

CANADA / JUDGMENT

Smith v. VM Agritech Limited

2023 BCSC 729

COURT

Supreme Court of British Columbia

DECIDED

2 May 2023

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2023 BCSC 729 Smith v. VM Agritech Limited IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: Smith v. VM Agritech Limited, 2023 BCSC 729 Date: 20230502 Docket: S230800 Registry:
Vancouver Between: Alan Gilbert Smith Plaintiff And VM Agritech Limited (formerly Myco
Sciences Limited) and Christopher J. Wightman Defendants Corrected Judgment: The text of the
judgment was corrected at paragraphs 9, 11, 12, and 18-20 on May 5, 2023. Before: The
Honourable Justice E. McDonald Reasons for Judgment The Plaintiff, no appearance: Counsel for
the Defendants: M.L. Ross N.D. Galanopoulos Place and Date of Hearing: Vancouver, B.C. April 4,
2023 Place and Date of Judgment: Vancouver, B.C. May 2, 2023 Table of Contents Introduction.. 3
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Introduction

- [1] This application concerns whether a notice of civil claim filed on February 1, 2023 (the "Claim") was properly served. The applicants, who are named as defendants, filed a jurisdictional response and applied to set aside the Claim, and service of the Claim, alleging that the Claim was improperly served on them.
- [2] For the reasons that follow, I have determined that service of the Claim shall be set aside.
Issue
- [3] The issue raised is whether, pursuant to Rule 21-8(3)(a) and (b) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [SCCR] the court should order the Claim and service of the Claim set aside.

Background

- [4] The plaintiff is a businessman and shareholder of Voice Mobility International Inc. ("Voice"), a corporation listed on the Toronto Stock Exchange. The Claim alleges that the plaintiff is a creditor of Voice.
- [5] The defendant, VM Agritech Limited ("VMAL"), is a UK corporation. The defendant, Christopher Wightman, is a businessman and a UK resident. Mr. Wightman is also the chairman of the board of directors of VMAL.

- [6] The Claim alleges that:
- a) In 2020, VMAL entered into an agreement to acquire Voice and take VMAL public;
 - b) Mr. Wightman retained Cassels Brock to provide legal services for VMAL;
 - c) VMAL and Voice agreed that VMAL would pay for legal services rendered by Cassels Brock;
 - d) VMAL failed to pay Cassels Brock's invoices for legal services for a total debt of \$24,155.91 (the "Debt"); and
 - e) In February 2022, the plaintiff paid Cassels Brock \$12,000 in exchange for an assignment of the Debt.
- [7] On or about January 4, 2023, the plaintiff notified VMAL and Mr. Wightman of the assignment of the Debt. The plaintiff demanded payment of the Debt.
- [8] In the plaintiff's January 4, 2023 email message to Mr. Wightman, the plaintiff states: Dear Chris, You have never paid the Cassels Brock charges that you incurred. These charges total \$24,155.91 and must be an ongoing item in VM Agritech's accounting. I ended up in 2022 paying these claims personally for VM Agritech because the lawyers that you retained to do this work insisted on being paid for their legal work. Of course, this is not the entire amount owing, or all the entire items of which you remain obligated. This is a discrete issue that needs to be paid to me personally and immediately. Thank you, Alan G. Smith
- [9] Mr. Wightman states in his affidavit #1 made March 21, 2023, that this was the first time he had heard of this. On January 8, 2023, Mr. Wightman replied to the plaintiff by email, stating: Dear Alan, Regrettably, I am in receipt of your email below of January 4th, 2023. We do not have any payment obligation or debt to you or to any entities to which you are affiliated. Any statement by you verbally or in writing to third parties to the effect that we have any such obligations or debts is defamatory. If we are apprised of the fact that you continue to make such baseless claims, we will take appropriate action to protect our reputation. Please have your lawyer direct all future communications to our Canadian legal counsel, Nikolaos Galanopoulos, at ndg@glawco.com. Chris
- [10] On January 17, 2023, the plaintiff formally demanded payment of the Debt from VMAL. The plaintiff also attached a copy of the assignment of the Debt.
- [11] On January 26, 2023, Mr. Galanopoulos emailed the plaintiff to acknowledge receipt of the assignment of the Debt. He denied VMAL's liability for the Debt on a without prejudice basis. Mr. Galanopoulos also asked the plaintiff to have his legal counsel correspond with him "if there is anything further".
- [12] On February 2, 2023, the plaintiff emailed Mr. Galanopoulos attaching a copy of the filed Claim and stating that on February 1st, he had served a copy of the Claim at Mr. Galanopoulos' office address. The Law

- [13] This application raises the requirements for serving originating pleadings on parties located outside of British Columbia.
- [14] Unless the court otherwise orders, a notice of civil claim must be served by personal service: SCCR 4-3(1)(a). For a corporation, personal service is effected by leaving a copy of the document with the "president, chair, mayor or other chief officer of the corporation" "treasurer, secretary, clerk or agent of the corporation" or in a manner provided by the Business Corporations Act or any enactment relating to the service of court documents: SCCR 4-3(2)(b)(i) to (iv).
- [15] Rule 4-5 of the SCCR deals with service outside British Columbia and the relevant portions are as follows: Service outside British Columbia without leave
- (1) An originating pleading, petition or other document may be served on a person outside British Columbia without leave in any of the circumstances enumerated in section 10 of the Court Jurisdiction and Proceedings Transfer Act. Required endorsement
 - (2) A copy of an originating pleading or petition served outside British Columbia without leave must state, by endorsement in Form 11, the circumstances enumerated in section 10 of the Court Jurisdiction and Proceedings Transfer Act on which it is claimed that service is permitted under this rule. Manner of service abroad
- (10) A document may be served outside British Columbia
- (a) in a manner provided by these Supreme Court Civil Rules for service in British Columbia,
 - (b) in a manner provided by the law of the place where service is made if, by that manner of service, the document could reasonably be expected to come to the notice of the person to be served, or
 - (c) in a state that is a contracting state under the Convention, in a manner provided by or permitted under the Convention.
- [16] The applicants rely on Rule 21-8 which provides for jurisdictional disputes. More particularly, they rely on Rule 21-8 (3) which sets out the procedure for disputing the pleading or service:
- (3) If a party who has been served with an originating pleading or petition in a proceeding, whether served in or outside British Columbia, alleges that the notice of civil claim, counterclaim, third party notice or petition is invalid or has expired or that the purported service of the notice of civil claim, counterclaim, third party notice or petition was invalid, the party may, after filing a jurisdictional response in Form 108, apply for one or both of the following:
 - (a) an order setting aside the notice of civil claim, counterclaim, third party notice or petition;

- (b) an order setting aside service of the notice of civil claim, counterclaim, third party notice or petition.

Analysis

- [17] Mr. Wightman resides in the UK and he states that VMAL is a company incorporated in the UK and with an office in the UK.
- [18] There is no dispute that the plaintiff did not serve the Claim on Mr. Wightman and VMAL in the UK. Rather, the plaintiff's position is that he served the applicants by serving the Claim on Mr. Galanopoulos, as he was instructed to do by Mr. Wightman.
- [19] Mr. Wightman states that he and VMAL never consented, nor offered, to allow service of the Claim through Mr. Galanopoulos. In my view, the evidence indicates that Mr. Wightman asked the plaintiff to communicate with their Canadian legal counsel but he did not agree to accept service of the Claim for himself or VMAL through Mr. Galanopoulos.
- [20] The plaintiff could have, but did not, communicate with Mr. Galanopoulos to inquire about whether he was authorized to accept service of the Claim on behalf of the defendants. I find the plaintiff failed to serve the applicants with the Claim in accordance with the SCCR.
- [21] The applicants referred me to *British Columbia (Director of Civil Forfeiture) v. Lam*, 2023 BCSC 159 [Lam] as authority for the relief sought in their application. At para. 7, Justice Jackson states:
- [7] Rule 21-8(1) permits a party to dispute this Court's jurisdiction over the parties and subject matter at issue, whereas R. 21-8(2) governs requests that the Court decline to exercise its jurisdiction. However, R. 21-8 addresses more than disputes about territorial competence and forum non conveniens. Rule 21-8(3) governs jurisdictional disputes based on allegations that the initiating proceeding is invalid or has expired or that service was invalid. For example, improperly effected service is invalid. Where service is required, effected service is fundamental to any further proceedings and is "imperative in order for a court to assume jurisdiction over the subject of the litigation": *William v. Lake Babine Indian Band*, 30 C.P.C. (4th) 156 at para. 37, 1999 CanLII 6121 (B.C.S.C.) [William]; *Kaur v. Virk*, 2022 BCSC 173 at para. 49. Where personal service is required, it must be effected for subsequent proceedings to be lawful: *Brookmount Explorations Inc. v. Dadon*, 2008 BCCA 113 [Brookmount] at para. 15, citing *Daignault v. Gueldner*, 2007 BCCA 40 [Daignault]. Accordingly, where a party alleges this Court lacks jurisdiction because the initiating proceeding is invalid or has expired or that service was invalid, R. 21-8(3) applies and a jurisdictional response is required.
- [22] The plaintiff submits that setting aside service will only delay and increase costs, especially where the applicants are aware of the Claim. However, properly effected service is fundamental and imperative to the court's jurisdiction over the subject of the litigation: *William* para. 49. It is clear that I must set aside service of the Claim.

- [23] The applicants further submit that the Claim is invalid, for example, because it is bound to fail. However, I conclude that Rule 21-8(3)(a) does not permit an applicant to challenge more than the technical validity of a notice of civil claim, counterclaim, third party notice or petition.
- [24] In *R & J Siever Holdings Ltd. v. Sunridge Meritt Motel Inc.*, 2007 BCSC 632 [R&J], rev'd on other grounds 2008 BCCA 59, Justice Ehrcke considered an application pursuant to Rule 14(6.2) of the now repealed Supreme Court Rules, B.C. Reg. 221/90. Rule 14(6.2) is worded nearly identically to Rule 21-8(3) of the SCCR, except that "originating process" has been replaced by "notice of civil claim, counterclaim, third party notice or petition", in the current wording.
- [25] In that case, a party who resided outside of British Columbia, applied to set aside a default judgment on the grounds that he was unaware of the proceedings against him and he did not authorize the law firm that represented him to appear on his behalf. The party relied on Rule 14(6.2) and Ehrcke J. concluded that the Rule did not apply, stating as follows:
- [22] In my view, Rule 14(6.2) does not apply in these circumstances, as the conditions precedent are not satisfied. The writ of summons is not invalid and has not expired; nor is this a case in which "the purported service of the process was invalid". There was no purported service of the writ of summons on Mr. Moldenhauer. Rather, there was deemed service, by virtue of Rule 11(3) and the entry of an appearance on his behalf. Rule 14(6.2) contemplates a situation in which the plaintiff has taken a step that is invalid or defective. In the present case, there is no defect or irregularity in any step taken by the plaintiff. The plaintiff has in all respects correctly followed and applied the Rules of Court. The alleged defect in the proceedings has nothing to do with the plaintiff, but rather with the law firm that entered the appearance on his behalf ... [Emphasis added.]
- [26] On my reading of this passage from R&J, particularly with regard to the reference made by the court to "any step taken by the plaintiff", the Rule is only concerned with challenges to technical or procedural defects in the steps taken, and not substantive defects within a claim.
- [27] In the present case, the applicants effectively seek to challenge the pleadings on the grounds available to a party under Rules 9-5 and 9-6. In my view, questions about whether the Claim is bound to fail or, whether there is a genuine issue for trial, do not form part of a challenge under Rule 21-8(3)(a).
- [28] I am further supported in this conclusion by Rule 28-8(1), which sets out that a party filing a jurisdictional response may apply to strike out the claim if the claim fails to allege facts to establish the court's jurisdiction over that party in respect of the claim.

- [29] In considering the matter of costs, I note that in *Carpenter v. E.B.H. Financial Services Ltd.*, 1998 CanLII 3916 (B.C.S.C.) at para. 11, the court granted costs to an out of province defendant where the originating pleading was set aside as invalid for failure to serve it on the defendant. Here, the applicants were not properly served with the Claim. They were effectively forced to file a jurisdictional response and to seek to aside the service of the Claim.
- [30] The applicants have succeeded in their application. As such, I find they are entitled to costs payable in any event of the cause.

Disposition

- [31] Service of the plaintiff's notice of civil claim filed on February 1, 2023 is set aside.
- [32] The applicants are entitled to costs in any event of the cause.
- [33] The balance of the relief sought in the applicants' March 22, 2023 notice of application is dismissed.
- [34] Item 2 under Part 1 of the applicant's March 22, 2023 notice of application is granted.
- [35] The relief sought under Item 3 of Part 1 of the applicant's March 22, 2023 notice of application was not argued or sought at the hearing so no order is made in respect of that. "E. McDonald J."

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