

CANADA / JUDGMENT

Tucci v. Peoples Trust Company

2015 BCSC 987

COURT

Supreme Court of British Columbia

DECIDED

11 June 2015

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2015 BCSC 987 Tucci v. Peoples Trust Company IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Tucci v. Peoples Trust Company, 2015 BCSC 987 Date: 20150611 Docket: S138544 Registry: Vancouver Brought under the Class Proceedings Act, R.S.B.C. 1996, c. 50 Between: Gianluca Tucci Plaintiff And: Peoples Trust Company Defendant Before: The Honourable Mr. Justice D.M. Masuhara Ruling on Sequencing Counsel for Plaintiff: A. Greenwood L. Brasil Counsel for Defendant: R.R. Hira, Q.C. P. Waldkirch Place and Date of Hearing: Vancouver, B.C. May 29, 2015 Place and Date of Judgment: Vancouver, B.C. June 11, 2015

Introduction

- [1] This is a class action. The substance of the action is an allegation that confidential financial information held by Peoples Trust Company ("PTC") was illegally accessed into by "cybercriminals" and that PTC should be held liable for the breach in privacy of the hundreds of individuals who has submitted personal information to PTC through its website and which information was accessed by the cybercriminals.
- [2] I have been assigned as case management judge.
- [3] PTC in this sequencing application seeks leave to bring on an application to have the plaintiff's action dismissed on the basis that the pleadings do not disclose a cause of action and should be struck in their entirety.
- [4] PTC says that this case falls within the exception to the general rule stated in *Watson v. Bank of America Corporation*, 2012 BCSC 146 at paras. 18-20 that the certification hearing be the first procedural hearing. In departing from the general rule Mr. Justice's Slade stated in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Agriculture and Lands)*, 2009 BCSC 1593 at para. 61: "a defendant must provide a "compelling reason" or demonstrate "exceptional circumstances" to receive an exemption from the general rule that the certification motion should be the first matter heard". Circumstances where a pre-certification application could be appropriately permitted include: where the motion is time-sensitive, would benefit the parties, furthers the objective of judicial efficiency, or has the potential to dispose of the litigation: *Kwicksutaineuk* at para. 62.

- [5] The exceptional circumstances in the present case are said to arise from two recent cases: *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308 and *Cook v. The Insurance Corporation of British Columbia*, 2014 BCSC 1289. PTC submits that these cases hold that there is no common law tort of invasion of privacy in British Columbia and that as such the within action is without foundation. I am advised that the two cases are under appeal and that a hearing date for *Ari* has been scheduled for October 13, 2015. Further, to the extent there are contractual breaches, PTC submits that the contractual breaches are in essence statutory breaches and are subject to the comprehensive dispute resolution procedure contained under the Personal Information Protection and Electronic Document Act, S.C. 2000, c. 5 and the Personal Information Protection Act, S.B.C. 2003, c. 63.
- [6] In opposing the application, the plaintiff argues that the general approach as espoused in many cases is that the first procedural application should be the certification hearing; noting particularly that the very question as to whether a cause of action has been identified is a key determination for the certification hearing. It is further argued that the question of whether there exists a tort of invasion of privacy exists or not in this province, is not dispositive of the entire action. The plaintiff submits that the pleadings identify a contractual bases for their action which is arguably outside of any statutory regime.
- [7] The certification hearing of this action is scheduled for April 2016. Discussion
- [8] The submissions have identified the tension that exists between the general approach of having the first procedure hearing being the certification application and the principle of efficiency, economy and proportionality.
- [9] The parties have referenced cases which have required the certification hearing to be the first application as well as cases where the court has allowed an application such as in the present case to proceed in advance: *Watson* at paras. 18-20; *Kwicksutaineuk* at para. 59; *Haghdust v. British Columbia Lottery Corporation*, 2011 BCSC 772 at paras. 11-13; *Douez v. Facebook, Inc.*, 2012 BCSC 2097 at para. 9; *Clark v. Energy Brands Inc.*, 2012 BCSC 557 at paras. 37-39; and *Strohmaier v. British Columbia (Attorney General)*, 2014 BCSC 2078 at para. 13.
- [10] The court retains a gatekeeper role in all instances and is to exercise its discretion judicially on issues such as present here. I am of the view that the defence submissions on whether a cause of action is disclosed should be argued at the certification hearing. The factors that lead me to this conclusion are that the key issue in this case though arguably analogous to the two cases referenced by the defendant is open to a contrary argument e.g. see: *Condon v. Canada*, 2014 FC 250; the appeal decisions could very well be available by the time of the hearing; the potential for multiple appeal paths being created which can lead to prolonged delays can be avoided; that there are aspects beyond the tort allegation which are present in the action such as the breach of contract pleadings so the potential elimination of the privacy torts may not dispose of the entire action; there is no evidence that allowing this application will promote a settlement; and the interests of economy and efficiency are not

sufficiently met by allowing this application. Indeed allowing two hearings is likely to detract from those interests by fostering unnecessary costs and delays. These factors lead me to conclude that diverting from the general approach is unwarranted. "The Honourable Mr. Justice Masuhara"

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