
CANADA / JUDGMENT

Newton v. Newton et al

2005 BCSC 1880

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1880 Newton v. Newton et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Newton v. Newton et al

2005 BCSC 1880

Date: 20051025

Docket: S045960

Registry: Vancouver

Between:

Christine Diane Newton

Plaintiff

And

Lyle George Newton, Dinyar Marzban, Jenkins

Marzban Logan, Gordon F. Hubley, Bestwick &

Partners, Meyers Norris Penny LLP, D. Jeffrey

Harder, BDO Dunwoody LLP, Gary S. Brewer and

Brewer, Edge & Company

Defendants

Before: The Honourable Mr. Justice B.I. Cohen

Oral Reasons for Judgment

In Chambers

October 25, 2005

Counsel for Plaintiff

D. Hobbs

M. Brotchee A/S

Counsel for G. Hubley and Bestwick & Partners

M. Hewitt

Counsel for Dinyar, Marzban & Jenkins Marzban Logan

L.J. Muir

Place of Trial/Hearing:

Vancouver

- [1] THE COURT: This is an application by the defendant Gordon F. Hubley, a chartered accountant, seeking an order that certain allegations be struck from the plaintiff's statement of claim.
- [2] The action was commenced by the plaintiff against her former husband and several legal and accounting professionals who advised the parties during their matrimonial litigation which was ultimately settled on October 15, 2001.
- [3] In her Statement of Claim, the plaintiff alleges inter alia, as follows:
44. In the circumstances it was a term of the agreement or alternatively it was the duty of Mr. Hubley to exercise all reasonable care and skill, as an accountant advising Ms. Newton in the settlement of the matrimonial proceedings and valuation of her shares to take all reasonable and proper care that the settlement advice and share valuation would be correct and would not contain inaccuracies or be absent necessary advice such that Ms. Newton would be lead in reliance thereon into making a settlement on unreasonable terms of her claims in the matrimonial proceedings with Mr. Newton.
45. By reason of the negligence and breach of agreement by Mr. Hubley, Ms. Newton entered a settlement of the matrimonial proceedings on the terms of the settlement which were materially unreasonable. The particulars of Mr. Hubley's breaches include:
- (a) advising Ms. Newton that she was not entitled to or should waive her claim to spousal support.
- (c) acting as an advisor to Ms. Newton on matters pertaining to settlement of the matrimonial dispute which were beyond Mr. Hubley's qualifications, experience and training as a chartered accountant and failing to advise Ms. Newton that the limits of Mr. Hubley's training, experience and qualifications in the aforesaid regard.

- (d) advising Ms. Newton to settle her matrimonial dispute with Mr. Newton without full disclosure of all the assets of Mr. Newton and the ABG of C, including the absence of any written or oral testimony or list of documents from Mr. Newton regarding disclosure of his personal or ABG of C's assets.
 - (f) failing to advise Ms. Newton that the presumption of an equal division of the family assets between Ms. Newton and Mr. Newton was rebuttable when in circumstances of her financial contribution, Ms. Newton may have been entitled to a portion greater than 50% of the family assets.
- [4] The defendant, Hubley, relies on Rules 18 (6) and 19 (24) (a) of the Rules. Under Rule 18(6) the defendant is required to establish that there is no bona fide triable issue of fact or law. Matters of fact cannot be weighed. Under Rule 19(24) (a), the action should be dismissed only if it is certain or sure to fail because it contains a radical defect. The test is stringent. The facts as stated in the statement of claim are taken as proven: See *Carnahan v. Coates* (1990), 71 D.L.R. (4th) 464; *Odhavji Estate v. Woodhouse* (2003), 233 D.L.R. (4th) 193.
- [5] In *Kripps v. Touche Ross & Co* [1992] B.C.J. No. 1550, Taylor J. A. for the Court states, as follows:

Referring to the judgment of the court given by Madam Justice Wilson in that case, Madam Justice Boyd says:

As I understand it, before summarily striking any portion of the Statement of Claim, it must be plain and obvious to the chambers judge "at once", that the pleading cannot stand. Put another way, the court must be satisfied that the outcome of the claim at trial is "beyond reasonable doubt". The issue is, whether there is a question fit to be tried, regardless of the complexity or novelty of that question

I agree that the decision of the Supreme Court of Canada in *Carey Canada Inc.* does not mean that complicated questions of law are necessarily unsuited to resolution on an application under Rule 19(24). That case stands, of course, for a different proposition -- that the fact that the questions raised are complex ought not to influence the court in favour of striking out a claim.

It seems to me that a court is not bound to refuse relief under Rule 19(24) simply because the relevant area of law is uncertain, that is to say because it seems possible another court might come to a different conclusion on the law. Every aspect of the common law is necessarily the product of evolution, and this process must continue if the common law is to serve its purpose. It would be wrong that those against whom action is brought in an area of law which happens to be in an active state of development should for that reason alone be required to bear the cost of enquiry into the facts before the court will decide whether the claim is one which calls for an answer. But it must also be said that it follows from the nature of the test which has to be met in order to strike out a claim under Rule 19(24) that where the court dismisses an application under the rule that does not mean that the plaintiff is entitled to succeed if the allegations pleaded are proved. To say that it is not obvious "at once" beyond reasonable doubt that a claim, as pleaded or

as it might be amended, is in law "bound to fail", is something very different from saying, as did the House of Lords in *Donoghue v. Stevenson*, [1932] A.C. 462, that the plaintiff, if she proved the facts which she averred, would be entitled to succeed. There are obvious differences in this regard between the Scottish law of "relevancy" and the law as it has come to be applied today under Rule 19(24).

I am therefore in agreement with Madam Justice Boyd when she characterizes the issue raised by these applications as being "whether there is a question fit to be tried, regardless of the complexity, or novelty, of that question" and that issue must be decided on the basis of the pleadings as they stand or as they might be amended: see *Minnes v. Minnes* (1962), 39 W.W.R. 112; approved in *Carey Canada Inc. v. Hunt* (above).

- [6] Mr. Hubley does not object to the pleadings relating to his activities qua chartered accountant. He says that those issues are contentious but they will be tried in due course. However, he submits that the plaintiff went well beyond reason and particularized the alleged breaches of duty of Mr. Hubley as including the duties of a lawyer. He asserts that the plaintiff has provided no evidence that would suggest Mr. Hubley provided advice to her on legal issues. He argues that in the absence of any material facts or evidence that demonstrates that Mr. Hubley expanded the scope of a typical accounting engagement, she is bound to fail on her claims against him on these issues. In the circumstances, he asks the Court to strike para. 45(a), (c), (d) and (f), under Rule 18(6).
- [7] Mr. Hubley also relies on Rule 19(24)(a) on the basis that the pleadings do not raise a cause of action, and Rule 19(24)(b) on the basis that the pleadings are unnecessary or vexatious, as they do not advance any claim known to law. He contends that the issue of whether a duty of care was owed to the plaintiff is a question of law and that if it is plain and obvious that no duty of care exists, it would be plain and obvious there is no cause of action and the claim should be struck: See *Border Enterprises v. Beazer* 2001 BCSC 17.
- [8] Mr. Hubley submits that the generally established principles relating to an accountant's negligence have no application to the instant case. He says that the plaintiff has pleaded no material facts that would demonstrate that he has a duty of care to advise her on the matrimonial issues.
- [9] In sum, Mr. Hubley submits that a claim against a chartered accountant for failure to provide legal services, in the absence of very unique facts, not pleaded in this case, is without foundation and is bound to fail.
- [10] I am satisfied that Mr. Hubley's application should be dismissed.
- [11] The thrust of the plaintiff's argument is not founded on an assertion that Mr. Hubley was in breach of a duty of care to the plaintiff qua lawyer. Rather, it is founded on the premise that if a chartered accountant wades into the settlement of matrimonial litigation then, depending on the facts, he may have assumed the standard of care of a matrimonial lawyer.

[12] There is some persuasive legal authority which I think supports the plaintiff's position. In *Drabinsky v. KPMG et al.* 41 O.R. (3d) 565, the Court found that a serious issue to be tried existed as to whether KPMG was in breach of its fiduciary duty to the plaintiff in accepting a retainer to carry out an investigation of irregularities in certain financial statements. While I recognize that this case involves a breach of fiduciary duty and not professional negligence, nevertheless I think that the statement set out in the case, and the case that it relies upon are apposite to the allegations in the case at bar.

[13] At p. 3 of the decision, Ground J. states as follows:

The question to be determined is whether, if a breach of the duty of loyalty and good faith and of the duty not to act in a manner adverse to the interest of the client is established, whether such breach is remedied by the establishment of a Chinese wall to prevent the disclosure of confidential information.

As to whether any distinction should be drawn between lawyers and accountants, in this respect, I adopt the words of Mr. Justice Pumphrey in the *Prince Jefri* decision referred to by counsel [*His Royal Highness Prince Jefri Bolkiah v. KPMG*, unreported, Engl. Ch., released September 15, 1998], pp. 22 and 23 as follows:

My attention has been drawn to all the principal, relevant English authorities. None are concerned specifically with the position of an accountant undertaking forensic services. Before turning to the authorities, which concern the position either of solicitors or of counsel, I should deal first with the question whether accountants offering forensic services are, in relation, at least, to those retainers concerned with forensic services, to be viewed as subject to similar obligations as are imposed on solicitors. I have come to the clear conclusion that they are. Nothing which I will say in this judgment is to be taken as having any impact, whatsoever, upon other work which accountants undertake and, in particular, work relating to audit. However, in relation to the supply of forensic services, in relation to the performance of tasks which can be and often are undertaken by solicitors and in relation to the giving and receiving of advice in relation to the conduct of litigation or threatened litigation, I can find no rational basis for drawing any distinction between the duty owed by an accountant to his client and that owed by his solicitor or counsel.

[14] In the Appeal Decision of *Bolkiah v. KPMG* [1998] E.W.J. No. 2937, the Court considered when it is permissible for a firm of accountants to conduct an investigation on behalf of a client against a former client for whom they have previously acted when they still possess information of a confidential nature relating to the former client which is relevant to the investigation. Lord Woolf, MR at p. 44 states, as follows:

It is inherent in the approach which I have adopted, which is not intended to differ from that of the New Zealand court that there is in the case of both solicitors and accountants no single test as to whether a firm of accountants or solicitors are or are not entitled to take instructions from a client to act against a former client. The answer in each case will depend on the steps which the firm has taken to protect the interests of the former client. There are differences between the

position of solicitors and accountants but what is involved on the accountant's part is forensic work it is not likely that the difference between the two professions will be decisive. The difference between the culture of the two professions, if in a particular case it exists, is the extent to which it interferes with the ability of the firm to protect the legitimate interests of the former client.

[15] At para. 105 Lord Justice Waller states, as follows:

The question then is whether by virtue of what Mr. Donaldson described as the culture of the accountants profession including in particular the culture of the major firms whether accountants should be treated any differently from solicitors. I am not persuaded that where they conduct an investigatory role of this sort they should be treated any differently. It seems to me that a client of an accountant's firm would react in exactly the same way as the client of a solicitor's firm and would be entitled so to react, where, having provided information in relation to a certain area he found that the firm was acting against him. Would a reasonable man informed of the facts as in this case reasonably anticipate a danger that confidential information might have already leaked prior to a wall being erected and might still leak once the wall was erected? I for my part, have little difficulty in seeing that he would consider that there was such a danger particularly having regard to the lack of consultation with him when the changeover took place.

[16] What I take from these authorities is the general principle that if a chartered accountant holds himself out as possessing special skill and knowledge to provide forensic accounting services then he undertakes to use care, knowledge and skill in providing those services. That is his clear professional duty to the client. However, in certain circumstances, the fair and reasonable standard of care and competence to be applied to determine whether the chartered accountant's duty has been met may be that of a solicitor.

[17] Applying the above general principle to the allegations in the instant case, the question arises as to whether the accounting services supplied by Mr. Hubley to the plaintiff were the conventional kind or whether they fall into a category possibly attracting a different standard of care. For the purposes of this application, I find that the pleadings and the evidence before the Court raise a triable issue on whether Mr. Hubley failed to meet the appropriate standard of care required of him when he assisted and advised the plaintiff on the settlement of her matrimonial claims in the litigation with her former husband.

[18] In his affidavit sworn April 14th, 2005, Mr. Hubley deposes that by May 1st, 2001, when the parties had still been unable to negotiate a settlement, the plaintiff then requested that he take a more active role negotiating her settlement interest in the group of companies owned by the parties. He says that between approximately May and August 2001, on behalf of the plaintiff, he negotiated her interest in the companies with the plaintiff's former husband and his financial advisor. He also says that during this period he often met with the plaintiff to ensure that she was kept up to date on the details of the negotiations as well as the arguments available to both sides regarding the settlement figures.

- [19] I am mindful that Mr. Hubley claims in his affidavit that negotiating the plaintiff's overall matrimonial settlement was never within the scope of his engagement and that he was retained only to assist in negotiating her interest in the companies, the purpose of which was to enable the plaintiff and her professional advisors to negotiate an overall matrimonial settlement with the plaintiff's former husband. He also claims that he did not provide any advice or counsel on legal issues or provide advice generally on broader issues associated with the plaintiff's overall matrimonial dispute.
- [20] However, Mr. Hubley's evidence is in conflict with the evidence set forth in the plaintiff's affidavit sworn by her on April 15, 2005. She deposes that her understanding was that Mr. Hubley, the defendant D. Jeffrey Harder, an expert in the valuation of company shares and the defendant Dinyar Marzban, her matrimonial lawyer would work together as lawyers and accountants to obtain the best result for her in her matrimonial dispute. She says that Mr. Hubley did not tell her that he was advising her in some limited way. Her concern at the time of the negotiations with her former husband was to arrive at a fair settlement on the value of her shares and she relied on Messrs. Harder, Hubley and Marzban to guide her through the process.
- [21] In particulars delivered to Mr. Hubley under cover of her lawyer's letter dated March 8th, 2005, the plaintiff alleges, inter alia, that she entered into an agreement on or about June 15, 2000, whereby the plaintiff agreed to retain the services of Mr. Hubley for a fee to advise her in the settlement of the matrimonial proceedings between her and her former husband and the value of her shares in the parties' group of companies; that she met personally with and communicated with Mr. Hubley on numerous occasions by telephone and fax; that Mr. Hubley advised the plaintiff, instructed and advised other advisors to the plaintiff and negotiated settlement on the plaintiff's behalf concerning the value and division of her interest in the family assets of her marriage; that he advised the plaintiff that she was not entitled to or should waive her claim to spousal support; acted as an advisor to her on matters pertaining to settlement of the matrimonial dispute which were beyond Mr. Hubley's qualifications, experience and training as a chartered accountant and failed to advise her of the limits of his qualifications in this regard; advised her to settle without full disclosure of all of the assets of her former husband and the parties' group of companies; failed to advise her that the presumption of an equal division of the family assets between the parties was rebuttable in the circumstances of her financial contribution to the marriage.
- [22] According to Mr. Hubley's counsel, the issue is how the duty owed by his client to the plaintiff translates to the kind of allegations contained in para. 45 of the Statement of Claim when the plaintiff pleads in para. 44 that it was the duty of his client to exercise all reasonable care and skill as an accountant.
- [23] Counsel insists that there is no authority to suggest that the duty of an accountant to his client can be measured on the standard of a lawyer. He also insists that the Drabinsky decision cannot apply since it deals with a breach of a fiduciary duty. He says that the case

involved a supply of forensic services by an accountant and that the services in the case at bar do not fall into that category of professional advice. He argues that Mr. Hubley's engagement by the plaintiff was solely to supply accounting advice and to work with the plaintiff's other professional advisors in his capacity as an accountant.

- [24] With respect, I disagree with Mr. Hubley's counsel that there is no factual allegations giving rise to the allegations raised in para. 45 of the Statement of Claim, or that there is no evidence to support the plaintiff's allegations.
- [25] According to the plaintiff's evidence and particulars, Mr. Hubley held himself out to provide her with professional services which not only included accounting advice but also assistance and advice in the settlement of her matrimonial litigation. I do not agree with counsel that her evidence points away from her allegations or that there is no legal, factual evidentiary foundation for the plaintiff's claim against Mr. Hubley. In my view, the plaintiff's evidence and the particulars of her allegations against Mr. Hubley serves to refute his complete denial that he supplied the plaintiff with assistance, advice or counsel on legal issues.
- [26] As plaintiff's counsel pointed out, on an application under Rule 18(6) the evidentiary burden on a plaintiff is very low. The plaintiff merely has to show that Mr. Hubley may have given her assistance and advice on the settlement of her matrimonial litigation. In her evidence and in her particulars she alleges that he did so. In his evidence he concedes that he took an active role in the settlement of the matrimonial litigation. Thus, it appears from the whole of the evidence before me that Mr. Hubley was a participant in the thick of the negotiations between the parties and directly involved in giving the plaintiff assistance and advice on the manner and means of settling the matrimonial dispute between the parties.
- [27] It is not for me on this application to weigh the evidence. Rather, I am satisfied under Rule 18(6) that there is enough evidence to demonstrate a bona fide triable issue between the plaintiff and Mr. Hubley that by providing the plaintiff with assistance and advice with the settlement discussions and negotiations surrounding the matrimonial litigation he may have taken on a role that is to be measured by the standard of care of a matrimonial lawyer.
- [28] I am also satisfied under Rule 19(24)(a) that there is a question fit to be tried on the standard of care to be applied to the professional services provided by Mr. Hubley to the plaintiff.
- [29] In the result, Mr. Hubley's application is dismissed, with costs to the plaintiff.

(Submissions)

- [30] THE COURT: My answer to your first question, is that I am certainly content to hear the matter if schedules permit. I do not wish to be seized of the matter in the event that I am not available and you wish to pursue the matter more quickly than I would be available. So I am certainly content to hear it, but if schedules do not permit, then certainly you are entitled to set it down before any judge in chambers and deal with the balance of the applications in this fashion.

[31] On the matter of costs, my view is that the costs should be in the cause.

[32] MR. HOBBS: We have consent that the defendant Gordon Hubley Limited would be added as a defendant so I would ask that we include that in the order and then I have agreement from counsel for Mr. Newton to adjourn our motion for production of privileged documents so I would like to include that in the order and the order would say that if Mr. Newton wishes to make some sort of application regarding costs arising out of these matters that that would be left open so costs would be adjourned vis-à-vis those motions so if I could deal with those matters and just put them in the order then we would have those bits and pieces dealt with. Counsel for Mr. Newton has made those agreements with me that we could deal with those matters that way.

[33] THE COURT: I do not have any difficulty with that. Thank you.

"B.I. Cohen, J."

The Honourable Mr. Justice B.I. Cohen

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