

CANADA / JUDGMENT

## ZLC Financial Ltd. v. Anthony

2022 BCSC 2240

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2240 ZLC Financial Ltd. v. Anthony

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

ZLC Financial Ltd. v. Anthony,

2022 BCSC 2240

Date: 20221222

Docket: S200948

Registry: Vancouver

Between:

ZLC Financial Ltd. and ZLC Wealth Inc.

Plaintiffs

**And**

Matthew Anthony, William Finlay also known as Bill Finlay, John V.R. Wark, J.V.R. Wark and Associates Inc., Finlay Wealth Management Ltd., 1223360 B.C. Ltd., Finlay Wark Anthony Wealth Management, Worldsource Financial Management Inc., and IDC Worldsource Insurance Network Inc.

Defendants

Before: The Honourable Justice Francis

Reasons for Judgment

Counsel for the Plaintiffs:

H. Jones

**C. van Duzer**

Counsel for the Defendants Counsel for the Defendants, Matthew Anthony, William Finlay also known as Bill Finlay, John V.R. Wark, J.V.R. Wark and Associates Inc., Finlay Wealth Management Ltd., 1223360 B.C. Ltd., and Finlay Wark Anthony Wealth Management:

P. Sullivan

E. Thorpe

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 28 and

November 28, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2022

**Introduction**

[1] The defendants Matthew Anthony, William Finlay, and John Wark (the "Advisors") bring this summary trial application seeking the court's determination of a number of issues in this claim. The plaintiffs are two affiliated companies that do business in the financial services field, marketing and distributing insurance and financial products to individuals and businesses. The Advisors worked for the plaintiffs until September 2019. The plaintiffs' lawsuit concerns the circumstances under which the Advisors terminated their association with the plaintiffs, and commenced working with the defendants Worldsource Financial Management Inc. and IDC Worldsource Insurance Network Inc. (collectively, "Worldsource").

[2] In the amended notice of civil claim, the plaintiffs plead that the Advisors breached their contractual obligations to the plaintiffs and engaged with Worldsource in a conspiracy to cause the plaintiffs harm by unlawful acts. The plaintiffs' claim is succinctly summarized by the plaintiffs in their response to this application:

This claim results from the improper departure of the Advisors from ZLC, on September 20, 2019 and the subsequent improper coordinated effort of the Defendants to transfer clients of ZLC, one by one, without agreement for the purpose of wrongfully denying ZLC its commissions for placed business.

[3] In this summary trial application, the Advisors ask the court to dismiss the plaintiffs' contractual and conspiracy claims as they pertain to the Advisors.

## Background Facts

- [4] There are three related entities who, at various times, had contracts with the Advisors that are relevant to this litigation. Zlotnik, Lamb & Company (the "Zlotnik Partnership") is a partnership that was formed in 1983. The Zlotnik Partnership sold financial products to individual and corporate clients. In 1986, ZLC Financial Ltd. ("ZLC Financial") was incorporated. ZLC Financial is in the business of distributing insurance and mutual fund products. In 1999, ZLC Wealth Inc. ("ZLC Wealth") was incorporated. ZLC Wealth is a registered portfolio manager. It offers products that are regulated as securities to the clients of ZLC Financial. ZLC Wealth and ZLC Financial are closely affiliated and they share a corporate office.
- [5] ZLC Financial, ZLC Wealth and, prior to its dissolution, the Zlotnik Partnership (collectively, "ZLC"), retain advisors who are remunerated by way of commissions on products sold by the advisor through ZLC. Commissions are generally paid for first orders on placed business, but also renewals and trailers, which are ongoing sources of commission income during the period of time that a client holds a particular product they purchased from an advisor working for ZLC.
- [6] On January 1, 2016, the Zlotnik Partnership was dissolved. At the time of dissolution, ZLC Financial was a partner in the Zlotnik Partnership. According to the affidavit of David Suzuki, director of ZLC Financial and ZLC Wealth, upon the dissolution of the Zlotnik Partnership, ZLC Financial "took over all aspects of the partnership business and continued the business, uninterrupted."
- [7] There are three primary agreements at issue in this litigation (collectively, the "Advisor Agreements"), all between the Advisors and the Zlotnik Partnership:
- a) a November 1, 1998 agreement between Mr. Wark and the Zlotnik Partnership (the "Wark Agreement");
  - b) an October 28, 1999 letter agreement between Mr. Finlay and the Zlotnik Partnership (the "Finlay Agreement"); and
  - c) a September 9, 2004 agreement between Mr. Anthony and the Zlotnik Partnership (the "Anthony Agreement").
- [8] The Wark Agreement and the Anthony Agreement are similar in form. Each defines Mr. Wark and Mr. Anthony, respectively, as the "Agent," and contains the following provisions:
- a) "Agent's interest in a contract" is defined to mean "the percent of Net Compensation relative to such contract allocated to the Agent at the time the contract is issued in accordance with Schedule 'A'."
  - b) Schedule "A" is a list of products with a percentage interest allocated to the Agent (e.g., 50% for life insurance and individual disability insurance--1st year; 50% for mutual funds; etc.).

- c) The Agent is entitled to commissions, which the Zlotnik Partnership agrees to pay on sales effected by the Agent in proportion to the Agent's interest in the contract in question.
  - d) If the contract is terminated for a reason other than the death or permanent disability of the Agent, the Agent shall only be entitled to first year, renewal commissions and trailer fees allocated to the departed agent according to the Agent's interest in such a contract.
  - e) A clause restricts the ability of the Agent to divert clients from ZLC.
  - f) The Agent is subject to a non-competition restriction that applies during the term of the contract.
  - g) The obligations of the Agent which expressly or by their nature survive the expiration or termination of the agreement continue subsequent to the termination of the agreement.
- [9] Unlike Mr. Anthony and Mr. Wark, Mr. Finlay never signed a comprehensive agreement with the Zlotnik Partnership that set out the terms of his compensation. The letter agreement that he signed contemplated that "a standard Associate's Contract will be drawn up and executed by you and Zlotnik, Lamb and Company", but it appears that this never happened.
- [10] Subsequent to the dissolution of the Zlotnik Partnership, in 2016, there were referral agreements entered into with each of the Advisors (the "2016 Referral Agreements").
- [11] The 2016 Referral Agreements are similar for each of the three Advisors and they provide for the payment of referral fees to each Advisor on ZLC Wealth revenue. The 2016 Referral Agreements provide that, where the contract is terminated other than by reason of death or permanent disability, and the Advisor becomes associated directly or indirectly with an investment advisory business other than ZLC Wealth, no referral fees will be payable to the Advisor. The 2016 Referral Agreements also contain a non-competition clause, which restricts the ability of the Advisor to engage in competitive employment during the term of the agreement.
- [12] On September 20, 2019, without notice, the Advisors terminated their association with ZLC. Almost immediately, the Advisors commenced selling financial products through Worldsource. Certain clients followed the Advisors when they moved from ZLC to Worldsource. With no agreement in place as to how the residual income from placed business would be dealt with after the departure of the Advisors from ZLC, a dispute arose between the parties about entitlement to that income. This, along with the circumstances of the Advisors' departure from ZLC, forms the subject matter of the plaintiffs' lawsuit.

## Issues

- [13] The primary dispute in this proceeding is about entitlement to commissions on placed business that the Advisors moved from ZLC to Worldsource when they ceased their association with ZLC. However, the factual allegations and relief sought in the amended notice of civil claim raise broader issues. In the amended notice of civil claim, the plaintiffs

plead a number of express and implied "key terms" in the Advisor Agreements and the 2016 Referral Agreements. The plaintiffs allege that the circumstances under which the Advisors departed ZLC and started a new business with Worldsource violated those express and implied key terms. Further, the plaintiffs allege that the Advisors conspired with one another, and with Worldsource, to breach their agreements and the express and implied key terms. There are 25 items of relief sought in the amended notice of civil claim, including declaratory relief, orders, damages awards, and accounting. The amended notice of civil claim invokes, among others, the doctrines of good faith, implied duties of confidentiality, interference with economic relations, and conspiracy.

- [14] The Advisor applicants concede that this application is brought to determine just one "slice", albeit a large one, of this action. The notice of application seeks, pursuant to Rule 9-7, an order dismissing the plaintiffs' "contractual claims" against the Advisors, an order dismissing the plaintiffs' conspiracy claims against the Advisors, and a dismissal of the relief sought in paragraphs 1-12, 14-15, and 19-24 of Part 2 of the amended notice of civil claim. This would only leave behind two substantive issues for determination: Worldsource's liability for improper interference with the economic relations of the plaintiffs, and Worldsource's liability to account.
- [15] Notwithstanding the significant number of issues that the Advisors seek to dispose of in this application, counsel for the Advisors submits that the issues on this summary trial are straightforward. He submits that all the issues that the Advisors seek to have adjudicated at this summary trial flow from two legal concepts: privity of contract and restraint of trade. In their submission, upon determination of these two issues, the remaining breach of contract claims against the Advisors, and the associated conspiracy claim, fall away.
- [16] The privity of contract argument advanced by the Advisors is based on the fact that ZLC Partnership, the only ZLC entity that was a party to the Advisor Agreements, dissolved in January 2016, years before the Advisors terminated their relationship with the plaintiffs. On this analysis, the Advisors had no obligations to the plaintiffs with respect to fees for placed business because the plaintiffs were not parties to the Advisor Agreements which imposed those obligations.
- [17] The second submission of the Advisors, advanced in the alternative, is that, if the Advisor Agreements bind the parties, any term in those agreements that limits the ability of the Advisors to receive fees for placed business after termination of their relationship with the plaintiffs is a restrictive covenant that is unenforceable for public policy reasons.
- [18] The Advisors submit that adjudication of these two issues will dispose of all claims against the Advisors for breach of contract and conspiracy.

- [19] The plaintiffs submit that the Advisor Agreements survived the dissolution of the Zlotnik Partnership, or alternatively, that an implied contract with the same terms governed the relationship between the plaintiffs and the Advisors during the three-and-a-half years between the end of the Zlotnik Partnership and the Advisors' departure from ZLC. Further, they submit that the evidence on the record in this summary trial application supports the conspiracy claim.

### Suitability for Summary Determination

- [20] The applicants submit that the facts and law at issue in this summary trial application are straightforward and highly amenable to summary determination.
- [21] The plaintiffs submit that the court should only determine this case summarily in the event the court agrees with the plaintiff's position that the Advisor Agreements were in force on September 20, 2019 and that the Advisors are required to remit fees on placed business to the plaintiffs. Otherwise, the plaintiffs submit that the court will be required to consider the terms of the implied agreement between the parties, which will necessitate further documentary discovery which has not yet taken place, as well as viva voce evidence and cross-examination.
- [22] Irrespective of the positions of the parties, before a summary trial may proceed, the court must be satisfied that the issues raised are suitable for determination under Rule 9-7 and that the summary trial application will assist the efficient resolution of the proceedings: Rule 9-7(11).
- [23] Rule 9-7(2) permits a summary trial application to proceed "either on an issue or generally." A number of cases have considered the use of the summary trial process when only one of several issues in an action is the subject of the application.
- [24] When "litigating in slices" is proposed, the court must carefully consider whether trying some issues and not all will contribute, in the end, to a just, speedy and inexpensive determination on the merits. In some cases, a summary trial of an issue may promote a more efficient determination of the case overall; in other cases, summary trial of an issue comes with significant risks, including inconsistent findings, multiple appeals, delay and confusion.
- [25] The Court of Appeal recently considered an appeal of a chambers judge's decision to determine the applicability and enforceability of a limitation clause at a summary trial in *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. Justice Groberman reviewed the authorities and held at para. 33 that "absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation." The Court endorsed the approach taken by this Court in *Coast Foundation v. Currie*, 2003 BCSC 1781 at paras. 13-18 and in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 [GVWD]. In that case, Justice Griffin summarized the relevant considerations:

[110] In summary, the authorities in BC, including Hryniak, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:

- a) whether the court can find the facts necessary to decide the issues of fact or law;
- b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
  - i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
    - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
    - (2) the potential for multiple appeals; and
    - (3) the novelty of the issues to be determined;
  - ii. the amount involved;
  - iii. the complexity of the matter;
  - iv. its urgency;
  - v. any prejudice likely to arise by reason of delay; and
  - vi. the cost of a conventional trial in relation to the amount involved.

[26] In this case, counsel for the applicants frames the question in this application as whether there exist any "post-relationship obligations" between the parties, including an obligation on the part of the Advisors to remit fees on placed business to the plaintiffs. The Advisors submit that there are no post-relationship obligations between the plaintiffs and the Advisors because: (i) there is no privity of contract between the plaintiffs and the Advisors giving rise to any obligations; and (ii) in the alternative, there are no enforceable obligations on the part of the Advisors to remit fees after they have terminated their association with the plaintiffs, even if the Advisor Agreements bind the parties. These are, on the applicants' submission, threshold issues, the resolution of which will considerably resolve the matters between the parties.

[27] The plaintiffs submit that there are a number of reasons why a summary trial is not appropriate (unless the court makes certain findings in the plaintiffs' favour), including:

- a) There are significant credibility issues;
- b) Relevant evidence has not yet been provided by the defendants despite repeated requests;
- c) The case is legally and factually complex; and

- d) There is a risk, if this summary trial proceeds, that the trial judge's hands will be tied insofar as findings of fact will be made on the record before the court on this application.
- [28] The amended notice of civil claim is broad in its allegations. The question of who is entitled to ongoing commissions from business that was placed by the Advisors during the tenure of their association with ZLC is a significant issue in this litigation, but it is by no means the only issue in the lawsuit. There remain outstanding issues surrounding whether the Advisors breached any express or implied contractual obligations to the plaintiffs by virtue of the circumstances of their departure from ZLC. These include, for example, the extent and scope of duties of loyalty and confidentiality owed by the Advisors to the plaintiffs, and whether the solicitation of staff of ZLC or failure to give notice of their departure violated any express or implied contractual obligations that the Advisors had to the plaintiffs.
- [29] The notice of application seeks summary adjudication of all issues in the litigation that invoke liability on the part of the Advisors. In oral submissions, this position was narrowed by counsel for the Advisors, who submitted that the allegations of breach of contract relating to the period of time prior to the termination of the relationship between the Advisors and the plaintiffs would not be disposed on this summary trial. Nevertheless, I have some difficulty reconciling the two narrow and discrete issues framed by the Advisors in this summary trial application--namely whether the Advisor Agreements survived the dissolution of the partnership, and whether certain provisions in the Advisor Agreements constitute an unenforceable restrictive covenant--and the 14 or more items of relief sought in the amended notice of civil claim that the Advisors say would be disposed of if I resolved those two issues. In my view, resolving the question of whether the Advisor Agreements survived the dissolution of the Zlotnik Partnership, and the question of whether certain provisions in the Advisor Agreements are impermissible restrictive covenants, only resolves two of a multiplicity of issues that arise on the pleadings.
- [30] For example, the amended notice of civil claim alleges that key terms of the Advisors' agreements with the plaintiffs were breached when the Advisors failed to give proper notice of the termination of their association with the Plaintiffs, when they took and used confidential information belonging to ZLC, and when they solicited staff of ZLC to work for their new company. None of these issues, and whether they constitute a breach of an express or implied agreement the Advisors had with the plaintiffs, will be resolved upon the court's determination of the narrow issues as framed by the applicants.
- [31] Notwithstanding the multifaceted nature of the breach of contract alleged in the amended notice of civil claim, which is not restricted to the Advisors' failure to honour their post-contractual obligations to remit fees on placed business, I have considered whether it is possible to determine, on a summary trial basis, only the narrow argument advanced the Advisors, namely whether or not the Advisors are bound, post-relationship, to remit fees on placed business to ZLC.

- [32] The difficulty with determining the presence or absence of post-relationship obligations on this summary trial is that in order to determine whether post-relationship obligations bound the Advisors, it is necessary first to determine what the agreement between the plaintiffs and the Advisors was. The plaintiffs have alleged that they were parties to contracts with the Advisors that contain key terms that were either express or implied. It is open to the court to determine whether the Advisor Agreements survived the dissolution of the Zlotnik Partnership, and whether particular terms of the Advisor Agreements are invalid as a restraint on trade, but neither of these issues will resolve the question of what exactly the agreement was between the parties with respect to receipt of commissions for placed business post-relationship, or any other matter pled in the amended notice of civil claim.
- [33] It cannot seriously be argued that the Advisors provided services to ZLC Financial for three-and-a-half years with no agreement at all as to how commissions, fees, and other remuneration matters would be dealt with. If the Advisor Agreements did cease to have effect upon dissolution of the Zlotnik Partnership, some other agreement, express or implied, written or oral, must have governed the relationship between the parties. However, the defendants are expressly not asking the court to make a finding as to what those agreements, oral or written, express or implied, were. They simply ask me to find that the Advisor Agreements ceased to be effective and therefore there were no post-relationship contractual obligations between the Advisors and ZLC Financial.
- [34] Adjudicating only the discrete issues that the Advisors place before the court in this summary trial application would not resolve the larger question of what contractual obligations the parties had to each other, if any, at the time the Advisors ceased their relationship with ZLC, and whether any of those obligations were breached.
- [35] Summary adjudication of the conspiracy claim is similarly interconnected in a way that it cannot be isolated and dealt with apart from the rest of the claim. The plaintiffs plead that the Advisors conspired with each other to unlawfully breach the contractual terms under which they were bound. Until those contractual terms are determined, a conspiracy to breach those terms cannot be adjudicated.
- [36] This case is unlike Ferrer, and other cases in which the issue about which a party sought summary determination was a limitation period, a threshold issue which, if determined, could dispose of some or all of the litigation. In this case, despite the defendants' attempts to isolate "post-relationship obligations" from other issues in the proceeding, the claim as it is framed in the plaintiffs' amended notice of civil claim gives rise to a number of intertwined issues.
- [37] In *Coast Foundation*, Groberman J. (as he then was) declined to determine the limitation issue on a summary trial. He held:

15 The court must be wary of making determinations on particular issues on a Rule 18A [now 9-7] application when those issues are inexorably intertwined with other issues that are to be left for determination at trial: *Prevost (Committee of) v. Vetter*, 2002 BCCA 202, 210 D.L.R. (4th) 649 (B.C. C.A.); inter-relatedness of issues is not always obvious, and caution is necessary whenever a party seeks judgment on an issue as opposed to judgment generally under Rule 18A [now 9-7]: *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2003 BCCA 534 (B.C. C.A.).

[38] In *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 at paras. 58-61, the Court of Appeal noted that the benefits of summary determination must be scrutinized carefully in "complex, fact-intensive, multi-party and multi-issue case[s]". As discussed above, determining the contractual obligations the parties owed to each other is a necessarily fact-intensive exercise. The issues raised by the Advisors on this application cannot be readily separated from this broader issue.

[39] Accordingly, I am of the opinion that it would be unjust to decide the issues on this application. The Advisors' summary trial application is dismissed.

"Francis J."

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