
CANADA / JUDGMENT

Pearlman v. I.C.B.C.

2012 BCCA 398

COURT

British Columbia Court of Appeal

DECIDED

2 October 2012

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pearlman v. I.C.B.C.,

2012 BCCA 398

Date: 20121002

Docket: CA038096

Between:

David Pearlman

Appellant

(Plaintiff)

And

Vince Critchley, G. Hocoluk, Quinlan Abrioux, The Insurance Corporation of British Columbia, Atlantic Trading Company Ltd., Rebecca Lee Spence, Dr. Malcolm Cofman, Dr. Burton Goldstein, Scott Stephens, Owen Bird Law Corporation, American Commerce Insurance Company

Respondents

(Defendants)

Correction: The front cover was corrected on May 13, 2014.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Neilson

The Honourable Madam Justice Bennett

On appeal from Supreme Court of British Columbia,

On appeal from: Supreme Court of British Columbia, April 24, 2009

(Pearlman v. ICBC, 2009 BCSC 1907, Vancouver Registry S064665); and

On appeal from: Supreme Court of British Columbia, April 28, 2010

(Pearlman v. Atlantic Trading Company Ltd., 2010 BCSC 809,

New Westminster Registry M101344 & Vancouver Registry S064665)

Oral Reasons for Judgment

Appellant appearing on own behalf:

Counsel for the Respondents, S. Stephens, Owen Bird Law Corporation and American Commerce Insurance Company:

J.L. Carpick and S.H. Stephens

Place and Date of Hearing:

Vancouver, British Columbia

September 28, 2012

Place and Date of Judgment:

Vancouver, British Columbia

October 2, 2012

- [1] SAUNDERS J.A.: Mr. Pearlman has made two applications to review orders made by single justices of this Court. The respondents to his applications set them to be heard last Friday and in addition, applied for an order, now referred to as a Houwelling order, extending a vexatious litigant order by severely limiting Mr. Pearlman from filing any document in the Court of Appeal Registry pertaining to an accident in November 2004, or several appeals commenced in this Court, or an action outstanding in the New Westminster registry of the British Columbia Supreme Court. The respondents would make exceptions in respect to certain filings signed by a member in good standing of the Law Society of British Columbia.
- [2] I turn to Mr. Pearlman's applications. The first filed application was to vary the order of Mr. Justice Low made August 7, 2012. The second filed application is to vary the order of Madam Justice Garson made August 16, 2012. In both motions Mr. Pearlman sought leave to appeal as leave is required by the vexatious litigant order of Mr. Justice Low made July 29, 2010. That order provides:

The Appellant is not to bring an appeal from any final order made in the action he commenced on June 25, 2010 (BCSC Action No.128649) in the Supreme Court of British Columbia, or from any final order made in any other action in the Supreme Court of British Columbia brought against any person and arising out of, or directly or indirectly connected to, the motor vehicle accident of November 25, 2004 without first obtaining leave of a justice of this court.

- [3] Mr. Justice Low's order of August 7, 2012, before us on the variation application, denied leave to appeal an order made by Mr. Justice Brown on July 11, 2012 refusing Mr. Pearlman leave to appeal an order made by Registrar Sainty taxing special costs.
- [4] Madam Justice Garson's order of August 16, 2012, before us on the variation application, denied leave to appeal an order of Madam Justice Gropper of February 2, 2012 dismissing Mr. Pearlman's action against the respondents American Commerce Insurance Company, Owen Bird Law Corporation, and Scott Stevens, ordering special costs and providing that Mr. Pearlman may not commence legal proceedings in the Supreme Court of British Columbia in respect to the November 2004 accident without first having obtained leave. In other words, one of the aspects of the order of Madam Justice Gropper is a vexatious litigant order in the Supreme Court of British Columbia.
- [5] The applications before us to vary the orders are brought under s. 9(6) of the Court of Appeal Act. The criteria this Court applies on such an application are well known. The common iteration of the criteria is found in *Haldorson v. Coquitlam (City)* (2000), 3 C.P.C. (5th) 225 at para. 7. We consider whether the applicant has established that the single justice whose order is before the court was wrong in law, wrong in principle or misconceived the facts. In particular we do not rehear the application and we do not re-weigh the evidence. With that general comment I turn to the two applications.
- [6] The order of Mr. Justice Low concerns the order of a Supreme Court justice dismissing Mr. Pearlman's application for leave to appeal the determination by Registrar Sainty of the amount of special costs. In his reasons for judgment Mr. Justice Low described the history of actions arising out of the accident in November 2004, as recited by Madam Justice Gropper in the course of her reasons of February 2, 2012. I do not propose to replicate that history but it is relevant to the reasons and is found in para. 6 of Mr. Justice Low's reasons for judgment. I will append this paragraph to the transcript of these comments as Schedule A when the transcript is prepared.
- [7] Mr. Justice Low listed, categorizing them as six, several grounds of appeal sought to be raised by Mr. Pearlman in relation to Mr. Justice Brown's order. They concerned the jurisdiction of the Registrar to tax special costs, the fact the application for leave to appeal the order of Madam Justice Gropper by which the special costs were ordered was on reserve by Madam Justice Garson, the effect of an order of Mr. Justice Williams giving Mr. Pearlman indigent status for the cost of filing his application for leave to challenge the taxation, a complaint of a lack of documentation before the Registrar, a complaint as to the significant photocopying costs allowed by the Registrar, and a complaint that the three defendants in

whose favour the costs order was made could have achieved the same result while incurring lower costs had they pursued the defence of res judicata which they had pleaded. Mr. Justice Low dealt with each of these points of contention and found that the appeal has no merit.

- [8] Before us Mr. Pearlman seeks to raise the same grounds of appeal. He says that Mr. Justice Low erred and his decision was contrary to law, and the weight of evidence. In his material, he contends that Mr. Justice Low ought not to have sat on the matter when it was he who made the vexatious litigant order. While advancing this latter point, however, Mr. Pearlman placed more weight in his oral submissions upon the scale of the special costs awarded. He says the amount assessed as special costs is unreasonable for a case that was dismissed on its pleadings. In his materials, in addition to his challenge of Mr. Justice Low's order he complains of some aspects of the order of Madam Justice Gropper. Those are issues that were before Madam Justice Garson and not before Mr. Justice Low and it would have been improper for Mr. Justice Low to consider Mr. Pearlman's complaints as to the order of Madam Justice Gropper, as that was not the application that was before him.
- [9] I have reviewed the application that was before Mr. Justice Low. It seems to me that his summary of the grounds of appeal sought to be raised by Mr. Pearlman are a fair representation of the issues presented to him.
- [10] Although Mr. Pearlman objects strenuously to Mr. Justice Low's views on the merits of the various grounds of appeal, I am not persuaded that Mr. Justice Low has made any error, and accordingly I am of the view that we may not interfere with it. In particular, on the issue Mr. Pearlman particularly addressed on Friday, the quantum of special costs, there is simply no error demonstrated in Mr. Justice Low's reasons for judgment. He addressed the issue on the basis of the submissions put to him, and said:
- [14] Fifth, Mr. Pearlman argues that photocopying costs assessed were in an unreasonable amount. This is a matter that falls within the expertise of the taxing officer and I see no reason why deference would not be given to her conclusions in that regard.
- [15] Finally, Mr. Pearlman contends, as I understand his submission, that the three defendants could have achieved the same result on the basis of the defence of res judicata which they pleaded, and at less cost. This would have resulted I suppose in a dismissal of the action under R. 9-6 instead of R. 9-5. But Mr. Pearlman does not say that he would have conceded the res judicata argument; nor has he demonstrated how that approach would have lessened the cost of the legal services provided by the law firm to the insurance company. The respondents chose the argument that succeeded and the Court cannot second guess that decision.
- [11] For the same reasons that Mr. Justice Low did not consider that the scale of disbursements had sufficient merit to justify leave to appeal being granted - it was a matter that fell within the expertise of the taxing officer - his larger complaint advanced to us that the costs were just too high, is a matter on which deference would be accorded the taxing officer. The appeal, therefore, in my view, does not have that degree of merit on this issue such that

leave to appeal should have been granted. I see no error demonstrated in respect to the argument on the scale of costs.

- [12] Nor in my view is there any ground for complaint that Mr. Justice Low sat on the application after he had made his vexatious litigant order. The making of one order does not impair the ability of a justice to hear a different application involving the same litigants.
- [13] There being no demonstrated error of law or principle, and no misconception of the facts, by Mr. Justice Low, I would dismiss the application to vary his order.
- [14] I turn now to the application to vary the order of Madam Justice Garson. In his application Mr. Pearlman complains that Madam Justice Garson failed to deal with the statement of claim which set out triable issues, has misunderstood the facts and has relied on facts found by Madam Justice Gropper which are erroneous.
- [15] In her reasons for judgment Madam Justice Garson recited the order made by Madam Justice Gropper and set out the history of the litigation as summarized by Madam Justice Gropper, much as Mr. Justice Low did. She described the litigation history:
- [15] The litigation history detailed in the reasons for judgment of Low J.A. and those of Gropper J. need not be repeated here. Those background facts amply demonstrate that Mr. Pearlman's claim to have been injured in the November 2004 motor vehicle accident has been judicially determined to have no merit. The litany of litigation Mr. Pearlman has commenced stemming from this motor vehicle accident, in addition to the original tort claim, includes: claims against his insurer ICBC and a claims examiner; claims against his American insurer and two of its individual employees; claims against his doctor; a claim against a law firm and individual lawyer briefly retained; and claims against the law firms and individual lawyers retained to act on behalf of the respondents in the tort action; and actions against the insurers. These actions have all been dismissed.
- [16] Madam Justice Garson then summarized Mr. Pearlman's complaints as to Madam Justice Gropper's order dismissing the claims against the three respondents and said:

She found that Mr. Pearlman's claims against these defendants were unfounded because they are based on a faulty premise, namely that he had been injured in the November 2004 accident. She noted that there has already been a judicial determination that he was not injured.

- [17] Madam Justice Garson found there was no merit to the proposed grounds of appeal of the dismissal order and dismissed Mr. Pearlman's application for leave to appeal that aspect of Madam Justice Gropper's order.
- [18] The second aspect of Mr. Pearlman's application for leave to appeal the order of Madam Justice Gropper concerned her vexatious litigant order. Madam Justice Garson said:
- [19] As to whether I should grant leave to appeal Gropper J.'s order, I conclude that leave ought not to be granted. I have already quoted para. 40 of Gropper J.'s reasons for judgment in which she explained her reasons for granting the vexatious litigant order. Mr. Pearlman has,

as Gropper J. noted, shown no self-restraint in pursuing various actions despite being unsuccessful at every level of the court. This procedural history demonstrates that the vexatious litigant order in the Supreme Court was more than merited. There is no merit to his appeal from the vexatious litigant order. I would dismiss the application for leave to appeal.

- [19] Mr. Pearlman contends that Madam Justice Garson was arbitrary in her refusal to grant leave. He makes many of the same submissions to us that were dealt with by her. As I have said, this is not a fresh hearing, and our task is to simply review the order for error of law or fact, or misapprehension of evidence.
- [20] On my review of the materials it appears to me plain that Mr. Pearlman has been seeking to re-litigate issues that have been disposed of in the Supreme Court of British Columbia. Madam Justice Gropper said the Statement of Claim disclosed no cause of action against these respondents. She also said that an essential premise of that claim had been litigated and decided against Mr. Pearlman, and so the claim was groundless. She also said the pleadings were oppressive and brought for an improper purpose, being to harass and oppress the defendants. In other words, the judge found that the pleadings were an abuse of process, and that Rule 9-5(1)(d) applied.
- [21] Mr. Pearlman complains that his pleadings are modelled on textbook pleadings and that Madam Justice Gropper was wrong to say they disclosed no cause of action. Even if this is so, her conclusion that a key premise of the litigation has been decided against Mr. Pearlman is fatal to his claim and Madam Justice Gropper was clearly correct in saying the action was groundless, oppressive, brought for an improper purpose and could not be sustained. It fits squarely within Rule 9-5(1)(d) of the Supreme Court Civil Rules. There is, therefore, no possibility the appeal of the order striking the statement of claim in respect to these parties could succeed. I see no merit at all to Mr. Pearlman's proposed appeal of the order of Madam Justice Gropper dismissing the claim against the three respondents and no basis at all to interfere with the order of Madam Justice Garson that the appeal lacked that degree of merit as is required to attract leave to appeal.
- [22] Nor do I see a basis upon which this Court could interfere with the vexatious litigant order made in the Supreme Court of British Columbia. The record clearly demonstrates that Mr. Pearlman has exceeded the bounds of proper litigation in respect to his accident of November 2004, and the litigation in respect to that accident must be brought to an end. There is no basis at all to interfere with the order of Madam Justice Garson denying leave to appeal on this issue. She clearly was not arbitrary as alleged by Mr. Pearlman, made no error of law or principle, and indeed was manifestly correct.
- [23] Accordingly I would dismiss the two applications of Mr. Pearlman.
- [24] The three respondents cross-apply for an order further limiting Mr. Pearlman's ability to initiate legal process in this Court by prohibiting him from filing or attempting to file any document in a registry of the Court of Appeal: (1) pertaining to the motor vehicle accident of

November 25, 2004 in which he was involved; (2) in seven Court of Appeal files; and (3) in a particular action out of the New Westminster registry of the Supreme Court of British Columbia. The application contemplates an exception for orders against Mr. Pearlman provided his filing is signed by a member in good standing of the Law Society of British Columbia and he is represented at a hearing.

- [25] The Houwelling order was a response by a division of this Court to an extreme situation in which the common form of vexatious litigant order had failed to control the excesses of the litigant. It was devised as a response to a history of failed applications by the litigant after the vexatious litigant order was made, a history which demonstrated persistent attempts to re-litigate issues in this Court.
- [26] Since the vexatious litigant order was made between these parties on July 29, 2010 in respect to the November 2004 accident Mr. Pearlman has applied successfully for leave to appeal on a matter that did not fall under the order but as to which there was some confusion on the application of the July 2010 order, he has continued court processes in respect to motions that had been filed before the July 2010 order was made, and he has made the two unsuccessful applications which were the subject of the applications to vary that I have already addressed.
- [27] The respondents succeeded on their vexatious litigant orders because they have been subjected to excessive and harrowing legal processes that are completely out of scale. This must be controlled. Yet there is a balance in respect to a litigant's access to court processes and it is assumed the vexatious litigant order will suffice to curtail a litigant's inappropriate use of court processes.
- [28] In this case the record of proceedings since the vexatious litigant order was made in this Court does not demonstrate, in my view, that the order of July 2010, coupled with the now final order of Madam Justice Gropper in the Supreme Court of British Columbia, are insufficient to protect the court processes from abuse. I consider it should not be augmented by the order sought at this time.
- [29] Accordingly I would dismiss all applications before us.
- [30] NEILSON J.A.: I agree.
- [31] BENNETT J.A.: I agree.
- [32] SAUNDERS J.A.: The three applications are dismissed.

"The Honourable Madam Justice Saunders"

SCHEDULE A

- [6] Mr. Pearlman keeps bringing actions arising out of a motor vehicle accident in which he was involved. In earlier proceedings in this Court, I made a vexatious litigant order against him under s. 29 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. In her reasons, indexed at 2010 BCSC 170, Madam Justice Gropper described the history of the actions and, with reference to my reasons, their disposition:
- [3] Mr. Pearlman has commenced several proceedings in this court arising out of the November 2004 accident. They are:
- a) A tort action against the other driver and the corporate owner of the other vehicle (David Pearlman v. Atlantic Trading Company Ltd. and Rebecca Lee Spence, B.C.S.C., New Westminster Registry, Action No. M101344);
 - b) An action against Mr. Pearlman's B.C. insurer, ICBC, and the individual ICBC claims examiner assigned to the file alleging, inter alia, fraud, bad faith and negligence (David Pearlman v. The Insurance Corporation of British Columbia/ICBC and Kelly Winn, B.C.S.C., Vancouver Registry, Action No. S064665);
 - c) An action against Mr. Pearlman's U.S. insurer, American Commerce Insurance Company and two of its individual employees alleging, inter alia, fraud, bad faith and negligence (David Pearlman v. American Commerce Insurance Company, Betsy Morrisette and Julie Deley-Shimer, B.C.S.C., New Westminster Registry, Action No. S103347).
 - d) An action against Mr. Pearlman's doctor alleging, inter alia, fraud, defamation and medical malpractice (David Pearlman v. Dr. Stan Lubin, B.C.S.C., Vancouver Registry, Action No. S064108);
 - e) An application for indigency status in respect to an action against the law firm and individual lawyer Mr. Pearlman briefly retained alleging, inter alia, fraud, bad faith, deceit, misrepresentation and negligence (David Pearlman v. Stephens & Holman and Michael P. Apperly, B.C.S.C., New Westminster Registry, Action No. S102068); and
 - f) The present action against the law firms and individual lawyers retained to act on behalf of the defendants in the tort and insurance actions, together with an expert witness and another of Mr. Pearlman's doctors.
- [4] Mr. Justice Low summarized the procedural history of the actions and their related appellate proceedings in *Pearlman v. Insurance Corporation of British Columbia*, 2010 BCCA 362 at paras. 8-16:
- [8] It appears that all the litigation initiated by Mr. Pearlman stems from the motor vehicle accident. His tort action against Atlantic Trading and Ms. Spence went to trial and a jury rejected the claim. That result spawned more litigation. Mr. Pearlman sued ICBC and Ms. Winn, an adjuster, over the obtaining of the medical report from his family doctor, Dr. Lubin.

- [9] The defendants in the ICBC action sought its summary resolution on a R. 18A application. They were substantially successful. The balance of the claim went to a jury trial but the trial judge dismissed the claim on a no evidence motion.
- [10] Mr. Pearlman brought an action against Dr. Lubin in connection with, as I understand it, the release of the medical report. A trial court judge dismissed that action.
- [11] Finally, Mr. Pearlman sued American Commerce Insurance Company ("ACIC"), I believe on a disability insurance policy for benefits to which he claimed he was due as a result of the motor vehicle accident. ACIC was unsuccessful in a R. 18A application but, on appeal, this court dismissed the action with costs.
- [12] Mr. Pearlman has appealed all the orders made against him. There are three separate appeals in the ICBC action - from the order made on the R. 18A application, from dismissal of the action on the no evidence motion and from dismissal of his appeal of the Registrar's taxation of costs (one of the two appeals now before me).
- [13] There are two separate appeals in the tort action - from dismissal of the claim and from dismissal of his appeal of the Registrar's taxation of costs (the other appeal now before me).
- [14] There is an appeal of the dismissal of the action against Dr. Lubin.
- [15] In each of the six appeals brought by Mr. Pearlman, the court has refused him indigency status and has ordered that he post security for costs. He has not posted security on any of the appeals and about \$66,000 in trial costs remain unpaid. Two of the appeals have been dismissed in chambers.
- [16] Mr. Pearlman was unsuccessful in review applications he brought in four of the appeals with respect to the indigency status and security for costs orders. I made similar orders in the two costs appeals in my oral reasons for judgment.

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