

CANADA / JUDGMENT

Osborne v. Harper

2005 BCSC 1683

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1683 Osborne v. Harper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Osborne v. Harper,

2005 BCSC 1683

Date: 20051201

Docket: 97-1630

Registry: Victoria

Between:

Wendy Osborne

Plaintiff

And:

Brian Alexander Harper and RBC Dominion Securities Inc.

Defendants

Before: The Honourable Mr. Justice Sigurdson

Supplementary Reasons for Judgment

Counsel for Plaintiff:

B.R. McConnan, Q.C.

Counsel for Defendants:

G.E.H. Cadman, Q.C.

H.D. Craig

Date and Place of Trial:

February 15-18, February 22,

and June 24, 2005

Further Submissions:

October 27, 2005

Victoria, B.C.

Introduction

[1] Following my reasons for judgment at trial dated August 19, 2005 [2005 BCSC 1202], I heard further submissions on the issues of the proper measure of general damages for breach of fiduciary duty, the issue of pre-judgment interest, and the liability of RBC Dominion Securities Inc. for the punitive damages award made against Mr. Harper.

General Damages

[2] This issue was addressed at ¶216-220 of my reasons for judgment. The plaintiff's submission was that damages fixed as at the date of trial should be about \$445,000 and interest thereafter. That submission was based on expert evidence as to the value of a portfolio if the failed investments had been invested in a manner consistent with Ms. Osborne's risk tolerance.

[3] The defendants say that the plaintiff is really seeking damages for lost opportunity, effectively to the date of trial, as opposed to the usual measure, which they say is the capital loss plus court order interest from the date of the purchase of the investments. In the defendants' view this would be \$143,000, the total investment, plus court order interest from the date the failed investments were made.

[4] The assessment of damages for breach of fiduciary duty is often a difficult question. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, the Supreme Court of Canada said at ¶73:

It is well established that the proper approach to damages for breach of a fiduciary duty is restitutionary. On this approach, the appellant is entitled to be put in as good a position as he would have been in had the breach not occurred. On the facts here, this means that the appellant is entitled to be restored to the position he was in before the transaction. The trial judge adopted this restitutionary approach and fixed damages at an amount equal to the return of capital, as well as all consequential losses, minus the amount the appellant saved on income tax due to the investments.

- [5] In my view, simply awarding the plaintiff damages based on the investment value at the time the investment was made plus court order interest does not put the plaintiff in the same position she would have been had the breach of fiduciary duty not occurred. On the other hand, I do not think the approach suggested by the plaintiff, which effectively provides her with a rate of return equal to the risk that she was prepared to assume for the entire period up to trial, is reasonable in the circumstances.
- [6] In determining the appropriate assessment of damages, I have considered a number of authorities referred to by Mr. Cadman, which indicate that, when the breach of fiduciary duty involves investments which were unsuitable, the court has often awarded the amount of the capital loss and interest but has not awarded damages for lost opportunity to place the capital more effectively. However, there is some flexibility in determining the proper measure: see, for example, *Huff v. Price* (1990), 76 D.L.R. (4th) 138 (B.C.C.A.) In that case the court said at 149:

Not only are damages for fraud and breach of fiduciary duty the same for the purposes of calculation, they are also the same for the purposes of the treatment they should receive in relation to the issues of causation and remoteness and they are the same with respect to the discharge of the burden of proof. Once the fraud or breach of fiduciary duty is shown, then the court assessing damages will not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiff to establish the amount of the loss and the cause of the loss. The burden of leading the evidence to disprove the amount of the loss and the cause of the loss will then fall on the defendant who has been found to have been fraudulent or in breach of fiduciary duty.

- [7] I find that the plaintiff is entitled to damages of the equivalent of what a portfolio consisting of the principal amounts of the three investments would have been worth shortly after the conclusion of the fiduciary relationship. The fiduciary relationship with Mr. Harper ended in May 1993. I find that assessing damages on the basis of what her portfolio would have been as of June 30, had it been invested in accordance with her accepted risk, is that proper measure of her loss. I think that would put her in the same position that she would have been but for the breach of fiduciary duty. In assessing damages on that basis, I have taken into account the continuing fiduciary relationship with Mr. Harper up until May 1993, the fact that Mr. Harper personally benefited from her investment in trying to advance the fledgling ventures in which he had a significant interest and the fact that he wilfully misled Ms. Osborne about the condition of these investments during the fiduciary relationship.
- [8] Guided in large part by Mr. Holley's evidence as to what the value of a portfolio based on the cost of the lost investments and the acceptable risk to Ms. Osborne would be at that point, I assess damages at \$195,000 as at June 30, 1993. For the sake of clarity, and to avoid double counting, that sum includes all amounts for pre-judgment interest up to and including June 30, 1993.

Court Order Interest or Equitable Interest

[9] The plaintiff seeks equitable interest, which was described by Mr. Justice Mackenzie in *K.L.B. v. British Columbia* (2001), 87 B.C.L.R. (3d) 52 (C.A.) this way (at ¶55):

Traditionally, the judicial decision to award equitable interest was restricted to ancillary relief associated with an accounting for profits or some other property claim. Lord Denning M.R. clearly identified this limited jurisdiction in *Wallersteiner v. Moir* (No. 2), [1975] 1 Q.B. 373. He stated at 388:

in equity, interest is never awarded by way of punishment. Equity awards it whenever money is misused by an executor or a trustee or anyone else in a fiduciary position who has misapplied the money and made use of it himself for his own benefit. The reason is because a person in a fiduciary position is not allowed to make profit out of his trust: and, if he does, he is liable to account for that profit or interest in lieu thereof.

[10] In my view, the attempt of the fiduciary to profit from his position, while relevant, was a consideration in the manner in which and the date at which I have assessed general damages. Beyond July 1, 1994, I find that the plaintiff is entitled to court order interest.

[11] As to the rate of interest, the defendants suggest that I should fix a lower rate than that set by the registrar. Section 1 of the Court Order Interest Act, R.S.B.C. 1996, c. 79 provides as follows:

(1) Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

[12] The defendants say I should exercise the discretion I have to fix the rate of interest at lower than the registrar's rates because of the failure of the plaintiff to proceed with the litigation in an expeditious and efficient manner. The defendants point to the fact that the plaintiff would have been aware of the failure of investments by sometime in 1993, yet the writ was not issued for another four years. The defendants also say that the plaintiff had several different counsel, had to renew the writ once and once had to file a notice of intention to proceed, and that, in the fall of 2003, the trial was adjourned at the plaintiff's request, in response to an amendment by the defendants to plead a limitation defence.

[13] Should I fix a lower amount for interest because of delay? The delay in this matter coming to trial has been lengthy. Why did the plaintiff take such a long time to bring this case to trial? The brief outline that I set out above is about all I was told about it. Why she changed lawyers or did not pursue the matter more promptly is unclear. Why the defendants did not move the case to trial is also not clear. The plaintiff asked me to consider that the context is one in which the defendant effectively breached his duty and wilfully concealed the breach through the continuation of the fiduciary relationship. That is true, but it only explains the delay before 1993. The extent to which Mr. Harper benefited from the breach of duty is not clear. It is significant, however, that if the defendants wished to shorten the period of delay,

they presumably could have set the matter for trial at an earlier time.

- [14] In all the circumstances, I do not think that it is unfair that the defendants must pay pre-judgment interest at the usual rates and, in exercising my discretion, I decline to fix an interest rate at less than that set by the registrar from time to time.

Punitive Damages

- [15] In the reasons for judgment, I awarded punitive damages.
- [16] In the further argument, Mr. Cadman raised the issue of whether these punitive damages should be imposed against RBC Dominion Securities, as there was only a finding of vicarious liability for Mr. Harper's actions, but not a finding of reprehensible conduct on the part of RBC Dominion Securities.
- [17] Mr. Cadman points to the Supreme Court of Canada's decision in *Blackwater v. Plint*, [2005] S.C.J. No. 59, 2005 SCC 58. After describing the case for the punitive damages against Plint, the Supreme Court said at ¶91:

The trial judge made no finding that Canada's behaviour in this case met any of those thresholds [high-handed, malicious, arbitrary or highly reprehensible misconduct]. He correctly stated that punitive damages cannot be awarded in the absence of reprehensible conduct specifically referable to the employer. While he found the Church liable on the basis of vicarious liability and Canada liable vicariously and on the basis of a non-delegable statutory duty, this was by virtue of the relationship between the parties and Mr. Plint, not because of any specific misconduct.

- [18] The plaintiff did not really challenge the proposition that it was necessary to meet the threshold of high-handed, malicious, arbitrary or highly reprehensible misconduct on the part of RBC Dominion Securities, but her counsel argued that it was too late for the defendants to make this submission: *Asselstine v. Manufacturers Life Insurance Co.* (2005), 40 B.C.L.R. (4th) 226, 2005 BCCA 292. That was a case where a university had a disability insurance plan that provided long term disability benefits to qualified employees. The action arose out of a claims agent's rejection of an employee's claim for long term disability insurance benefits. The university had contracted with Manufacturers Life Insurance Company ("Manulife") to administer the plan.
- [19] The Court of Appeal held that it was inappropriate to raise the issue on appeal of the university's liability for punitive damages awarded against its agent. In a majority judgment, Justices Huddart and Donald said at ¶53-57:

Because of the way the defendants pleaded and conducted their defences we can find no meaningful separation dividing the conduct of principal and agent. Manulife adjudicated the claim for the University and they treated the actions of one as that of the other. It is as though an in-house administrator managed the claim. In that case it would make no sense for the University to say it is immune from punitive damages for the conduct of an employee acting in the course and scope of her employment.

The defendants filed joint pleadings and engaged the same solicitor and counsel throughout the action. They pleaded in their amended statement of defence:

18. UBC and Manulife specifically deny paragraph 10 of the Plaintiff's Amended Statement of Claim, and say that, at all material times they acted in good faith, reasonably, and in accordance with the provisions of the ASO Plan, having regard to the medical and other evidence that was available to them, and that the mere denial of the Plaintiff's claim for total disability benefits, because of the provisions of the ASO Plan, is not an act of bad faith, and that there is no requirement on UBC to subordinate its legitimate economic and contractual interests to those of the Plaintiff.

We are told that at trial neither defendant advanced a position which would distinguish them as to their respective liabilities. In particular, the point taken by our learned colleague on the absence of vicarious liability for punitive damages of an agent was not presented below.

As a result of the defendants' approach the plaintiff was unable to prepare a case to meet this point. Had the plaintiff known that the University intended to distance itself from Manulife's conduct for any reason she could have investigated the working relationship between the defendants and led whatever evidence she discovered to establish common responsibility for breach of the good faith obligation. On the pleadings and the conduct of the defence, the plaintiff had in our view every reason to believe that joint responsibility was not a contested issue.

While it is true, as our colleague has found, that no privity of contract exists between Manulife and the plaintiff, and that the plaintiff did not plead a tort against Manulife and therefore there is no legal basis for the judgment against Manulife, nevertheless the University cannot shift its ground on appeal in order to dodge responsibility for Manulife's conduct. In a very real sense the University accepted that Manulife's actions were the University's actions and must now live with that position. Were it otherwise the plaintiff would suffer significant prejudice.

- [20] I do not think the reasoning in Asselstine applies to the circumstances of this case. First, this issue was raised at trial and before the final order was entered, not, as in Asselstine, for the first time on appeal. Second, even though the case at bar was jointly defended and RBC Dominion Securities did not plead that it would not be vicariously liable if their broker has acted in a manner to attract punitive damages, there was some evidence at trial of the separate role of RBC in its dealings with Ms. Osborne. Third, I think that it was open to the plaintiff to attempt to prove that the conduct of the corporate defendant ought to attract punitive damages. In my view, the plaintiff did not establish on the evidence that RBC Dominion Securities was malicious, high-handed, arbitrary, or highly reprehensible. Although they were found to be vicariously liable for the breach of fiduciary duty, I do not find that they should be vicariously liable for the punitive damages.

Summary

[21] I assess general damages for breach of fiduciary duty at \$195,000 as of June 30, 1993, with court order interest thereafter. RBC Dominion Securities is vicariously liable for the general damages but not the punitive damage award. The plaintiff will have her costs at scale 3.

"J.S. Sigurdson, J."

The Honourable Mr. Justice J.S. Sigurdson

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