
CANADA / JUDGMENT

Stewart v. Clark

2012 BCSC 1093

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1093 Stewart v. Clark

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stewart v. Clark,

2012 BCSC 1093

Date: 20120720

Docket: S118194

Registry: Vancouver

Between:

Donald Stewart

Plaintiff

And

Alan Clark, The Financial Institutions Commission for British Columbia, The Attorney General for British Columbia, Her Majesty the Queen in Right of British Columbia, and Morneau Shepell Inc.

Defendants

Corrected Judgment: The front page of the judgment was corrected
on December 13, 2012

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

June 21 and 22, 2012

Place and Date of Judgment:

Vancouver, B.C.

July 20, 2012

- [1] The plaintiff retired from his employment with a pulp mill on Vancouver Island in 2004 where he had worked for many years. At the time of his retirement the mill was owned by Pope & Talbot Ltd. In October 2007 Pope & Talbot sought the protection of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), but went into receivership in 2008.
- [2] At the time of his retirement the plaintiff was a member of the Pope & Talbot Pension Plan for Permanent Salaried Employees ("the Pension Plan"). The defendant, Alan Clark ("the Superintendent") was Superintendent of pensions pursuant to section 2 of the Pension Benefits Standards Act, R.S.B.C. 1996, c. 352 (the "PBSA").
- [3] In July 2009, pursuant to the PBSA the Superintendent gave directions to the defendant Morneau Shepell Inc. ("Morneau") for the distribution of the assets of the Pension Plan, which at that time had insufficient funds to meet its obligations.

- [4] Section 35 of the PBSA requires that a "defined benefit provision" in a pension plan must contain a method to allocate and distribute the plan's benefits, including a method to determine priorities in the event the plan is being wound up and is underfunded. Section 45(1) gives the Superintendent authority, on a basis he "considers reasonable and equitable in the circumstances and consents to, in writing", to provide for a method "of allocation and distribution of the assets of the plan and the priorities for determining the benefits of persons entitled to the assets". The parties agree the Pension Plan had a "defined benefit provision".
- [5] The plaintiff complains the directions given by the Superintendent have deprived him, and other members of the proposed class he seeks to represent, of substantial pension benefits. In particular the plaintiff alleges the Superintendent's direction to Morneau authorized a pro rata distribution when he ought to have directed that the plaintiff, and the other members of the proposed class, receive 100% of their pensions in priority to the distribution of pension benefits to others. The plaintiff alleges the direction to implement a pro rata distribution was done "without any legal authority for doing so".
- [6] Morneau was the administrator of the Pension Plan and it is alleged Morneau had a fiduciary duty to the plaintiff, and other members of the proposed class, not to distribute the pension benefits as directed by the Superintendent because to do so was "contrary to [Pension] Plan text and [Morneau] knew the Superintendent had no lawful authority to give directions for a pro rata distribution".
- [7] The defendant, the Financial Institutions Commission for British Columbia ("FICOM") is alleged, under the direction and authority of the Superintendent, to have interfered illegally in the distribution direction made to Morneau.
- [8] The Superintendent, Morneau and FICOM are alleged to have conspired to implement the pro rata distribution, thereby causing loss and damage to the plaintiff and other members of the proposed class.
- [9] The Superintendent is alleged to have owed a duty of care to the plaintiff, and to the proposed class, and to have breached that duty by "failing to give any, or any proper, consideration to the limits of his jurisdiction and statutory authority".
- [10] I will refer to all defendants, with the exception of Morneau, as the "Crown defendants".
- [11] The plaintiff, and the other proposed class members, became aware of the Superintendent's direction to Morneau within about two months of the issuance of the directions in July 2009, and shortly thereafter sought legal advice. Further, the plaintiff, and the other proposed class members, before any money was actually paid out in accordance with the directions given by the Superintendent, became aware of the intention of Morneau to make a distribution pro rata.

- [12] The Crown defendants argue the plaintiff, and the other members of the proposed class, had open to them the process authorized by the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, and only that process, to challenge the exercise of the statutory power of decision given to the Superintendent.
- [13] The Crown defendants submit the plaintiff's notice of civil claim can succeed against them only if the trial court is satisfied the Superintendent, when directing Morneau to make a pro rata distribution, acted unlawfully. If he acted lawfully, the action must fail.
- [14] In essence that proposition is correct but in my view slightly misstates the fatal flaw in the plaintiff's position. The plaintiff's action is bound to fail because the plaintiff has no right of action by a notice of civil claim to challenge the exercise of a statutory power of decision. The law of British Columbia provides for such a challenge pursuant only to the Judicial Review Procedure Act. In Part 1 of the plaintiff's notice of civil claim he alleges the Superintendent acted "without lawful authority". A government actor, such as the Superintendent, whose legal authority to make a decision is challenged by a person, such as the plaintiff, who believes himself aggrieved by an unlawful decision, is subject to the law which applies to judicial review of administrative action. Section 2 of the Judicial Review Procedure Act provides that an application for judicial review must be brought by petition, and that the reviewing court may grant various forms of relief including a declaration or injunction in relation to the exercise, or purported exercise, of a statutory power, or may grant relief in the nature of prerogative writs to control the behaviour of a public official. Neither the plaintiff, nor any other member of the proposed class, applied for judicial review of the direction given by the Superintendent to Morneau.
- [15] Unlike an action commenced by notice of civil claim, judicial review is intended to provide a summary procedure enabling a superior court to review the record which was before the government actor, and whose decision is challenged, to determine if, on that record, it was lawful, and if not to make appropriate orders. The process is intended to be as expeditious as reasonably possible. A decision that may have been deficient ought to be subject to challenge at a time when a remedy the court is entitled to grant will have practical benefits.
- [16] In this instance the plaintiff did not invoke the Judicial Review Procedure Act once he and the intended members of the class learned of the directions of the Superintendent in June 2009. Instead, a civil action was commenced in December 2011, which was well after the plan benefits (save for a contingency reserve) had been paid out in accordance with the directions of the Superintendent. If the plaintiff had sought judicial review of the decision of the Superintendent, this Court would have decided whether the Superintendent's direction was lawful and pending that decision the payout could have been stayed. If it was determined the decision was not lawful it would have been quashed or the Superintendent would have been required to reconsider his directions with the court's ruling in mind. On the other hand, if it was determined the Superintendent's direction was lawful, that would have been the end of the matter.

- [17] There is no parallel process given to a person aggrieved by the unlawful exercise of a statutory power. The aggrieved person is not entitled to choose between judicial review and a tort action seeking damages. To attempt to do so is a prohibited evasion of the statutory scheme found in the Judicial Review Procedure Act: see *Bercheid v. Ensign*, [1999] B.C.J. No. 1172; and *Cimaco International Sales Inc. v. British Columbia*, 2010 BCCA 342.
- [18] The plaintiff submits *Cimaco* is no longer good law, having been overtaken by the Supreme Court of Canada's decision in *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62. I do not agree. *TeleZone* did not address the question of a collateral attack on judicial review by means of a civil action. *TeleZone* addressed the jurisdiction of the Federal Court. The question the Supreme Court of Canada answered was whether the Federal Courts Act, R.S.C. 1985, c. F-7, ousts the jurisdiction of a provincial superior court to hear a common law action for damages for breach of contract. The authority of *Cimaco* is unimpaired.
- [19] It is perhaps worthy of note that if the plaintiff is entitled to sue for damages, and succeeded, the result would be not that a different method of distributing the benefits of the Pension Plan would be implemented. That was no longer possible when the notice of civil claim was filed. The result now, if the notice of civil claim as a class proceeding went to trial successfully, would be that the tax payers of British Columbia would be required to pay damages to the plaintiff and those he seeks to represent. The plaintiff does not seek a readjustment of the Pension Plan in his favour, he seeks a different pension plan paid for by the tax payers of British Columbia. If there had been a successful application for judicial review, damages may have been avoided altogether. This illustrates the benefits of the summary process intended by judicial review.
- [20] There is, however, another potential source of money, apart from the Crown defendants, to which the plaintiff looks, and that source is *Morneau*. The plaintiff alleges he was one of the retired members who ought to have enjoyed a priority claim against the Pension Plan. He alleges in his notice of civil claim that his priority claim against the Pension Plan was defeated by the directions given to *Morneau* by the Superintendent to distribute the Pension Plan's assets pro rata, thereby ignoring what are described by the plaintiff as the "Priority Termination Provisions" in the Pension Plan.
- [21] If the plaintiff cannot rely on the validity of the Priority Termination Provisions, the claim against *Morneau* must fail. *Morneau* argues the plaintiff cannot rely on the Priority Termination Provisions because in earlier litigation he made an election, from which it is said he cannot now resile, to advance a claim against directors and officers of *Pope & Talbot*, in which he denied the validity of the Priority Termination Provisions.
- [22] In 2007, when *Pope & Talbot* sought the protection of the CCAA, PricewaterhouseCoopers was appointed as the monitor. The plaintiff provided an affidavit to the monitor deposing that he believed he had been misled by directors and officers of *Pope & Talbot*, as a result of which he refrained from taking certain steps that would have enhanced the Pension Plan to his benefit.

- [23] In August 2009, Walker J., who was managing the CCAA proceedings in response to the plaintiff's affidavit, ordered the, "Pension Claimants", of whom the plaintiff was one, to deliver a statement of claim to the monitor. That was done by the plaintiff and the other claimants on September 9, 2009. The statement of claim was not filed in the Supreme Court Registry and the plaintiff in his application response before me refers to it as a "proposed statement of claim". It cannot be properly characterized as only "proposed". Walker J. in the exercise of his role of the CCAA Judge had an expansive discretion to manage those proceedings: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60. The statement of claim delivered by the plaintiff and others had no less substance than a statement of claim filed in the court registry in the usual way.
- [24] In his statement of claim the plaintiff alleged that in or about 2005, Pope & Talbot amended the Pension Plan to "provide the Pensioners with priority of payment in the event the Plan was wound up and was underfunded". The amendment to the Pension Plan is a reference to the Priority Termination Provisions.
- [25] In his statement of claim the plaintiff alleged the Priority Termination Provisions, as a result of the negligence of directors and officers of Pope & Talbot, had not been validly registered, thereby causing him to suffer a loss of pension benefits when the Pension Plan was terminated while underfunded. That claim was ultimately compromised and Walker J. approved the settlement on October 15, 2009.
- [26] Morneau argues in its application before me that the plaintiff cannot now, in his notice of civil claim, repudiate the position he elected to take in his statement of claim, in September 2009, that the Priority Termination Provisions were invalid. Morneau relies on Rule 9-5(1)(d), to assert the plaintiff's claim against it in the notice of civil claim is an abuse of process.
- [27] Morneau submits the statement of claim delivered by the plaintiff speaks for itself and the question to be decided on Morneau's application resolves itself largely into a question of law. I agree but nevertheless on an application of this nature I am entitled to receive evidence. There appears to be no dispute on the facts. In this instance I have considered both the notice of civil claim which Morneau argues is an abuse and the earlier statement of claim from which emerges the inconsistency which reveals the abuse.

The law in relation to the assertion of inconsistent rights

- [28] In *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5, Tysoe J.A. considered whether the plaintiffs' prior conduct ought to be characterized as an election which precluded the subsequent claim which was challenged in that case. Tysoe J.A. referred to the doctrine of election as articulated in *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480, as follows:

In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims. [emphasis in original].

[29] In *Scarf v. Jardine*, 1882 H.L. (E) 345, Jardine supplied goods to a firm with two partners, Scarf and Rogers. Their partnership later dissolved. Rogers continued to do business under the name of the dissolved partnership and was joined by a new partner named Beech. Jardine continued to supply goods to the new firm. A cheque from the new firm, payable to Jardine, was dishonoured. Jardine sued Rogers and Beech for the price of goods supplied, both before and after the change in the partnership. The new partnership went into liquidation and Jardine proved his claim as a creditor. In doing so he swore that Rogers and Beech were indebted to him for all amounts owing. Later he sued Scarf for some of the same amounts. Their Lordships held Jardine had elected to hold Rogers and Beech liable for all amounts owing, and having done so could not sue Scarf. Lord Blackburn discussed the principle in issue as follows:

[W]here a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. [...] Where once there has been an election to do one of the two things you cannot retract it and do the other thing; the election once made is finally made. [p. 360]

[30] Lord Blackburn continued:

The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind had thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of remedies but has communicated it to the other side in such a way as to lead the opposite party that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act - I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way - the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

[T]he plaintiff goes on and issues a writ against Rogers & Beech - he sues Beech. I am unable to conceive a more unequivocal act; he has thereby adopted Beech as his debtor at that time. I do not think it's going to judgment or not going to judgment is material.

[31] In *Vanmills Establishment v. Coles* (1992) 8 C.P.C. (3d) 178 (B.C.S.C.), Cohen J. discussed the law in British Columbia when a party seeks to assert inconsistent rights and referred to *Morrison-Knudsen Company v. B.C. Hydro & Power Authority* (No.2), [1978] 4 W.W.R. 193 (B.C.C.A.), where these words are found:

It is necessary at the outset to distinguish between the two kinds of election that one must consider in a case such as this: an election between inconsistent rights and an election between alternative remedies. When faced with a fundamental breach the innocent party to a contract

may elect to affirm the contract and hold the other party to the performance of its contractual obligations and sue as well for damages. On the other hand, he may elect to accept the breach as a repudiation of the contract. This is an election between inconsistent rights. It must generally be made with promptitude and communicated to the other party, and, once made, it is irrevocable.

[32] Cohen J. in *Vanmills* held:

This is not a matter of a litigant pursuing inconsistent remedies, where no election is necessary until judgment. There can be no doubt that in the instant action Crux is attempting to pursue inconsistent rights. Crux elected in his action against Sigurdson to claim that he had disposed of his legal and beneficial interest in the C.I.S. shares to Coles. Having elected to sue Sigurdson on that basis, I find that Crux cannot now sue Coles in the instant action on the basis that he retained a beneficial interest in the C.I.S. shares. In my opinion, his election in his action against Sigurdson is binding upon him. The principle that, in the case of inconsistent rights, a plaintiff's irrevocable and unequivocal election is deemed to be made by the commencement of an initial action is established in *Scarf v. Jardine* (1882), 7 H.L. (E.) 345 and *Ashmore v. Bank of B.N.A.* (1913), 13 D.L.R. 73 (B.C.C.A.).

[33] In *Pepper's Produce Ltd. v. Medallion Realty Ltd.* 2012 BCCA 247, Levine J.A. upheld a decision of a chambers judge refusing to add defendants. The plaintiff had sued Gao Tam Enterprises Ltd. alleging a contract by that defendant to sell its business to the plaintiff. It settled the claim and then applied to add two individuals alleging they were the sellers of the business. Levine J.A. found the claims were "diametrically inconsistent", and relying in part on *First Majestic Silver Corp.* *supra*, for the proposition that pursuing inconsistent rights amounts to an abuse of process, dismissed the appeal.

[34] The plaintiff relies on *Willson v. British Columbia (Attorney General)*, 2009 BCSC 1272, in which Johnston J. addressed issues arising out of inconsistent pleadings. The plaintiff submits Johnston J. did not find this to constitute an abuse of process. In my view Willson does not assist the plaintiff. That case involved various applications, including leave for a law firm to act as counsel of record for both plaintiffs and third parties, as well as orders ancillary to that application, or, in the alternative, that the applicants be allowed to continue as "friendly defendants". Having addressed those questions Johnston J. referred to "inconsistent and conflicting pleadings between the draft statement of defence in this action, which admits everything in the statement of claim, and pleadings recently filed in another action. Johnston J. commented that the argument before him was "based upon the application at what has been called the doctrine of election ...". Johnston J. observed that the "Question is, what should I do about it? It is not fair to the other parties in this action to stay the action generally because of this difficulty" and concluded that to avoid unfairness he ought to stay only one of several actions.

[35] Johnston J. was addressing complex questions of litigation management and made no ruling which was intended to change the law, as laid down in cases of high authority, on the doctrine of election.

- [36] The plaintiff further submits his claim cannot be defeated by the doctrine of election unless he was possessed of full knowledge of the true facts when he made his election. In *United Australia Ltd. v. Barclays Bank, Limited*. [1941] A.C. 1 (H.L.), Lord Atkin spoke of unequivocal acts of election taken with "full knowledge". The plaintiff submits this phrase must mean full knowledge of all the true facts.
- [37] I do not agree with the plaintiff's argument on the issue of knowledge. The jurisprudence in regard to the doctrine of election is intended to ensure the administration of justice is not brought into disrepute by a party who pursues inconsistent and irreconcilable rights. A court cannot be burdened with the task of making a choice between opposing rights, and to invite it to do so is an abuse. It is the fact of the assertion of "diametrically inconsistent" rights which constitutes the abuse. Once inconsistent rights are asserted the plaintiff is fixed with knowledge of that fact. If it is a relevant consideration that a plaintiff, when he made his election, he did not know enough about the evidentiary facts underlying the assertion of clearly inconsistent claims, the effect would be to thwart altogether the application of the doctrine at an early stage of litigation, and to permit irreconcilable claims to go forward, while the allegedly unknown facts and "the truth" were investigated, thereby engendering much confusion.
- [38] I find the plaintiff is bound by the election he made in his September 2009 statement of claim in which he alleged the Priority Termination Provisions were invalid.
- [39] The notice of civil claim is an abuse of process and must be dismissed. The defendants are entitled to their costs on Scale B.

"Mr. Justice K.N. Affleck"

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