

CANADA / JUDGMENT

## Saloojee v. Gibsons (Town)

2021 BCSC 2729

COURT

Supreme Court of British Columbia

DECIDED

18 October 2021

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2021 BCSC 2729 Saloojee v. Gibsons (Town)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Saloojee v. Gibsons (Town),

2021 BCSC 2729

Date: 20211018

Docket: S160872

Registry: Vancouver

Between:

Mujtaba Saloojee

Plaintiff

And:

Town of Gibsons, Sunshine Coast Regional District,

Good Samaritan Canada (a Lutheran Social Service Organization), Riley MacKenzie, Pamela Robertson, Jesse Whitmore, Matthew Kelly, John/Jane Doe #1, John/Jane Doe #2, John/Jane Doe #3, and ABC Company

Defendants

Before: The Honourable Madam Justice Adair

Oral Ruling on Plaintiff's Application to Adjourn

Counsel for the Plaintiff:

R.L. Wishart

M.L. Sagert

Counsel for the Defendant Town of Gibsons:

J.A. Dowler, Q.C.

N. Krueger

Place and Date of Hearing:

Vancouver, B.C.

October 18, 2021

Place and Date of Ruling:

Vancouver, B.C.

### **October 18, 2021**

- [1] THE COURT: I am dealing with a notice of application that was filed on behalf of the plaintiff on October 18, 2021. The subject matter of the notice of application was discussed last Friday, October 15, at which time plaintiff's counsel indicated that she wished to bring an application to adjourn the trial for up to five days. At that time she advised that the purpose of the adjournment would be to personally inspect documents of the company Acroloxus. I heard Dr. Michael Jackson, who is the president of that company, testify last week. Counsel advised further that she also wished to be provided with documents that might possibly have been sent to Gibsons' engineering department that were referred to in an email.
- [2] At that time, plaintiff's counsel also advised that the adjournment would be to permit plaintiff's counsel to inspect the documents and any documents with respect to Norma Brow, who was at the time an employee at the Town of Gibsons and who apparently provided some material to Acroloxus in connection with the work that they were doing in the mid 2000s.
- [3] In the notice of application, the relief that is sought is a little bit different than what was discussed on Friday last week. So, just reading from the notice of application, para. 1, the plaintiff seeks to have the trial adjourned for a period of two days. Paragraph 2, the plaintiff seeks production of email correspondence from Dr. Jackson to counsel for the Town, which plaintiff's counsel says attached maps referenced in Dr. Jackson's June 7, 2021 email. I am advised that that in fact has already been done, and that part of the notice of application will be dismissed as moot.

- [4] Next, in para. 3, the plaintiff is seeking production of email correspondence from counsel for the Town to Dr. Jackson responding to Dr. Jackson's query on the relevance of the documents which he refers to and/or attaches to his June 7, 2021 email to counsel for the Town. Based on the record that I have and the submissions that I have received, that has also been produced, and that paragraph will be dismissed at moot.
- [5] Next, para. 4, an order is sought that within two days of pronouncement of the court's order, Acroloxus produce to counsel for the plaintiff the documents listed in para. 4 of the notice of application. Acroloxus was not given notice of this application. As I mentioned, the president of Acroloxus, Dr. Jackson, testified under subpoena from plaintiff's counsel last week and gave evidence about documents his company prepared and other matters. In the circumstances, I see no basis on which to make the orders sought in para. 4 of the notice of application, in light of Dr. Jackson's appearance as a witness in this trial, and especially without notice having been given to Acroloxus. Para. 4 of the notice of application will therefore be dismissed.
- [6] Paragraph 5 of the notice of application seeks several items of relief in respect of, and I am just going to read from the notice of application:

All documents including but not limited to reports, correspondence, notes, maps, memoranda and photographs exchanged between Wendy Gilbertson and Dr. Michelle Evelyn, Dr. Michael Jackson and David Stiles with respect to the park [that is, White Tower Park]

It continues, that within two days of pronouncement of the order of this court, the Town of Gibsons produce to counsel for the plaintiff, and again I am going to read:

- a) All documents, including but not limited to, reports correspondence, emails, notes, maps, memoranda and photographs provided by Acroloxus to the Engineering Department at the Town of Gibsons with respect to White Tower Park and/or the Christenson lands.
- [7] I am going to pause there. Based on the state of the evidence before me at this point, there is nothing. And then:
- b) All documents, including but not limited to, reports correspondence, emails, notes, maps, memoranda and photographs provided by Norma Brow to Acroloxus with respect to the park.
- c) All documents including but not limited to reports, correspondence, emails, notes, maps, memoranda and photographs exchanged between Wendy Gilbertson and Dr. Michelle Evelyn, Dr. Michael Jackson and David Stiles in relation to the park.
- [8] I will say that, in my view, that is not exactly what I had in mind when I told counsel on Friday morning, when this application was being discussed, that the relief requested in the notice of application, I am just going to read [from the transcript], "needs to be particular and absolutely precise, so it can't be a broad general description like anything else that might fall in this general category."

- [9] And then finally in para. 6 of the notice of application, the plaintiff seeks an order that the defendant Town of Gibsons produce Ms. Wendy Gilbertson for an examination for discovery with respect to the maps, the reports of Acroloxus and the meeting notes and matters arising out of the same.
- [10] So, the purpose as I see it, based on the notice of application, of the adjournment that is now requested is to obtain additional discovery of documents, and then, once that is completed, to do additional examination for discovery of the Town of Gibsons representative, Ms. Gilbertson.
- [11] I am going to pause here and review the chronology that brought us here.
- [12] This action was filed in January of 2016. The events happened on June 2, 2012. The plaintiff at that time was 17 years old, so he was a minor. The original trial date was set for April 23, 2019 for 19 days.
- [13] On February 27, 2019, a trial management conference was held before Master Muir. A further trial management conference was scheduled for April 1, 2019, so that is about three weeks before the originally scheduled trial date. The amended trial brief that was filed by plaintiff's counsel in connection with that TMC indicated that the trial could not be completed in the 19 days set but would require 23 days, and counsel were not available to continue the trial after the 19 days scheduled.
- [14] There were apparently two cross-applications that were contemplated. One to adjourn the trial, and then a severance application to be brought by the defence to sever liability from quantum. Those were to be heard on April 5, 2019. They were in fact heard on April 5, 2019. There is no entered order for that hearing, but the clerk's notes indicate that the trial was adjourned generally. The trial would proceed when both liability and quantum could be heard together (so, the severance application was rejected), and costs would be in cause.
- [15] A notice of trial was filed then in September of 2019, and the trial was reset for 24 days beginning April 14, 2020. On February 11, 2020, a trial management conference was held again before Master Muir. An order was made at that time that the trial be adjourned generally, and the trial would not have been able to proceed in any event because of pandemic measures which were taken in March of 2020.
- [16] The reason for the adjournment again appears to have been that there was insufficient time scheduled for the trial to complete.
- [17] On March 24, 2020, a notice of trial was filed, and the trial then was set to begin on July 12, 2021 for 37 days. On July 12, 2021, the trial then began in front of me. At that time, it was set for 37 days. The trial was interrupted for two weeks (the weeks of August 9 and August 16), because another trial had been assigned to me for those two weeks.

- [18] The trial then continued through to September 1, which was day 27. At that point, plaintiff's counsel advised that there was one more witness to be called, Mr. Michael Courage, and then the plaintiff's case would be closed. My expectation was that if Mr. Courage had been available on September 1, he would in fact have been called that day because there was certainly time to deal with his evidence on that day, and presumably the plaintiff would have closed his case on September 1.
- [19] Continuation dates had been set for 14 days (instead of 10 days) beginning October 12, 2021, bringing the total trial days up to 41. Based on the draft trial schedule, which assumed that the defence case would start on October 12 (and that draft schedule was discussed on September 1), it appeared that more time, at least five days, would be required to complete the trial including submissions.
- [20] At that time, a significant portion of the trial time, a little less than 20 percent, had been allocated to argument over objections to the admissibility of defence expert reports. Before the trial adjourned on September 1, the court encouraged counsel to see whether it was possible to reduce the time required to deal with those objections and, ideally, eliminate them altogether. Because of the schedules of counsel, there were problems finding consecutive days on which counsel on both sides were available to continue and complete the trial. Counsel were left to discuss over the break how those matters might be addressed.
- [21] On October 12, when the trial resumed, plaintiff's counsel had added two more witnesses in addition to Mr. Courage. Dr. Jackson was one of those witnesses. Dealing with those witnesses took the better part of three days. However, to avoid losing any more court time, and although the plaintiff had not yet closed his case, Gibsons delivered its opening statement on October 13.
- [22] Last week, the court and counsel also discussed finding five more days to complete the trial, and, specifically, to complete the trial in 2021. The only weeks that were identified as possibilities were the week of November 1 (and that was subject to plaintiff's counsel being able to adjourn a previously scheduled trial), or the week of December 6. The week of November 1 was strongly preferred so as to avoid another break in the trial.
- [23] As of the end of the day on October 14 - so that is trial day 30 - the expectation was that the plaintiff would be closing his case at the beginning of the court day on October 15, and the first defence witness, Ms. Gilbertson, was expected to begin her evidence. Instead, as I mentioned, at the beginning of the court day on October 15, plaintiff's counsel advised the court that she would be seeking an adjournment of up to five days.
- [24] I am going then to come back to the matters that remain in issue in the plaintiff's notice of application.

- [25] The documents with respect to which the plaintiff is now seeking further discovery are documents for the most part created by Acroloxus in 2006. Some of those documents were put to Dr. Jackson last week and were marked as Exhibit 55 in this trial. They were admitted into evidence with limits on their admissibility. Plaintiff's counsel says that there are more documents, therefore the request for additional production. The "more documents" are what is described in para. 5 of the notice of application.
- [26] At this point I am going to address the June 2021 correspondence between Mr. Dowler, who is one of counsel for the Town of Gibsons, and Dr. Jackson. Some of the background to this correspondence is found in a notice of application that was filed on behalf of the plaintiff on April 6, 2021, in which documents were sought from the Town of Gibsons, Michael Mills (who I heard testify last week), and also Acroloxus. The document that was sought from Acroloxus was a copy - and I am reading from the notice of application - a copy of the report prepared in October 2007 for the Town of Gibsons. Based on the record before me, there is no such report.
- [27] There then was correspondence exchanged between plaintiff's counsel and counsel for the Town of Gibsons concerning at least the documents requested for production by Gibsons in that notice of application. Ultimately, the notice of application was adjourned and then reset for hearing, but ultimately never came on for hearing. Instead, on May 3, 2021, a letter was sent to Dr. Jackson at Acroloxus by plaintiff's counsel, and a copy of this letter is found at Exhibit "K" to the affidavit of Ms. Ng. In that letter, there is again a request for an October 2007 report. Then item number 2 in the letter asks for copies of any - and I am reading - "any reports/documents/photographs/correspondences for the purpose of investigation conducted with respect to White Tower Park."
- [28] Then, on June 7, Dr. Jackson sends an email message to Mr. Dowler. A copy of this email message is found at Exhibit "F" to the affidavit of Ms. Ng, and the email reflects that there are a number of attachments sent with the email. The subject line of the email is "Saloojee versus Town of Gibsons." And I am just going to read from this email:

Hi Jim, I've been doing a lot of digging to see if we can find any files regarding the mapping that we did for this client and I found some rough drafts of the maps which were drawn up on an old computer which I am attaching for your consideration.

I've also attached all the reports including two confidential documents from 2005 and 2006 (see file names) which are my rough notes of a meeting with Wendy Gilbertson and also an interim report that we sent to Wendy to let her know how the work was progressing.

I await your advice and have not sent any of these to Wishart. They are asking for all documents relating to a report of Oct 2007 which does not exist. They are also requesting any document for the purposes of investigation and all reports produced in 2007. Parties are aware of the three reports, August 21, 2006, Dec 14, 2005 and July 16, 2007 but please note we also prepared a 21 July 2007 proposal (not a report) which is attached.

There will be a second email with the remaining maps as they are too big to send in one go.

- [29] Then Mr. Dowler sends an email communication to Ms. Wishart on June 29, 2021. There are two copies of this in the application record. One is found at Exhibit "G" to Ms. Ng's affidavit. It is a single page and there is no indication of any attachments. The other copy of this email is found at Exhibit "B" to the affidavit of Toni Fabbro. The text of the message is identical although the layout is a little bit different. This, like the copy attached to Ms. Ng's affidavit, has the subject "Saloojee versus Town of Gibsons." This copy actually reflects that there are attachments, including a document described as Saloojee versus Town of Gibsons which I understand is a copy of Dr. Jackson's June 7 email to Mr. Dowler.
- [30] The conclusion that I draw is that under cover of the email sent by Mr. Dowler to Ms. Wishart on June 29, among the attachments that were sent at that time was in fact a copy of Dr. Jackson's June 7, 2021 email to Mr. Dowler.
- [31] Sorry, just before I go on. That email, as I have read, indicates that there is a second email that Dr. Jackson is going to be sending, and in the email message that Mr. Dowler sent to Ms. Wishart on June 29, 2021, the last line says "please get back to me if you have any questions."
- [32] The test on an application to adjourn is well established. It is described, for example, in *Navarro v. Doig River*, 2015 BCSC 2175, at paras. 18 and following. There is no dispute that the adjournment of a trial is a discretionary matter and the discretion must be exercised in accordance with the interests of justice. The paramount consideration is whether it is necessary to adjourn the trial in order to ensure a fair trial on the merits. A fair trial is not a perfect trial. A perfect trial, as has been mentioned a number of times, is, unfortunately, an illusory goal.
- [33] The material fact or facts that plaintiff's counsel says the documents that are being requested go to and the reason why additional discovery is also required, additional oral discovery is required, is in the amended notice of civil claim, para. 14, where the plaintiff alleges at all material times the defendant Town of Gibsons manages the park and trails at or near the premises (and the "premises" are described in the previous paragraph of the notice of civil claim). Then in the response to civil claim, Ms. Wishart during submissions took me to, in division 2, para. 6, the lands (and that is essentially what is described in the notice of civil claim as the premises), The lands are undeveloped and contain wetlands, riparian areas and naturally forested areas. Then in the legal basis section, para. 2, where the Town of Gibsons asserts, and I quote:

Gibsons says that the lands are rural premises that contain forested areas as those terms are used in the Occupiers Liability Act.

- [34] So, those are the material facts that this evidence would presumably go to.

- [35] However, I have already heard evidence from a number of witnesses in this trial about the state of White Tower Park and this area pre-June 2, 2012 as well as after. I have heard evidence in that respect from Mr. Oberson (who was the very first witness who testified), Mr. Clint Fox, Jesse Whitmore, Riley MacKenzie, as well as Dr. Jackson last week. There is also discovery evidence from Ms. Gilbertson, and Ms. Gilbertson is going to be testifying as a witness in this trial.
- [36] In my view, in the circumstances here, the costs of adjourning the trial outweigh any real benefits and are prejudicial to timely justice for both parties. We are already at risk of not being able to complete the trial by the end of 2021, especially since the defence case was supposed to start last week. Finding continuation dates to complete the trial this year has been challenging, and unless there is absolutely no other alternative consistent with the interests of justice, I am extremely reluctant to have a trial that started in July of 2021, so July this year, not complete but be put over into sometime next year.
- [37] Finding continuation dates in 2022 based on what I have been told is likely also to be very challenging. Ms. Krueger, who has been co-counsel for the Town of Gibsons, is going on maternity leave in 2022. That is something that is not going to be changing.
- [38] In my view, timely justice simply cannot be served by another adjournment, even two days. Based on what I see in the notice of application, there is certainly a risk that, depending on what turns up, I may be asked for a further adjournment. I am just not prepared to allow that. The suggestion that has been made to make up for lost time has been that the plaintiff will abandon objections to the admissibility of expert reports, except for the reports of Mr. McGeough. But I note that in the current draft trial schedule, dealing with the objections to the admissibility of Mr. McGeough's expert reports was estimated to take a day. That, frankly, is really a day that we do not have, and the proposal that has been made is really not a solution to the problem that we have.
- [39] I am not persuaded, and I have taken the time to review some of the correspondence that was exchanged in June of this year, that the issues concerning Acroloxus's documents were not matters that could not have been dealt with prior to trial based on those communications exchanged in June, or even if they could not have been dealt with in June, at least long before now.
- [40] In my view, the interests of justice do not justify the order sought. The time has come for the plaintiff to close his case.
- [41] The application for the adjournment, and for orders compelling additional discovery of documents and discovery of Ms. Gilbertson are dismissed.
- [42] That concludes my ruling.

"Adair J."

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