

CANADA / JUDGMENT

Oei v. Hui

2020 BCCA 214

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 214 Oei v. Hui

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Oei v. Hui,

2020 BCCA 214

Date: 20200724

Docket: CA45549

Between:

Hong Leong Oei, Hong Kong Expo Holdings Ltd.

and Canadian Metropolitan Properties Corporation

Respondents

(Plaintiffs)

And

Hui Chi Yan, otherwise known as Terry Hui

and Concord Pacific Acquisitions

Appellants

(Defendants)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Stromberg-Stein

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated

August 10, 2018 (Oei v. Concord Pacific Acquisitions, 2018 BCSC 1346,

Vancouver Docket S-161950).

Counsel for the Appellants:

J.K. McEwan, Q.C.

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I.G. Nathanson, Q.C.

M.C. Ohama-Darcus

Place and Date of Hearing:

Vancouver, British Columbia

November 25, 2019

Place and Date of Judgment:

Vancouver, British Columbia

July 24, 2020

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Madam Justice Stromberg-Stein

The Honourable Madam Justice Griffin

Summary:

The respondents (plaintiffs) alleged the appellants (defendants) had engaged in tortious abuse of process by commencing a prior action, with knowing falsity of the claims, to constrain the ability of the respondents to deal with or develop property and to induce or compel the respondents to continue negotiations with respect to the property. The appellants applied to strike the respondents' amended notice of civil claim as disclosing no cause of action. The judge provided the elements of the tort of abuse of process as (1) a collateral and improper purpose, (2) an overt act, and (3) damages, but stated that on the authority of *Smith v. Rusk*, 2009 BCCA 96, the generally applied element of an overt act may not be required in British Columbia. The judge held it was not "plain and obvious" the abuse of process action could not succeed. On appeal, the

appellants contend the judge erred in holding that a plea of "knowing falsity" may be actionable absent a collateral purpose, that is, one outside the ambit of the litigation, and submit an overt act is a requirement of the tort.

Held: Appeal allowed. A plea of "knowing falsity" cannot transform purposes within the ambit of the litigation into tortious purposes in respect of the tort of abuse of process. This conclusion is affirmed by the doctrine of absolute privilege. On the issue of an overt act, the expression of doubt concerning this element in British Columbia rests on shaky ground; absent a reasoned basis to diverge from the law first stated in British Columbia, an overt act is required for the tort. The order is set aside and the application is remitted to the Supreme Court of British Columbia for fresh consideration.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This appeal is from an order dismissing the defendants' application to strike the plaintiffs' amended notice of civil claim alleging the tort of abuse of process, on the basis it discloses no reasonable claim (Rule 9-5(1)(a) of the Supreme Court Civil Rules). The issues before us concern the elements of the tort - what must plaintiffs plead to establish a cause of action for abuse of process allegedly committed in previous legal proceedings?
- [2] The appellants are Concord Pacific Acquisitions and Mr. Hui (principal of Concord), defendants in this current action, S-161950, commenced by the respondents Mr. Oei, Hong Kong Expo Holdings Ltd., and Canadian Metropolitan Properties Corporation. Action S-161950 is the second in time of two actions between the parties. The first action, S-158989, was commenced on October 30, 2015, by Concord as plaintiff against Mr. Oei, Hong Kong Expo, and Canadian Metropolitan Properties as defendants and it is the underlying litigation to this current action. In the first action, Concord alleged that it had entered into an agreement with Mr. Oei, Hong Kong Expo, and Canadian Metropolitan Properties, on certain terms by which Concord would acquire a 50% indirect interest in real property and would enter into a joint venture to develop the property. They sought specific performance of that contract or, in the alternative, damages. By order pronounced August 10, 2018, Mr. Justice Voith dismissed the first action. See 2019 BCSC 1190.
- [3] On February 29, 2016, Mr. Oei, Hong Kong Expo, and Canadian Metropolitan Properties, reversed their litigation roles and became plaintiffs in this action against Concord and Mr. Hui. They allege that Mr. Hui and Concord engaged in tortious abuse of process in commencing the first action by concocting claims known to be false for the purposes of constraining their abilities to deal with their lands and coercing them to negotiate. The critical paragraph of this current action's amended notice of civil claim is paragraph 12. It alleges:
 12. Terry Hui and Concord deliberately, with knowledge of the falsity of the claims advanced by Concord, as alleged in [S-158989], determined that these claims would be advanced for the purpose of seeking to constrain the ability of the plaintiffs to deal with the Lands or to develop the Lands by means of a partnership or joint venture with other Canadian

developers. In advancing these false claims, the defendants knew: (a) that the result of such claims would be that no other developers or others would enter into agreements with the plaintiffs for the development of the Lands as a mixed-use residential and commercial project; to act as general contractor for the construction of the project; to manage the marketing and sale of all residential condominiums in the project; to manage the lease-up of commercial space in the project, the on-going leasing and other property operating matters relating to the commercial space; (b) the plaintiffs did not have the expertise to perform these services and required the retainer of third parties to do so; (c) the plaintiffs would be unable to sell the Lands while those claims were extant. The defendants thereby sought to induce or compel the plaintiffs, and particularly the plaintiff Oei, to continue negotiations with Concord for the purpose of entering into agreements by which Concord would have an indirect interest in the Lands and obtain for itself, or one of its affiliates, agreements to develop, construct, market and sell and/or lease the Lands.

[Emphasis added.]

- [4] In these reasons I refer to the parties either as appellants and respondents, or as the Concord parties and the Oei parties.
- [5] Tortious abuse of process requires as a precursor, previous court proceedings advanced against the now plaintiffs, by the now defendants. The classic formulation of this tort presents three elements. Professor Fleming stated two of these elements in J.G. Fleming, *The Law of Torts*, 4th ed. (Sydney: The Law Book Company, 1971) at 548, in a passage adopted by Mr. Justice Anderson (later J.A.) in *Guilford Industries Ltd. v. Hankinson Management Services Ltd.* (1973), 40 D.L.R. (3d) 398 at 405 (B.C.S.C.):

The essential elements of abuse of process are: first, a collateral and improper purpose, such as extortion, and secondly, a definite act or threat, in furtherance of a purpose not legitimate in the use of the process. Some such overt conduct is essential, because there is clearly no liability when the defendant merely employs regular legal process to its proper conclusion, albeit with bad intentions.

The second element described by Professor Fleming of "a definite act or threat, in furtherance of a purpose not legitimate in the use of the process" is commonly referred to by the shorthand description of an "overt act".

- [6] The two Fleming elements of 1) a collateral and improper purpose, and 2) an overt act, are joined by the third element, damages resulting to the plaintiff from the wrongful use of the legal process. The tort's first requirement that the underlying litigation have a collateral and improper purpose is not contested as an essential element of the tort, although what conduct may constitute a collateral and improper purpose is at issue. As I will discuss, the second element, an overt act, has been said by this court to be of questionable application in British Columbia.

[7] Professor Fleming's rather narrow description of the tort is derived from the seminal authorities starting with *Grainger v. Hill* (1838), 4 Bing. (N.C.) 211, and stands in contrast to the broader concept of the procedural fault of abuse of process which may ground the striking of pleadings under Rule 9-5(1)(d), an elevated award of costs, and other procedural remedies, but which cannot lead to an award of damages. In reviewing the jurisprudence advanced, and the judge's comments on the tort of abuse of process, this distinction is important. In particular, unlike tortious abuse of process, the procedural fault of abuse of process does not require that the wrongful behaviour be for a collateral and improper purpose.

[8] Additionally, as I will discuss, the tort of abuse of process stands in tension with the public policy doctrine of absolute privilege (sometimes referred to as "absolute immunity"). The classic explanation of this doctrine comes from *Munster v. Lamb* (1883), 11 Q.B. 588 (C.A.), including this passage at 604:

The rule of law is that which is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness.

[9] The keys to the compatibility of absolute privilege and tortious abuse of process are the formulation of absolute privilege as applying to what is said "in the course of the administration of the law", and the requirement that tortious abuse of process involves something outside that administration of the law, encapsulated by the phrases "collateral and improper", "outside the normal incidents of litigation", or "outside of the ambit of the litigation", and sometimes coupled with "ulterior".

[10] In British Columbia the question of whether the second Fleming element - an overt act in furtherance of the collateral and improper purpose - is also required was said in *Smith v. Rusk*, 2009 BCCA 96, to be uncertain. In *Smith*, Mr. Justice Smith, referring to comments in certain decisions of courts in British Columbia and an academic comment, said at para. 34 that in respect of the tort, "[i]t may be arguable that the law in British Columbia does not require an overt act or threat".

[11] Mr. Justice Voith, the trial judge in the first action, heard the application to strike the plaintiffs' amended notice of civil claim alleging the tort of abuse of process. In light of *Smith*, the judge could not say the failure to plead an overt act was a fatal deficiency in the pleading and the parties agreed at the hearing that the point was "off the table". The judge, on being told the law was uncertain, did not review the pleadings to determine whether the second Fleming element was pleaded. Instead he kept his discussion to the need to plead the first Fleming element, a collateral and improper purpose. In doing so he discussed the effect of the allegation of knowing falsity on the requirement to plead this element and concluded that it was not plain and obvious that the plea in the current action would not sufficiently state the first element.

- [12] The appellants contend that the judge erred in this conclusion. They say that absent the plea of knowing falsity, the "purpose alleged" in paragraph 12 of the amended notice of civil claim, broadly understood, was within the ambit of the first action and that the plea that knowingly false allegations had been made in the first action could not transform the purpose of that action into one that was collateral and improper. The judge's conclusion, they say, offends against the doctrine of absolute privilege prohibiting actions based on falsehoods expressed in earlier court proceedings. Last, the appellants ask us to clarify the content of the tort in British Columbia by finding an overt act or threat must be pleaded.
- [13] The respondents submit that the judge was correct in finding that a claim in which critical allegations were known by the pleader to be false, brought to create economic pressure on the other side and to cause a negotiation, can satisfy the first Fleming element. They submit that absolute privilege does not foreclose the result here because the doctrine is not as absolute as contended by the appellants and because, they say, their case is not premised on the falsity of pleadings in the first action but rather on an improper purpose. At the hearing of the appeal they asked us not to decide the case on the issue of absolute privilege because, they say, the submission was not advanced below and consequently we do not have the benefit of the judge's reasoning on the issue. The respondents submit, also, that we should decline to take up the invitation to clarify the law in British Columbia to determine whether an "overt act or threat" is a requirement of the tort, given that the appellants did not ask the judge to address that question. In the alternative, they request an opportunity to amend their pleadings.
- [14] Two legal standards are engaged in this appeal. The first is the standard applicable to Rule 9-5(1)(a) applications. The judge correctly referred to the applicable test, reiterated in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, that a claim will be struck under this rule only if it is plain and obvious, assuming the facts to be true, that the pleadings disclose no reasonable cause of action. He also stated correctly that the court must not weigh evidence under Rule 9-5(1)(a); the challenge is to the pleadings as they stand and the question is whether the claim pleaded cannot succeed as a matter of law.
- [15] The second standard relates to our task, which is to determine whether the judge erred in law in respect of the first Fleming element of the tort - a collateral and improper purpose. This question attracts the standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33.

DISCUSSION

1. The First Fleming Element - Collateral and improper Purpose

- [16] It is convenient to address the submissions by considering first whether the Oei parties' amended notice of civil claim in this action, absent the allegation of knowing falsity, alleges that the first action was commenced by the Concord parties for a collateral and improper purpose. If so, the pleading is sufficient and the plea of knowing falsity adds nothing to the Rule 9-5(1)(a) analysis. On the other hand, if, stripped of its allegation of knowing falsity, that amended notice of civil claim does not allege a collateral and improper purpose, the

question becomes whether the plea of knowing falsity fills the gap to satisfy the requirement of a plea of collateral and improper purpose. Wound into this second enquiry is the effect, if any, of the doctrine of absolute privilege on the issue.

Did the Judge Determine the Sufficiency of the Pleading Absent the Allegation of Knowing Falsity?

- [17] As a starting point in considering whether the amended notice of civil claim before us, absent the claim of knowing falsity, satisfies the requirement to plead a collateral and improper purpose, I ask whether the judge decided this issue.
- [18] The judge began his consideration of the tort of abuse of process by discussing the meaning of the words "collateral and improper purpose". He correctly observed that the tort of abuse of process was less broad than abuse of process under Rule 9-5(1)(d), and he referred to cases concerning the procedural fault of abuse of process: *Chernen v. Robertson*, 2014 BCSC 1358; *Flavelle v. Mahood* (1980), 25 B.C.L.R. 236 (S.C.), *aff'd* (1981), 33 B.C.L.R. 10 (C.A.); *Wang v. British Columbia Medical Association*, 2010 BCCA 43; and *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, including this disjunctive statement in *Flavelle* at 242:

A pleading is an abuse of process if made knowing there is no factual basis for the allegations made or if made for some improper collateral purpose.

- [19] The judge then moved to a discussion of the parties' positions on the scope of the elements of the tort. The Concord parties contended before him that a collateral and improper purpose is one that is independent of or unrelated to that which they could achieve in the underlying litigation if successful; they said a concocted action is not tortious so long as the plaintiff's purpose falls within the ambit of the litigation. The Oei parties contended that the essence of the tort is misuse or perversion of the court process. They said that in British Columbia the need to prove a collateral and improper purpose is entangled with the questionable "overt act" requirement, and unclear.
- [20] The judge held that the tort requires a collateral and improper purpose. He then said:
- [24] Second, I consider that the Defendants seek to unreasonably constrain the ambit of what can constitute an improper purpose or a purpose that is "collateral" to the action for the tort of abuse of process. It is the content of that requirement that is at issue on this application.
- [25] It is clear that there are various inevitable incidents or consequences of litigation. These include, *inter alia*, delay, cost, potential embarrassment, difficulty in securing financing and a chilling effect on those who would otherwise do business with the party who has been sued. Such matters are not actionable and cannot ground a claim for abuse of process.

[26] I consider, however, that a different result may ensue, where a plaintiff commences an action, based on what it knows to be a fiction, for the very purpose of achieving these same consequences and in order to coerce the party that has been sued. Such purposes are "collateral" to the action and constitute both a misuse and a perversion of the court's processes.

[Emphasis added.]

[21] The judge next reviewed the jurisprudence and observed that many of the cases followed a trial and focused on the acts or conduct of the alleged tortfeasor, unlike the application before him which simply concerned the pleadings. He concluded:

[44] Once again the incidental and natural consequences of a properly commenced action, such as delay and cost, can satisfy the "improper" or "ulterior" purpose requirement of the tort if an action is advanced on the basis of material facts that are known to be false and where, the very object of the action is to create such cost or delay for the purpose of exerting economic pressure, or otherwise coercing, a defendant. Such an object or strategy can/ would constitute a misuse and perversion of the court's processes and would, I consider, properly ground an action for abuse of process.

[47] ... Furthermore, I do not consider that it is "plain and obvious", or "perfectly clear", or "absolutely beyond doubt" that the Plaintiffs' action cannot succeed. This is so for several reasons. First, I consider that there is some uncertainty in this jurisdiction, in relation to the requirements of the tort of abuse of process. Second, I consider that the natural incidents of an action that is properly commenced can, in different circumstances, take on a different character. Thus, I consider that the "improper" or "extraneous purpose" element of the tort of abuse of process can be made out in circumstances where a plaintiff knowingly advances a "baseless" claim for the purpose of i) creating or manufacturing the incidents of litigation that I have described ii) to coerce a defendant into an agreement.

[48] In particular, I do not consider that is plain and obvious that an action for specific performance, that is commenced by a plaintiff on facts that the plaintiff knows to be false, and that is commenced for the purpose of both inhibiting or constraining the ability of a defendant to develop its land and to compel or coerce the defendant to negotiate with that plaintiff, does not support an action for abuse of process.

[Emphasis added.]

[22] It appears to me from these passages that the judge did not decide whether the amended notice of civil claim, stripped of the allegation of knowing falsity, sufficiently pleads the first Fleming element. That is, he did not decide whether the pleadings in the current action, other than the plea of knowingly false allegations, pleaded a collateral and improper purpose. I will set that issue aside, and first address the other possibility identified in my para. 16 above, that the plea of knowing falsity, by itself, can satisfy the requirement for a plea of a collateral and improper purpose. I will then return to the matter of the sufficiency

of the plea, stripped of its knowing falsity allegation, for purposes of the first Fleming element.

The Plea of Knowing Falsity and the First Fleming Element

- [23] For this discussion I must take the purpose of the first action as alleged in this action in paragraph 12 of the amended notice of civil claim as true. That is, I must consider that in the first action the Concord parties sought to constrain the ability of the Oei parties to deal with the lands which were the subject of the claim for specific performance or their ability to develop the lands by arrangements with other developers, and that the Concord parties sought to compel the Oei parties to negotiate with them to obtain agreements giving Concord an indirect interest in the land and the right to participate in the development, construction, marketing and disposition of the land.
- [24] I have set out above the main portions of the judge's reasoning in which he: concludes that the plea that knowingly false allegations were made in the first action "can satisfy the 'improper' or 'ulterior' purpose requirement of the tort" (at para. 44); holds that where an action is based on a fiction for the purpose of achieving some of the inevitable incidents or consequences of litigation so as to "coerce the party" the purposes are "collateral" to the action (at para. 26); and, in the result, dismisses the application (at paras. 47, 48).
- [25] Although the respondents resist reading the reasons for judgment as giving the plea of knowingly false allegations a transformative effect on the adequacy of the pleading of the first Fleming element, I can read the reasons in no other way. The judge's reasons focus on the effect the plea of knowingly false allegations has on the "incidents of litigation" (see para. 47). By his reasoning, this plea is the difference-maker; he uses it to transmute an unobjectionable plea in the first action into one that was collateral and improper.
- [26] The common understanding of the conjunctive phrase "collateral and improper purpose" is that the purpose must be outside of the normal incidents of litigation. In the 10th edition of Fleming, *The Law of Torts* (Sydney: Thomson Reuters, 2011), the editors explained at 707, relying upon a seminal case from the High Court of Australia, *Varawa v. Howard Smith* (1911), 13 C.L.R. 35 at 91:

It involves the notion that the proceedings were "merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate."

They said further at 708:

Of course, not every collateral advantage sought by a litigant becomes improper merely because it is beyond the court's power to grant it. Actions are commonly settled on terms that a court could not impose, for example an apology for libel, or specific performance of certain contracts. In order to be improper the ulterior advantage must be one not reasonably related to the subject matter of the litigation and but for which the defendant would not have commenced the proceedings.

- [27] The question at this stage becomes whether the plea of intentionally dishonest allegations advanced in the first action is capable of changing the purpose from one inside the ambit of the first action to a collateral purpose outside it.
- [28] The judge answered this question affirmatively. In so saying he relied upon *D.K. Investments Ltd. v. S.W.S. Investments Ltd.* (1984), 59 B.C.L.R. 333 (S.C.), *aff'd* (1986), 6 B.C.L.R. (2d) 291 (C.A.), leave to appeal *ref'd* [1986] 2 S.C.R. vi; *Goldman, Sachs & Co. v. Sessions* (1999), 38 C.P.C. (4th) 143 (B.C.S.C.); *Border Enterprises Ltd. v. Beazer East Inc.*, 2002 BCCA 449; *Glazer v. Kirsch*, [1985] B.C.J. No. 3058 (Co. Ct.); *Norton, Stewart, Norton & Scarlett v. Kirsch* (1987), 16 B.C.L.R. (2d) 221 (Co. Ct.); and *Pires v. Vectis Technologies*, 2007 BCSC 1144.
- [29] In *D.K. Investments*, the underlying action was a claim for specific performance of a contract for the purchase and sale of land. The plaintiff filed a *lis pendens* and a caveat; the defendant filed a counterclaim for abuse of process. The case was tried; it was not a pleadings case. In his reasons for finding liability, Mr. Justice Finch (later C.J.B.C.) found at 339, that contrary to the claim for specific performance, the plaintiff had not desired "to complete the agreement it had made", that it "knew it had no claim to fixtures other than the building", and that the action was commenced "to coerce the defendant to sell at a lower price than that bargained for, or to obtain for the plaintiff benefits which the plaintiff could not otherwise obtain". Thus the judge found the plaintiff had not wished to pay the price set out in the contract of which it claimed specific performance, and intended to delay the agreement's completion. Although the judge relied on the falsity of statements in the filed caveat to support his conclusion that the purpose of the claim for specific performance was an abuse of process, I take the gravamen of the decision to be that the action was for a collateral and improper purpose because the plaintiff never held the purpose of enforcing the contract for sale of the land. At most the false statements in the caveat were evidence of the improper purpose, but the purpose itself is what was collateral and improper to the claim. Thus *D.K. Investments* does not support the judge's conclusion that a plea of knowing falsity can have a transformative effect on the pleaded purpose.
- [30] Nor does *Goldman, Sachs & Co.*, in my view, support such a conclusion. In *Goldman, Sachs & Co.*, the defendant Mr. Sessions was sued on his personal covenant to pay, and two corporations of which he was the principal were joined as defendants on the basis they were his alter egos and liable for his debt. The plaintiffs brought pre-judgment garnishment proceedings attaching bank accounts of the corporations. The corporate defendants counterclaimed for abuse of process. In upholding the plea of tortious abuse of process, Mr. Justice Smith (later J.A.) held:

- [27] the knowingly baseless institution of a lawsuit against the corporate defendants would be, if proven, a misuse of the courts process if its purpose was to enable the plaintiffs to attach the funds on deposit in their bank accounts in order to coerce Anthony Sessions to settle the claim against him, as is alleged. The issuance of pre-judgment garnishing orders against those bank accounts would be, in those circumstances, an act "outside the ambit of the legal claim upon which the court is asked to adjudicate": Fleming, *The Law of Torts*, [9th ed.] at p. 688. It would be a step taken for the extraneous purpose of coercing Anthony Sessions by oppressing the corporate defendants.
- [31] Here the judge described Goldman, Sachs & Co. as demonstrating that if the action (against the corporations) was properly commenced, the purpose of economic pressure would be an incident of the action but if the action was, to the plaintiff's knowledge, "baseless, and with the object of coercing the personal defendant, the economic pressure that was placed on the personal defendant would constitute an improper and ulterior purpose" (at para. 40). This view, however, does not recognize that Justice Smith's observation spoke of a knowingly baseless claim against the corporate defendants for the purpose of coercing the individual defendant. If true, this would be a case in which third parties were sued for the purpose of forcing settlement of their claim against another party. That was the abuse of process claimed, and it appears to me that Justice Smith's conclusion rests on the plea that the purpose of the action against the corporate defendants was only to obtain advantage over a different party, a purpose he said was "outside of the legal ambit of the legal claim" the court was asked to adjudicate. That is not the plea before us, which is to the effect that knowingly false allegations were made against parties to obtain advantage from those same parties.
- [32] In *Border Enterprises*, the Federal Crown sought to strike a claim of the tort of abuse of process committed in previous litigation commenced by the Federal Crown. The plaintiff alleged that the Federal Crown had commenced an action to avoid liability, expenses, and costs in remediating property. Mr. Justice Thackray, writing for the court and employing the test counsel put to him, found that no material facts were pleaded that disclosed a misuse or perversion of the court's process and said avoidance of liability was a proper purpose, although some "methods" of doing so may be improper. In this case, the judge referred to Justice Thackray's comment that some "methods" of avoiding liability could be improper and said that had *Border Enterprises Ltd.* pleaded that the claim was baseless and had been commenced to put financial pressure on the plaintiffs, embarrass the plaintiffs, or delay site remediation, "a different result would have ensued" and the pleading would have survived. I do not consider *Border Enterprises* to be authority for this proposition.
- [33] Both *Glazer* and *Norton* are analogous to the case before us. *Glazer* concerned a knowingly false allegation in the filed defence, as did *Norton*. In my view, those decisions are not correct, and cannot be reconciled with the approach described by Professor Fleming taken to normal incidents of litigation nor, as I will discuss, with the doctrine of absolute privilege. In my view they ought not to be followed. For that reason I also consider *Pires*, the decision of Master Taylor relying on *Norton*, is in error.

- [34] In contrast to Glazer and Norton, trial decisions in British Columbia and elsewhere have held that advancing a false claim, for wrongful motives, is not enough to establish the tort of abuse of process: *Teledata Communications Inc. v. Westburne Industrial Enterprises Ltd.* (1990), 65 D.L.R. (4th) 636 (Ont. S.C.) ("factually groundless"); *Scintilore Explorations Ltd. v. Larche*, [1999] O.J. No. 2847 (S.C.) ("a false claim or false evidence"); *Office and Professional Employees Int'l. Union v. Office and Professional Employees Int'l. Union, Local 15*, 2006 BCSC 847 [OPEIU] (at para. 15 citing *Teledata*). See also *A.M. v. Matthews*, 2003 ABQB 942 on malicious institution of proceedings.
- [35] All of this is not to say that advancing intentionally false pleadings is not odious to the court process. Lawyers, of course, are bound by the ethics of their profession not to promote suits upon frivolous pretences, and they have an obligation as officers of the court not to be false to the court. Apart from serious ethical standards applicable to lawyers, all parties are subject to sanctions by way of costs for misconduct in the court process, are bound by rules designed to expeditiously weed out baseless claims, including an application to dismiss a claim under Rule 9-5(1)(d) for procedural abuse of process, and can be asked to post security for costs. The question before us is not whether intentionally false pleadings, if established, could attract opprobrium in the first action, but whether such pleadings can support a claim in tort for abuse of process by reason of the alleged knowing falsity of the allegations. Such a claim in tort requires a pleaded purpose that is outside the ambit of the first action, whereas procedural abuse of process is more widely discovered.
- [36] The tort of abuse of process is narrow, intentionally so to foreclose the spawn of litigation wherein one failed action begets another action, which may beget another action, and so on.
- [37] In the case of abuse of process advanced against a plaintiff, one action may beget another action only where the first action is brought for a purpose that is both improper and collateral (outside of what might be achieved against the person on whom the claim is made). This keeps the litigation between parties from multiplying beyond the original proceedings, which are intended to address all issues between the parties arising from the *lis*. The same notion, adapted, also narrows the tort of abuse of process as it applies to a defence that is advanced. Looking at this aspect of the tort, I conclude that knowing falsity, by itself, is not a "purpose" as required for the tort, and a plea of knowingly false allegations cannot transform an acceptable purpose into a tortious purpose in respect of the tort of abuse of process.

Concordance of the Tort of Abuse of Process and the Doctrine of Absolute Privilege

- [38] My conclusion above is affirmed by considering the fit of this order with the doctrine of absolute privilege. They are, in my view, incompatible; I consider that by stretching the allegation that the Concord parties filed knowingly false pleadings in the first action so as to transform the plea from non-tortious to tortious, as done in paras. 25 and 26 of the reasons for judgment, the judge trod upon the absolute protection afforded to statements uttered in the course of litigation.
- [39] The doctrine of absolute privilege, for reasons of policy, shields the legal process from itself becoming the source of further litigation. It has developed most robustly in the context of proceedings against lawyers and in the law of defamation, but the doctrine applies broadly.
- [40] The Oei parties complain that the appellants did not address this doctrine on their application to strike. I consider that the issue naturally arises from the view the judge took on the effect of the plea of knowing falsity as potentially taking a pleading that did not allege a purpose beyond the ambit of the first action into one that is beyond that ambit and, as it arises from his reasons, must be addressed. On my understanding of the tension between the tort and the doctrine of absolute privilege, it is the requirement to plead a collateral purpose, that is, a purpose outside the ambit of the first litigation, that allows the tort to harmonize with the doctrine. Resting the decision on the plea of knowing falsehood potentially upsets the harmony, and the issue in my view is fairly engaged in this appeal.
- [41] This court has previously considered the actionability of statements made by lawyers in the course of the litigation process, including statements made outside the courtroom in correspondence with other counsel in respect of the action, and statements made by a complainant to a disciplinary body.
- [42] Madam Justice Levine, in *Hamouth v. Edwards & Angell*, 2005 BCCA 172, concluded that absolute privilege extends to communications by lawyers in respect of judicial proceedings. She said:
- [2] There is no dispute that a lawyer is protected by absolute privilege regarding statements made in a court proceeding, and that the privilege extends to communications made in the course of inquiry with respect to or in preparation for judicial proceedings: see [Munster] at 600 and 604; *Web Offset Publications Limited v. Vickery* (1999), 43 O.R. (3d) 802 at 804 (C.A.); *Gatley on Libel and Slander*, 9th ed. (London: Sweet & Maxwell, 1998) at 13.12 -13.13; John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services) at 618-19. The privilege also extends to such statements made with respect to quasi-judicial proceedings of a tribunal: see *Sussman v. Eales* (1985), 33 C.C.L.T. 156 at 157 (Ont. H.C.J.), appeal allowed in part (1986), 25 C.P.C. (2d) 7 (Ont. C.A.); applied by this Court in *Hung v. Gardiner* (2003), 13 B.C.L.R. (4th) 298 (C.A.), 2003 BCCA 257 at 6-9, and *Schut v. Magee* (2003), 15 B.C.L.R. (4th) 250, 2003 BCCA 417 at 15-18.
- [3] There is also no dispute that absolute privilege provides immunity against suit.

[43] Referring to her earlier reasons in *Hung v. Gardiner*, 2003 BCCA 257, Justice Levine said:

[23] In *Hung v. Gardiner*, this Court considered the application of absolute privilege to disciplinary bodies that have the power to investigate complaints and impose disciplinary sanctions. I concluded (at para. 30), in reasons for judgment with which Ryan and Hall JJ.A. agreed, after considering *Sussman, Lincoln v. Daniels*, [1962] 1 Q.B. 237 (Eng.C.A.), *O'Connor v. Waldron*, [1935] A.C. 76 (P.C.), reversing [1932] S.C.R. 183; *Boyachyk v. Dukes* (1982), 136 D.L.R. (3d) 28 (Alta.Q.B.) and *Rajkhowa v. Watson* (1998), 167 N.S.R. (2d) 108 (S.C.) (In Chambers) that where such a body has "the power to determine the legal rights and to affect the status of" the parties who appear before it, it exercises powers that are similar to that of a court. Absolute privilege applies to complaints made to such bodies to initiate proceedings and to communications made in the course of their investigations.

[Emphasis added.]

[44] *Hung*, in turn, applied *W. Blake Odgers & Robert Ritson, Odgers' Digest of the Law on Libel and Slander*, 6th ed. (London: Stevens, 1929) at 195:

An absolute privilege also attaches to all proceedings of, and to all evidence given before, any tribunal which by law, though not expressly a Court, exercises judicial functions -- that is to say has power to determine the legal rights and to effect (sic) the status of the parties who appear before it.

[Emphasis added.]

[45] It is, as noted by Justice Cromwell in *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, the occasion of the statement, not the words, that attract the privilege. See also *Leighton v. Canada (Attorney General)*, 2012 BCSC 961.

[46] The doctrine has broad application outside of defamation cases: *Marrinan v. Vibart*, [1962] 3 All E.R. 380 (C.A.). In *Lefebvre v. Durakovic*, 2018 BCCA 201, Justice Groberman surveyed the leading British Columbia authorities on absolute privilege and referred with approval to *McDaniel v. McDaniel*, 2008 BCSC 653, rev'd in part 2009 BCCA 53, wherein he had previously stated:

[18] Witnesses are absolutely immune from civil liability for anything that they say in court, even if what is said is false and even if they harboured malicious motives for giving evidence.

See also *Lower v. Stasiuk*, 2013 BCCA 389, leave to appeal ref'd [2014] 2 S.C.R. viii, wherein Justice Levine cited this passage from *McDaniel* with approval, and *Goldberg v. Law Society of British Columbia*, 2009 BCCA 147, in which Mr. Justice Donald, at para. 51, quoted with approval a statement from the New Brunswick Court of Appeal in *Penney v. New Brunswick Association of Social Workers*, 2002 NBCA 28, that "the policy considerations underlying the immunity rule were developed to prevent legal actions for damages in defamation, negligence or other damages however framed."

[47] A notice of civil claim is a specialized statement made by a party to commence legal proceedings. If a complaint to a disciplinary body is protected by absolute privilege, certainly a notice of civil claim attracts that protection.

[48] The application of absolute privilege to defence pleadings in a court action was addressed in *Dooley v. C.N. Weber Ltd.* (1994), 118 D.L.R. (4th) 750 (Ont. Gen. Div.). In passages approved by Madam Justice Griffin (later J.A.) in *Duncan v. Lessing*, 2016 BCSC 1386, aff'd 2018 BCCA 9, Justice Reilly said at 753:

I conclude, after considering submissions of counsel and the relevant jurisprudence, that an absolute privilege attaches to the pleadings and they may not form the basis for a cause of action, even for abuse of process. The development of this privilege has been consistent and without exception, applying in England, Canada and other common law jurisdictions to judges, witnesses, counsel and litigants. The privilege extends to statements made in court, the evidence of witnesses, to submissions, to addresses, to statements in court by counsel, to pleadings (as in this case) and perhaps even to statements made to investigators in the preparation of a prosecution.

[Emphasis added.]

[49] In addition to *Duncan*, *Dooley* has been applied in British Columbia in *McColl v. Thompson*, 2015 BCSC 1034, a case of a counterclaim alleging abuse of process by the plaintiffs by virtue of the content of their notice of civil claim. See also *Foote v. Hallen*, 2014 BCSC 564.

[50] The respondents submit that the doctrine of absolute privilege is not offended in this case because the tort of abuse of process is one of the narrow exceptions to the general rule, referring to *311165 B.C. Ltd. v. Canada (A.G.)*, 2017 BCCA 196, leave to appeal ref'd [2017] 1 S.C.R. v, and say that this claim is not premised on giving false evidence but rather on the improper purpose they pleaded.

[51] I do not see these submissions as answers because they assume a collateral and improper purpose has been pleaded. I have explained above that the judge's use of the plea of knowing falsity to determine that the alleged purpose was collateral and improper skirted the required decision on the pleaded purpose. In this case, as discussed above, the judge rested his conclusion on the allegation of knowingly false pleadings in the underlying litigation. His conclusion has allowed an action to proceed in circumstances in which he has not found that the pleaded purpose, by itself, is collateral. In the event the pleaded purpose, absent the allegation of knowing falsehood, is not collateral, using the plea of knowing falsity to meet the requirement to plead a collateral purpose, steps squarely into the spotlight of absolute privilege and is, in my view, impermissible.

Conclusion on the First Fleming Element

- [52] I conclude that the plea of knowing falsity of allegations in the first action cannot be the difference-maker between a pleading that does not allege a collateral and improper purpose and one that does allege such a purpose. Respectfully, it was not open in law to establish a sufficient plea of the first Fleming element based upon the plea of knowing falsity of allegations made in the first action.
- [53] As I indicated at my para. 22, the judge did not review the amended notice of civil claim, absent the plea of knowing falsity, so as to determine whether, stripped of the knowing falsity portion of paragraph 12, the amended notice of civil claim met the pleadings burden on the first Fleming element.
- [54] In *Bank of Montreal v. Basant Motors Ltd.*, 2019 BCSC 748, Mr. Justice Sewell described this case, at para. 40, as one in which "a collateral purpose was clearly pleaded". I do not agree. On a review of paragraph 12 of the amended notice of civil claim in this current action, the collateral purpose is not clear to me. In the first action the Concord parties claimed specific performance of an agreement to purchase 50% of the lands and to develop them, and damages. The allegation in paragraph 12 of this case is that the first action was advanced for the purpose of constraining the Oei parties from dealing with the lands or developing them with others. Paragraph 12 further alleges that the Concord parties sought to compel the Oei parties to continue negotiations with Concord for an indirect interest in the land and agreements to develop, construct, market, and sell and/or lease the lands. It is well established that the normal incidents of litigation, including settlement, are not collateral and improper purposes. Considering that settlement discussions often produce terms that could not be included in a court judgment, it is not obvious to me at this stage that the purpose pleaded in paragraph 12 of this action of constraining the Oei parties from dealing with others concerning the lands or negotiating with the Concord parties in respect to ownership and development of the lands, is "clearly collateral", that is, outside the ambit of the first action, or not reasonably related to the subject matter of the litigation, or outside the range of solutions that might reasonably be considered in settlement discussions.
- [55] The question is whether we should decide whether a collateral and improper purpose has been pleaded without knowing how the judge would have answered this question and without the benefit of his reasoning. On balance I consider we should not answer this question for the first time, but rather remit this question to the trial court to determine whether the purpose advanced in the amended notice of civil claim, uninfluenced by the plea of knowing falsity, meets the requirements of the first Fleming element.

2. The Second Fleming Element - An Overt Act Requirement

- [56] The judge did not address the second Fleming element, an overt act, as on the authority of *Smith* it was unclear whether performance of an overt act in furtherance of the collateral and improper purpose is an essential element of the tort of abuse of process in British Columbia.
- [57] The uncertainty spoken of in *Smith* derives from statements in the British Columbia Supreme Court, for example in *Starbucks Corp. v. The Second Cup Ltd.* (1993), 46 C.P.R. (3d) 492 (B.C.S.C.). Starbucks posed the question whether the overt act, said by Fleming to be required for this tort, may be found in the lawsuit itself or was required to be external to the lawsuit. Mr. Justice Donald (later J.A.) referred to *Guilford, D.K. Investments, and John Irvine, "The Resurrection of Tortious Abuse of Process"* (1989), 47 C.C.L.T. 217 - an annotation in *Canadian Cases of the Law of Torts* following *Pacific Aquafoods Ltd. v. C.P. Koch Ltd.* (1988), 47 C.C.L.T. 214 (B.C.S.C.) - and concluded that it was not plain and obvious that the claim as pleaded without the allegation of an overt act could not succeed. He held that the trial judge should determine the issue after trial.
- [58] In the twenty-seven years since Starbucks, the issue has not been settled in this court. We are invited by the appellants to resolve the question in favour of the Fleming expression of the tort, requiring an overt act outside of regular legal process.
- [59] The respondents say we should not engage this question because the parties discouraged the judge from considering it, and refer us to my reasons in *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at para. 46, explaining the restrained approach this court generally takes to entertaining new legal questions that have not been the subject of a reasoned decision. In the alternative, they ask for an opportunity to amend their pleading.
- [60] I cannot say the judge erred in his treatment of this issue. Indeed, the question was taken "off the table".
- [61] Nonetheless, the doubt cast by *Smith* continues to prevent the trial court from fully resolving pleadings motions involving this element of the tort, and the issue has not advanced to this court for resolution of the confusion. No doubt this by itself creates confusion and expense, and having persisted so long, is not a good state of affairs. I consider it is appropriate to say something about the "overt act" issue.
- [62] I will admit to being puzzled at the proposition that in 1993 the law on this point was uncertain. That thought appears to have been seeded by comment on *D.K. Investments* and *Guilford*, both trial decisions wherein the field of dispute at trial appears to have focused on the element of purpose. Tracking this discussion as best I understand it, I see no case in which a British Columbia court has said that Justice Anderson's original description in *Guilford* of the tort as requiring Fleming's two elements, was incorrect. It is true that Justice Anderson did not identify the overt act committed in *Guilford*, but he recited the need for an overt act in describing the tort and did not disavow it. Rather, he appears to have kept his trial reasons to the issues disputed at trial by the parties, as trial judges do. The passage in

Quinn v. Leathem, [1901] A.C. 495 (H.L.), applied in Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd., 2016 BCCA 432, leave to appeal ref'd [2017] 1 S.C.R. ix, explains:

there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.

[Emphasis added.]

Had Justice Anderson been asked in Guilford, he may have found that the requirement of an overt act was met in that case by the plaintiff's filing a claim of a mechanic's lien (a step that precedes the action necessary to enforce the lien) without a contractual claim in respect to the properties liened, so as to advance collection of a putative debt owing to a related company.

[63] In the other named case that seems to have prompted the doubt, D.K. Investments, Justice Finch dealt with a tale of deceit of a plaintiff who sued for specific performance of an agreement, registered a *lis pendens*, and filed a caveat based on the defendant owner's alleged failure to provide title to fixtures. The defendant counterclaimed, alleging amongst other wrongs, the tort of abuse of process. Justice Finch observed that D.K. Investments' claim for specific performance alleged a failure to convey title to certain fixtures but that the principal of D.K. Investments testified the claim for specific performance was intended to bring pressure on a third party to provide a release of a petroleum agreement it had with the defendant. Although the details of all of this are not spelled out in what is a complicated narrative of shifting positions, on my understanding of the reasons and comparing this to the original formulation of the tort in Grainger, this appears to be a case of steps taken to obtain a release from a third party outside the ambit of the litigation in issue. It is true that Justice Finch did not recount the two elements described by Professor Fleming, and instead described the essence of the tort as "the misuse or perversion of the court's process for an extraneous or ulterior purpose", saying, and referring to Guilford, "[t]here must be a purpose other than that which the process was designed to serve" (at 339). He held, however:

The purposes behind the action were completely improper. There has been ample overt conduct by the plaintiff in its attempts to achieve its improper ends.

[Emphasis added.]

Judgment was given in favour of the defendant who had counterclaimed. On appeal to this court the plaintiff challenged findings of fact and the principles on which damages were awarded; this court did not discuss the elements of the tort of abuse of process.

- [64] These cases were followed by the County Court cases Glazer and Norton, both referring to Justice Finch's description that the essence of the tort is misuse of the process for an extraneous and ulterior motive.
- [65] Pacific Aquafoods then came along and, relying on Norton, Mr. Justice Meredith opined that the only important facts in a case alleging tortious abuse of process are those that go to the purpose of the impugned legal process. This case prompted academic comment questioning the Fleming element of overt act.
- [66] Relying upon these cases and the comment, Justice Donald in Starbucks sent the case before him to trial, saying, at 496-497:

It is arguable whether this court has developed an approach to the tort of abuse of process which ascribes less importance to the overt act element than the Ontario courts.

[Emphasis added.]

- [67] Chronologically, after Starbucks, Mr. Justice Tysoe (later J.A.) in *Ascot Holdings Ltd. v. Wilkie* (1993), 49 C.P.R. (3d) 188 (B.C.S.C.), supp. reasons 42 A.C.W.S. (3d) 25 (B.C.S.C.), described the tort as requiring prosecution for an improper collateral purpose and an overt act or threat in furtherance of the improper purpose. In like vein Madam Justice Kirkpatrick (later J.A.), in *Summex Mines Ltd. v. Farallon Resources Ltd.*, [1998] B.C.J. No. 1723 (S.C.), adopted this passage from Professor Fleming's 8th edition of *The Law of Torts*, (Sydney: The Law Book Company, 1992) at 622-623:

Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to serve. It involves the notion that the proceedings were "merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate." It is therefore immaterial whether the suit thus commenced was founded on reasonable cause or even terminated in favour of the instigator: the improper purpose is the gravamen of liability.

In addition to the improper purpose, there must be some overt act or threat, distinct from the proceedings themselves, in furtherance of that purpose, such as in the abovementioned case the extortion accompanying the *capias*. Were it otherwise, any legal process could be challenged on account of its "hidden agenda."

[Emphasis added.]

- [68] In *Goldman, Sachs, & Co.*, Justice Smith referred to Starbucks and questioned but did not decide the necessity of proof of an overt act.
- [69] Finally, *Border Enterprises*, as noted above, considered a claim that a Federal Crown action was taken in bad faith, for the sole purpose of avoiding liability, expenses, or costs related to remediation of land and causing loss, damage, and harm due to expenses and costs incurred

as a result of the Federal Crown action. Justice Thackray noted, at para. 51, that counsel agreed at trial that the elements of the tort were: "a willful misuse or perversion of the court's process for a purpose extraneous or ulterior to that [which] the process was designed to serve, and some damage flowing therefrom ". He said no material facts in the pleadings disclosed a misuse or perversion of the court's process and struck the claim. He then continued to the question of whether an overt act was required. Referring to the statement of Justice Donald in *Starbucks* he said, at para. 61, that while Fleming's two elements are followed in Ontario, it is "open to debate" whether the overt act is necessary in British Columbia. He declined to resolve that "debate", saying "it should be initiated within the Federal Crown action."

- [70] Subsequent to *Border Enterprises*, Madam Justice Quijano in *Home Equity Development Inc. v. Crow*, 2002 BCSC 1747, referred to *Guilford*, *Ascot*, an Alberta case, and Ontario cases in opining that a "definite act or threat to advance the collateral improper purpose" is an essential element of the tort (at paras. 20-21).
- [71] To different effect, in *W.D. World Travel Inc. v. Lock*, 2006 BCSC 114, Master Bolton considered a motion to strike out an abuse of process claim. He relied on the uncertainty as to the state of the law expressed in *Starbucks* and refused to strike out the claim for lack of a pleaded overt act.
- [72] In 2006, in *OPEIU*, Madam Justice Dillon comprehensively canvassed the law, and noted that as most cases failed at the improper purpose stage, consideration of an overt act was not necessary on their facts. She then stated that the court had, on multiple occasions, supported Fleming's formulation of the elements of the tort, including the requirement of an overt act. She wrote:
- [24] Aside from *Guildford* and *D.K. Investments*, the British Columbia cases have not had to go so far as to find facts to support the overt act element of the tort. However, support is given to the Fleming definition and there is no doubt that the second element, an overt act, is required. Anderson J. accurately described this conduct in *Guildford* as amounting to "legal blackmail." The act cannot be found within the very process complained of because this would not be in furtherance of the improper purpose which is also to be outside the ambit of the action. I agree with Irvine that to focus on improper motive alone would expand the tort and require examination of bad motives alone. It would leave the requirement for an overt act meaningless. To define the act within the scope of the relief available within the lawsuit itself would broaden the tort beyond its classic description from *Grainger v. Hill* (1838), 4 Bing N.C. 212, 132 E.A. 769. In that case, the defendant sued wrongfully on a mortgage in order to force the plaintiff to surrender the register of a vessel to the defendant, a remedy to which he was not entitled in the litigation.

[Emphasis added.]

- [73] In 2007, Master Taylor, in Pires, quoted Ontario authority for the proposition that "a definite act or threat" in furtherance of the purpose is required to establish the tort. But again, in 2008, the uncertainty stated in Border Enterprises, based on Starbucks, was repeated: *Adroit Resources Inc. v. Tres-Or Resources Ltd.*, 2008 BCSC 1211.
- [74] We reach Smith. By then, this court had adopted the view in Border Enterprises that the law in British Columbia is unclear on the overt act requirement, and had not resolved the issue. Relying on Starbucks and Border Enterprises, Justice Smith said:
- [34] It may be arguable, however, that the law of British Columbia does not require an overt act or threat.
- [75] The reasons in Smith refer to Guilford and D.K. Investments but do not refer to Justice Anderson's adoption of Fleming's elements in Guilford, nor the reference in D.K. Investments to Guilford (quoting Fleming), nor Justice Finch's conclusion an overt act was established, nor the several decisions of the Supreme Court of British Columbia which had affirmed the "overt act" requirement of the tort.
- [76] Since Smith, this court has faced the tort in *Palmer v. Palmer*, 2015 BCCA 438; *Gadhri v. 0760815 B.C. Ltd.*, 2017 BCCA 31; and *311165 B.C. Ltd.* In *Palmer* and *Gadhri*, the court made no reference to the requirement of an overt act, and adopted without discussing whether an overt act was otherwise present, the description that the tort requires a misuse or perversion of the court's process for an extraneous purpose. In *311165 B.C. Ltd.*, Mr. Justice Groberman noted, at para. 59, that the tort's elements in British Columbia were "less well defined", but instructed that the pleadings must allege "collateral or improper" purposes.
- [77] This uncertainty in the law stands in contrast to authorities in Ontario, Alberta, Nova Scotia, Saskatchewan, New Brunswick, Prince Edward Island, all of which require an overt act: *Atland Containers Ltd. v. Macs Corp. Ltd.* (1974), 54 D.L.R. (3d) 363 (Ont. S.C.); *Beckingham v. Sparrow* (1977), 2 C.C.L.T. 214 (Ont. S.C.); *Tsiopoulos v. Commercial Union Assurance Co.* (1986), 32 D.L.R. (4th) 614 (Ont. S.C.); *Poulos v. Matovic* (1989), 47 C.C.L.T. 207 (Ont. S.C.); *R. Cholkan & Co. v. Brinker* (1990), 1 C.C.L.T. (2d) 291 (Ont. S.C.); *Metrick v. Deeb* (2003), 16 C.C.L.T. (3d) 298 (Ont. C.A.), leave to appeal ref'd [2004] 1 S.C.R. viii; *Apotex Inc. v. Ontario (Minister of Health & Long-Term Care)* (2005), 204 O.A.C. 275; *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, leave to appeal ref'd [2011] 2 S.C.R. vii; *Grenon v. Canada Revenue Agency*, 2017 ABCA 96, leave to appeal ref'd [2017] 2 S.C.R. vii; *Rocky Mountain Rail Society v. H & D Hobby Distributing Ltd.* (1995), 167 A.R. 16 (Q.B.); *Amirault v. Westminer Canada Ltd.* (1994), 127 N.S.R. (2d) 241 (C.A.), leave to appeal ref'd [1994] 3 S.C.R. xi; *Potash Corp. of Saskatchewan Inc. v. Barton*, 2013 SKCA 141, leave to appeal ref'd [2014] 2 S.C.R. viii; *Belong v. Her Majesty the Queen in Right of the Attorney General of Canada and Timothy Quigley*, 2013 NBCA 68, leave to appeal ref'd [2013] 1 S.C.R. vi; *Heath v. Mercantile Finance Service Ltd.*, 2015 PECA 11.

- [78] In Australia the tort appears to require an overt act or threat, but commencement of proceedings may constitute an improper act sufficient for the tort when there has been a prior demand or threat to obtain something not achievable through the proceedings: *Williams v. Spautz*, [1992] HCA 34. Since *Williams*, multiple decisions of appellate courts in Australian states have affirmed the view that an overt act is required to establish the tort of abuse of process. See e.g., *Paradise Grove Pty. Ltd. v. Stubberfield*, [2001] QCA 117; *The Beach Club Port Douglas Pty. Ltd. v. Page*, [2005] QCA 475; *Maxwell-Smith v. S. & E. Hall Pty. Ltd.*, [2014] NSWCA 146; and *Burton v. Office of the Director of Public Prosecutions*, [2019] NSWCA 245.
- [79] Canvassing these many authorities, it seems plain to me that the original expression of doubt as to the requirement in British Columbia of an overt act rests on shaky ground, but it has been repeated. I consider the reasons of Justice Dillon in *OPEIU* to best state the requirements in British Columbia, and while the extra-provincial authorities cited here are not binding in British Columbia, their nearly unanimous view of the tort is persuasive, absent a reason in principle why the formulation is wrong. We have not had a reasoned decision in British Columbia explaining the error in Professor Fleming's description, which did find its way into the seminal case of *Guilford*, although that aspect of *Guilford* appears to have been overlooked and has created, in the result, confusion. I conclude that absent a reasoned basis to diverge from the law first stated in British Columbia, that the tort conceptually requires more than a collateral and improper purpose, and that the "more" is an overt act or threat.

CONCLUSION

- [80] In my view the judge erred in his analysis of the first element of the tort of abuse of process by relying upon the allegation of knowing falsity to establish a collateral and improper purpose. I would set aside the order and remit the application to the Supreme Court of British Columbia for fresh consideration.

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Madam Justice Griffin"

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