morriss

Plaintiff

And

Gerald Cuttler, David Rowntree, Stikeman Elliott, Calvin Patterson,

475338 B.C. Ltd., Mark Festing, Donna Festing, Prism Properties Inc.,

Bryce Chapman, Peter Berrang, Diane Erickson, John Doe and Jane Doe

Defendants

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

In Chambers

Counsel for the plaintiff:

In person

Counsel for the defendants

G. Cuttler, D. Rowntree, S. Elliott

and C. Patterson:

J.G. Dives

Place and Date of Trial/Hearing:

New Westminster, B.C.

August 21, 2009

Place and Date of Judgment:

New Westminster, B.C.

September 4, 2009

- [1] The defendants Cuttler, Rowntree, Stikeman Elliott and Patterson apply for particulars from the plaintiff of certain paragraphs of the statement of claim. This follows along after the defendants' Demand for Particulars sent to the plaintiff on August 17, 2009 and the Reply of the plaintiff that these defendants do not consider provides the particulars required.
- [2] The paragraphs of the statement of claim and the particulars sought of each paragraph are as follows.
- [18] That on at least two occasions, in or about 1994, Morriss met with Cuttler, in his offices in Vancouver, to deal with matters incidental to the Security Agreement and Cutler was made aware of the interest of Morriss in the lands under the terms of the Security Agreement.

Paragraph 18: provide particulars as to the "interest" of Morriss in the lands which it is alleged that Gerald Cuttler was made aware of;

- [30] In the alternative, Morriss claims that the Defendants, Cuttler, Rowntree, Stikeman, Patterson, Festing, Dona Festing and 435388 BC Ltd. have conspired through and with each other and with John Doe or Jane Doe and through a course of dealings to deprive by fraud or cheat Morriss of the benefit of his rights and interests in the Land under the terms of the "Security Agreement".

Paragraph 30: provide particulars of the "conspiracy" and "course of dealings" alleged as it relates to these defendants;

- [31] In the further alternative, Morriss claims that Rowntree, Cuttler, Stikeman, Festing, Donna Fasting, 435388 B.C. Ltd., set upon a course of conduct as early as 1994 and conspired through and with each other and with John Doe and Jane Doe to cheat and defraud Morriss of his interest in the Lands and that they subsequently induced and invited Prism, Chapman

Barrang and Erikson to join them in their fraudulent dealings as against Morriss and as a consequence Morriss has been fraudulently deprived or cheated of his interest in the Land pursuant to the Security Agreement.

Paragraph 31: provide particulars of the "course of conduct" and the circumstances of the "conspiracy" alleged against these defendants.

- [3] The plaintiff provided a Reply to the Demand for Particulars on August 18, 2009 that stated as follows:
1. In reply to the first Demand set out in the undated Demand for Particulars of the Defendants, Cuttler, Rowntree, Stikeman Elliott, and Patterson, received August 17, 2009, the "interest of Morriss in the Lands" referred to in paragraph 18 of the Statement of Claim, refers to the continued "interest" that Morriss retained in the Lands after he and Hydro Fuels transferred the fee simple to Festing. The "interest" was less than a fee simple and was in the nature of an option to purchase a fee simple.
 2. In reply to the second Demand set out in the undated Demand for Particulars of the Defendants, Cuttler, Rowntree, Stikeman Elliott, and Patterson, received August 17, 2009, Stikeman Elliott was imbued with the knowledge of Rowntree because Rowntree was an associate or partner with Stikeman Elliott and Morriss had communicated to Rowntree that the form of the Option to Purchase originally appended to the Settlement Agreement was unacceptable because the term was limited to one year and Festing agreed, verbally, with Morriss that he would extend the time period indefinitely. Rowntree was aware of this verbal agreement between Morriss and Festing. Morriss alleges that because Cuttler was the lawyer for Festing in Vancouver Action Nos. C900597 and related actions, Cuttler would, most probably, have been advised by Festing, Patterson or Rowntree or someone else from Stikeman Elliott of the "interest of Morriss in the Lands" as aforesaid. Morriss also alleges that because Patterson was the business lawyer and personal friend of Festing, Patterson would, most probably, have been advised of the "interest of Morriss in the Lands" as aforesaid. Morriss claims that Cuttler, being aware of the "interest of Morriss in the Lands" carried on acting for Festing in Vancouver Action No. C900597 and concealed from the court the fact that Morriss had not agreed to the form of the Option to Purchase and, furthermore, put before the court in evidence a document that inferred Morriss had agreed to an Option to Purchase with a one year term when Cuttler knew that was not the case. Morriss alleges that Cuttler and Festing conspired to hide and conceal from Morriss the false facts that Cuttler and Festing were presenting to the court in Action No C900597 by failing to deliver to Morriss Notices of Hearing, Notices of Trial, Notices of Motions and Affidavits in Action No. C900507, as is generally required by the Rules of Court, because those would have alerted Morriss to the fact that the court was being misled about his "interest in the Lands". Morriss alleges that because Patterson was the personal friend and business lawyer of Festing, Patterson would have been aware of and would have provided guidance to Festing on these matters. Morriss further alleges that Patterson's involvement in the conspiracy continued when he became involved as solicitor for Prism Properties Ltd. and acted to assist Prism

Properties Inc. in the acquisition of title to the Lands knowing some or all of the matters referred to herein.

3. In reply to the third Demand set out in the undated Demand for Particulars of the Defendants, Cuttler, Rowntree, Stikeman Elliott, and Patterson, received August 17, 2009, Morriss, alleges that Festing, Cuttler, Patterson Rowntree or some other undisclosed person, advised or communicated to Berrang, Chapman or Erikson of the fact of the "interest of Morriss in the Lands", as aforesaid, and being aware of the "interest of Morriss in the Lands" they proceeded to acquire the Lands through Prism Properties Inc. and, thereafter, fraudulently, denied any knowledge of the "interest of Morriss in the Lands" when they had been informed or advised of that "interest".
4. In general Reply to the Demand for Particulars of the Defendants, Cuttler, Rowntree, Stikeman Elliott, and Patterson, received August 17, 2009, Morriss claims that due to the nature of the torts of fraud and conspiracy, which, by definition, involve concealment and secrecy, he is not privy to and not aware of the full particulars of the "conspiracy" or "course of conduct" referred to in paragraphs 30 and 31 of the Statement of Claim and that full or better particulars of the "conspiracy" and "course of conduct" will be provided from the Answers of the Defendants to the Interrogatories and demand for Discovery of Documents that were delivered to the Defendants on or prior to August 1, 2009.
- [4] Counsel for the applicants submits that as the statement of claim alleges the applicants engaged in a fraudulent conspiracy to deny the plaintiff his legal rights, the Reply of the plaintiff to the Demand for Particulars is not responsive and the plaintiff must provide the particulars originally demanded and now requested in this application.
- [5] Counsel submits that the only purpose of the plea of conspiracy against the lawyers for whom he acts is to attempt to force them to provide confidential information about their clients and to divulge solicitor/client communications. In the case of the defendant Cuttler the submission is that the plea is designed to have him removed as counsel in this litigation for the defendant Festing and 475338 B.C. Ltd.
- [6] Rule 19(11) of the Rules of Court states as follows:

Where particulars necessary

- (11) Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the particulars shall deliver the particulars in a separate document either before or with the pleading.
- [7] In *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1994) 96 BCLR (2d) 156, Chief Justice McEachern said the following which is relevant to this application.

According to *Canada Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, at pp. 471-2, the tort of conspiracy exists if:

- (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
- (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

Accordingly, the following elements must be proved:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;
3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
(ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);
4. actual damage suffered by the plaintiff.

In *Proconic Electronics Ltd. v. Wong* (1985), 67 B.C.L.R. 237, Southin J. (as she then was), said at pp. 241-2:

I think a plaintiff who makes serious allegations of misconduct against someone who stands in a fiduciary relationship to him and who says he cannot give any particulars of those allegations must adduce some evidence even if very little in order to require a defendant to answer. Defendants are not to be called upon to answer a bald allegation of breach of fiduciary duty of which there is no evidence and of which no particulars are given.

In *Thompson v. Coquitlam* (1979), 15 B.C.L.R. 59, Esson J. (as he then was) said at p. 63:

It is well settled that the gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt acts causing damage.

Esson J. also cited Bullen, Leake & Jacob's *Precedents of Pleadings*, 12th ed. (1975), p. 341. The current edition of Bullen, Leake & Jacob's *Precedents of Pleadings*, 13th ed. (1990) states at p. 221:

The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff.

In my judgment, pleadings alleging conspiracy must be as specific as possible.

In *Hunt v. Carey Can. Inc.* (1990), 49 B.C.L.R. (2d) 273, (S.C.C.) the Court clarified the test to be applied in determining whether a pleading should be struck out.

After reviewing both English and Canadian cases, Wilson J., speaking for the Court, concluded that the test to be applied in considering whether or not to strike out a statement of claim is:

... whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case which is "fit to be tried"... (pp. 289-90).

Notably, in setting out this test, Wilson J. did not say that the same test should be applied before the court may exercise any of the other powers prescribed by the Rule, such as granting a stay or ordering an amendment.

In support of the view that the Hunt test does not apply to stays, Wilson J. at pp. 280-81 of that case said:

Rule 19(24)... and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action... This process of codification first took place in England...

One of the most important points advanced in the early decisions dealing with O. 25, r.4 [the early forerunner of R.19(24)], was the proposition that the rule was derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed. In *Pooley*... Lord Blackburn asserted that the new rule "considerably extends the power of the court to act... and enables it to stay an action on further grounds than those on which it could have been stayed at common law.

This indicates that the power to grant a stay is broader than that to strike out a statement of claim. Further, R. 19 (24) sets out four different grounds for exercising the powers given under it. While the law now seems settled that an order striking out a pleading must be grounded on the fact that "it discloses no reasonable claim", it is my view the granting of a stay, or the exercise of any of the other powers set out in the Rule, may be granted on this or any one of the other grounds stated.

(pp. 158-160.)

[8] In *Can-Dive* the Chambers judge had stayed the conspiracy cause of action until it was properly pleaded and this order was upheld on appeal.

[9] As I interpret the statement of claim in its entirety the plaintiff complains that in or about 2007 when he came to exercise an option to purchase lands allegedly granted to him by a Security Agreement entered into with Festing (¶16), the purchasers of the lands at that time (*Prism*, *Chapman*, *Berrang* and *Erickson*) refused to acknowledge that he had any such rights (¶28).

- [10] The plaintiff says that Festing had retained Rowntree, a lawyer with Stikeman, and Festing, Rowntree and/or Stikeman retained Cuttler to assist with matters incidental to the Security Agreement, whereby Cuttler became aware of the plaintiff's interest in the lands. Further the plaintiff alleges he met with Cuttler in or about 1994 and Cuttler was made aware of his interest in the lands (¶17 and ¶18).
- [11] It is alleged that when the Prism purchasers purchased the lands they retained the services of Cuttler and Patterson to act on the conveyance (¶27).
- [12] The plaintiff claims by ¶29 that the Prism purchasers fraudulently conspired to cheat and defraud him of his interest in the lands when they knew of his interest from the Festing group and their lawyers Cuttler and Patterson.
- [13] In the alternative by ¶30 the plaintiff claims that the lawyers Rowntree, Stikeman and Patterson conspired with Cuttler and the Festing group and with other unknowns through a course of dealings to deprive the plaintiff of his interest in the lands under the terms of the Security Agreement.
- [14] Paragraph 31 moves the alleged conspiracy further on in time to when the Prism purchasers purchased the property and alleges that the defendants within ¶30 induced and invited the Prism purchasers to join them in the fraudulent dealings and to deny the plaintiff his interest in the lands.
- [15] The statement of claim does not give any more details of this alleged "Security Agreement", nor of the option to purchase or buy back other than that it existed pursuant to the Security Agreement.
- [16] The plaintiff's Reply to the Demand for Particulars does give the further particular that his interest in the lands as alleged in ¶18 of the statement of claim is the right to purchase as set out in ¶16.
- [17] In response to the Demand for Particulars of ¶30 the plaintiff alleges that he told Rowntree that the option to purchase originally appended to a Settlement Agreement was unacceptable because the term was limited to one year, and Rowntree was aware of a verbal agreement between Festing and the plaintiff to extend the time period indefinitely.
- [18] This response suggests that the Settlement Agreement may be the "Security Agreement" alleged in the statement of claim and the option to purchase or right to purchase an interest in the lands pursuant to the Security Agreement is partly written and partly verbal.
- [19] The Reply goes on to allege Cuttler as lawyer for Festing would probably have been told by Festing, Patterson or Rowntree of the plaintiff's interest in the land and Patterson, as Festing's business lawyer and friend, probably would have been advised of the plaintiff's interest for that reason alone.

- [20] This imputation of knowledge to Cuttler of the plaintiff's interest in the lands is basically the same allegation against Cuttler set out in ¶17 of the statement of claim, but amounts to less than the direct knowledge attributed to Cuttler from the plaintiff himself in ¶18 of the statement of claim. Why the plaintiff alleges this indirect knowledge of Cuttler when he says he gave Cuttler the direct knowledge is a good question.
- [21] The Reply further alleges against Cuttler that he concealed to the court in C900597 the fact that the plaintiff had not agreed to the form of the option to purchase with a one year term, and put before the court a document that inferred that was the case when he knew it was not. It is alleged Cuttler and Festing conspired to hide and conceal from the plaintiff the false facts that they were presenting to the court and failed to tell the plaintiff of a trial going on and the evidence to be presented at the trial that allegedly would have alerted the plaintiff to the fact that the court was being misled about his interest in the lands.
- [22] It is alleged that later in time Patterson became involved again as solicitor for the purchaser Prism while knowing some or all of these matters.
- [23] The Reply does not indicate how the plaintiff has been denied the benefit of his interest in the lands by anything Cuttler did or did not tell the court in C900597 about his interest in the lands, when no connection is alleged between whatever happened at that court hearing and the eventual sale of the land in or about 2007 to the Prism purchasers.
- [24] It also does not give any indication how all these allegations of fact, even if true, could amount to a conspiracy amongst these defendants and what course of dealings it is alleged they engaged in to deprive the plaintiff of his interest in the lands, as set out in ¶30 of the statement of claim.
- [25] In response to the particulars demanded of ¶31 of the statement of claim the plaintiff alleges that the same defendants alleged by ¶30 to be in a conspiracy then told the Prism purchasers of the plaintiff's interest in the lands and induced the Prism purchasers to conspire with them to acquire the land and deny the plaintiff's interest to him.
- [26] This is really no more of a particular of ¶31 than already set out in that paragraph.

Disposition

Paragraph 18

- [27] The plaintiff will provide particulars of his interest in the lands being alleged, in terms of whether that interest is in documentary form, in oral form, or is a combination thereof, and state the full effect of the interest alleged.

Paragraph 30

- [28] The plaintiff will provide particulars of the "conspiracy" in terms of particulars of any concerted action by these defendants that it is alleged was intended to injure this plaintiff, and how the plaintiff was injured by it.
- [29] The plaintiff will provide particulars of the alleged "course of dealings" by these defendants including when this alleged course of dealings took place and what the course of dealings consisted of, how the alleged course of dealings was intended to deprive the plaintiff of his interest in the lands and how he was deprived of his interest by this course of dealings.

Paragraph 31

- [30] The plaintiff will provide particulars of the alleged "course of conduct" by these defendants including what that conduct consisted of, how it was designed to injure the plaintiff and how the plaintiff was injured by it.
- [31] Provide particulars of the "conspiracy" in the form of the particulars required of ¶30.
- [32] Until these particulars are provided the claims against these defendants in fraud and conspiracy are stayed.
- [33] It is a serious matter to make allegations of fraud and conspiracy against anyone and especially professional people whose integrity is fundamental to their profession. The plaintiff should think long and hard about whether it is really necessary for him to maintain these allegations of fraud and conspiracy in order to achieve his ends, and be prepared to prove them or be subject to a severe order for costs.

"Truscott J."

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