

CANADA / JUDGMENT

Schmidt v. Balcom

2020 BCCA 217

COURT

British Columbia Court of Appeal

DECIDED

24 July 2020

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2020 BCCA 217 Schmidt v. Balcom

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Schmidt v. Balcom,

2020 BCCA 217

Date: 20200724

Docket: CA46827

Between:

Larry Schmidt and Luzia Torres

Appellants

(Plaintiffs)

And

Ralph Balcom, Kathy Balcom, Madden Holdings Ltd., 0732734 B.C. Ltd.,

Asher Place Senior Residency Limited Partnership, Asher Strata Homes,

a Partnership, Chander Suri, 414052 B.C. Ltd., 535895 B.C. Ltd.,

Central Planning and Management Consulting Ltd., and North Central Management Corporation

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Goepel

(In Chambers)

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

dated March 31, 2020 (Schmidt v. Balcom, 2020 BCSC 651,

Prince George Registry Docket S1548213).

Counsel for the Appellants,

appearing via teleconference:

J.M. Duncan

Counsel for the Respondents,

appearing via teleconference:

R.J. Stewart, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 25, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 24, 2020

Summary:

The appellants apply for leave to appeal an order that they be examined for discovery. Held: application dismissed. The proposed appeal does not concern a point of significance to the practice or to the action itself. Further, the appeal is of no merit and will hinder the progress of the action. It is not in the interests of justice to grant leave.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] The appellants, Larry Schmidt and Luzia Torres, apply for leave to appeal the order of Mr. Justice Tindale ordering them to be examined for discovery in the underlying action and in a related proceeding. Justice Tindale's reasons are indexed at 2020 BCSC 651.

BACKGROUND

[2] To put the parties' submissions in context, it is first necessary to set out in some detail the relatively complex background.

- [3] The appellants invested money in the development of three seniors' complexes in Prince George, by way of a limited partnership, the Asher Place Senior Residency Limited Partnership ("Asher Place"), which is a defendant in these proceedings. Asher Place was established in 2003 to construct the senior residency complexes. The respondent Madden Holdings Ltd. ("Madden") is the general partner of Asher Place, and the respondents Ralph and Kathy Balcom are the controlling shareholders and principals of Madden.
- [4] In September of 2015, Madden signed a contract to sell strata units owned by Asher Place to a third party, Premier B.C. Properties Corp. ("Premier"). The appellants allege this was done without notice to the investors, and they commenced this action in November of 2015 (the "2015 Action"). In their amended notice of civil claim ("ANCC") filed on December 18, 2015, they allege that Madden misrepresented the financial affairs of Asher Place, breached its fiduciary duty to Asher Place, and had not accounted for the sale proceeds of units that had been sold. In the ANCC, the appellants state that they are bringing the claim on their own behalf and also by way of a derivative action on behalf of Asher Place.
- [5] The appellants caused certificates of pending litigation ("CPLs") to be registered against the strata units, which resulted in Madden being unable to complete the sale of the units to Premier. In July of 2016, Premier sued Madden for breach of contract, and Madden in turn commenced a third party proceeding against the appellants claiming damages against them for unlawfully filing the CPLs (the "2016 Action").
- [6] On February 4, 2016, the appellants filed an application for leave to continue the 2015 Action as a derivative claim; to make Asher Place a plaintiff rather than a defendant; and to amend the pleadings, if required, to continue the derivative action.
- [7] In December of 2016, Madam Justice Choi granted leave to the appellants to commence a derivative action in the name of Asher Place. The appellants were authorized to control the conduct of the proceeding at the expense of the partnership. Justice Choi's reasons are indexed at 2016 BCSC 2438.
- [8] On April 7, 2017, the appellants commenced a derivative action in the name of Asher Place (the "2017 Action"). The claims in the 2017 Action mirror the derivative claims in the 2015 Action.
- [9] On November 6, 2018, Justice Macintosh made an order that there would be a joint trial of the 2015 Action and the 2017 Action, and that discovery evidence and evidence at trial in one action would be evidence in both actions (the "Macintosh Order"). The parties in both actions were given liberty to seek further directions respecting the order.
- [10] In February of 2020, the parties came before Mr. Justice Tindale. Madden and the Balcoms sought an order that the 2017 Action, commenced in the name of Asher Place, be dismissed by way of summary trial on the basis that Asher Place is not a separate legal entity and cannot bring an action, making the notice of civil claim a nullity. They also sought orders that the appellants submit to examination for discovery by Madden in the 2015 Action and

the 2016 Action. The appellants objected to examination on the basis that they are not the de jure plaintiffs in the derivative action, and they cannot speak to the operations and activities of the partnership.

- [11] Justice Tindale rejected the application seeking to dismiss the 2017 Action. He found that the common law allows for a derivative action to be brought in the name of a limited partnership. That decision is under appeal as of right.
- [12] Justice Tindale granted Madden's application that the appellants submit to examination for discovery in the 2015 Action and 2016 Action. He found that the 2015 Action is not limited to derivative claims, but also relates to personal claims of Schmidt and Torres. He noted that a majority of the paragraphs in the ANCC that refer to wrongdoing refer to it being done to both the appellants and to Asher Place. Further, Justice Choi did not authorize the 2015 Action to continue as a derivative action, but rather authorized a new derivative action. He concluded:
- [95] The manner in which the amended notice of civil claim was drafted intertwines the derivative claims on behalf of Asher Place with the personal claims of Schmidt and Torres in such a manner that there is significant overlap as to the facts in issue, that is to say between what is alleged to be derivative claims and what is alleged to be personal claims of Schmidt and Torres.
- [96] For the purpose of this application, it does not specifically matter whether the 2015 Action is characterized as a derivative action or not. The claims and allegations made in the amended notice of civil claim invariably relate not only to Asher Place but Schmidt and Torres as well. Clearly Schmidt and Torres would have relevant information in relationship to the actions by the defendants which they allege impacted them.
- [97] Further, while the plaintiffs may have registered a CPL on behalf of Asher Place which is part of the subject matter in the [2016 Action], they would have relevant information as to why they did that.
- [98] In my view, both Schmidt and Torres are compellable to be examined in the 2015 Action and the [2016 Action] on matters where it is alleged they were impacted by the actions of the defendants or are otherwise mentioned in the amended notice of civil claim. Schmidt and Torres are also compellable to be examined on the [2016 Action] in relationship to the filing of the CPL.
- [13] The judge's order was as follows:

This court orders that Madden Holdings Ltd. may conduct an examination for discovery of Larry Schmidt and Luzia Torres in respect of matters in issue with this action;

This court further orders that Madden Holdings can conduct an examination for discovery of Larry Schmidt and Luzia Torres in respect of issues relating to the filing of a certificate of pending litigation and raised in third party proceedings filed in Premier B.C. Properties Corp. and others v. Madden Holdings Ltd., SCBC Vancouver Registry Number S166074.

[14] The appellants filed their notice of application for leave to appeal on April 29, 2020. The proposed grounds of appeal are whether the chambers judge erred in making orders having the effect of permitting Madden to conduct examinations for discovery of the appellants pursuant to Rule 7-2(2) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 on a derivative claim commenced by the appellants, and on matters raised in a related action not before him, where the appellants appeared in that related action as third parties acting in a representative capacity only, and where the respondent had not sought such orders in the application before the chambers judge.

APPLICABLE TEST

[15] An appeal does not lie to the Court from a "limited appeal order" without leave of a justice: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 7(2). "Limited appeal orders" are defined in s. 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001.

[16] The party seeking leave bears the onus of establishing that the conditions for leave have been met: *British Columbia Teachers' Federation v. British Columbia (Attorney General)* (1986), 4 B.C.L.R. (2d) 8 at 11 (McLachlin J.A. in C.A. Chambers).

[17] In *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326, Saunders J.A. (in Chambers) articulated the well-established test for determining whether leave to appeal from a limited appeal order should be granted:

[10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

See also *Chavez v. Sundance Cruises Corp.* (1993), 77 B.C.L.R. (2d) 328 (C.A.).

[18] The criteria for leave are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Saunders J.A. in Chambers). Even where the four criteria have been met, leave may still be denied where it would not be in the interests of justice to grant leave: *Movassaghi v. Aghtai*, 2010 BCCA 175 at para. 27 (Smith J.A. in Chambers).

POSITIONS OF THE PARTIES

- [19] The parties have very different views as to the effect and impact of the order under appeal. These views, in turn, have shaped the parties' submissions on the criteria which must be considered in determining whether or not to grant leave to appeal.
- [20] The appellants view the appeal as being of critical importance and significance to the practice, in particular in regards to the procedure governing examinations for discovery in the context of a derivative action. They submit that given the terms of the Macintosh Order that the discovery evidence in the 2015 Action and 2017 Action shall be evidence in both actions, that allowing the discovery to go forward as ordered could cause great confusion since reconciling the discovery evidence at trial between the two actions may prove unattainable. They also point out that there appear to be no authorities concerning discoveries in common law derivative actions as opposed to derivative actions that are subject to the Business Corporations Act, S.B.C. 2002, c. 57 (the "BCA").
- [21] The respondents, on the other hand, submit that this case is not of general importance. They say all that has been ordered is that the appellants attend to be discovered in regards to the personal claims that they have made in the 2015 Action. They say that they have no intent to discover outside those personal claims. They say that if there is any confusion, it arises because the ANCC in the 2015 Action has joined the personal claims of the appellants and derivative claims of Asher Place.

DISCUSSION

- [22] At the outset, I should say that I agree with the appellants that questions concerning the proper parties to be discovered in derivative actions is a matter of general importance to the practice. I also agree that there appear to be few, if any, decisions concerning discoveries in a derivative action outside the context of claims brought pursuant to the BCA. That said, discovery in the context of derivative actions under the BCA were extensively canvassed by Justice Pitfield in *Discovery Enterprises v. Ebco Industries Ltd.*, 2001 BCSC 235. In that decision, Justice Pitfield, in extensive and detailed reasons, discussed the complications of discoveries in derivative proceedings and provided useful guidance as to how the rules governing discoveries can be modified to allow such discoveries to fairly proceed. While *Discovery Enterprises* arose in the context of derivative proceedings brought pursuant to the BCA, Justice Pitfield's common sense approach can be adapted and applied in common law derivative proceedings.
- [23] While the question of who may be discovered in a derivative proceeding may be of importance to the profession, it does not arise in the context of this appeal. In the 2015 Action, the appellants make personal claims. The appellants acknowledged that they can be examined on those claims. The respondents at the leave hearing agreed that Justice Tindale's order did not give them the right to examine the appellants in relation to any the derivative claims brought on behalf of Asher Place. They say their discovery of the appellants will be

limited to the personal claims. If the respondents attempt to resile from that position in the course of the discoveries, I have little doubt that appellants' counsel will direct his clients not to answer questions that go to the derivative claims.

- [24] A further problem with the proposed appeal is that it would be asking a division of this Court to opine on the scope of discovery in an evidentiary vacuum. A much better course is for the discovery to proceed, and if questions are asked that the appellants refuse to answer because they believe they stray from their personal claims, the obligation to answer the questions can be decided in the context of a bona fide dispute between the parties.
- [25] It is also important to note that the discoveries are only being ordered in the 2015 Action in which the appellants have brought personal claims. The respondents have not sought to examine the appellants as representatives of Asher Place in the 2017 Action. If such an application is brought, the trial court will undoubtedly have to consider Justice Pitfield's wise counsel in determining whether to allow such an examination.
- [26] In the result, therefore, I am of the opinion that the proposed appeal does not, in the present circumstances of this case, concern a point of significance to the practice or to the action itself. The order that the appellants wish to appeal simply orders them to be examined for discovery on their personal claims in the 2015 Action and in regard to the CPL they sought in the 2016 Action.
- [27] In my view, the appeal is of no merit and will hinder the progress of the action. It is not in the interests of justice to grant leave.
- [28] The application for leave to appeal is dismissed.

"The Honourable Mr. Justice Goepel"

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