

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wong v. British Columbia Securities Commission***,
2011 BCSC 149

Date: 20110208
Docket: S088719
Registry: Vancouver

Between:

**Gilbert Kenneth Wong and
0512974 B.C. Ltd.**

Plaintiffs

And

**British Columbia Securities Commission
Brenda M. Leong,
Douglas B. Muir,
Alan E. Keats,
Mark E. French,
Steven Plummer,
Michael Sorbo,
George B. Coleman,
Stephen J. Wilson,
James A. ("Sasha") Angus,
Peter J. Brady,
Mutual Fund Dealers Association of Canada and
Wendy Royle**

Defendants

Before: The Honourable Mr. Justice Cole

Reasons for Judgment

Acting on his own behalf:

G.K. Wong

Counsel for the British Columbia Securities
Commission, B. Leong, D. Muir, A. Keats,
M. French, S. Plummer, M. Sorbo, G. Coleman,
S. Wilson, J. Angus, P. Brady:

H.A. Mickelson, Q.C.
G. Trotter

Place and Date of Hearing:

Vancouver, B.C.
September 8,9, and 10, 2010

Place and Date of Judgment:

Vancouver, B.C.
February 8, 2011

[1] This is an application by the defendants, British Columbia Securities Commission ("BCSC"), Brenda M. Leong, Douglas B. Muir, Alan E. Keats, Mark E. French, Steven Plummer, Michael Sorbo, Stephen J. Wilson, James A. ("Sasha") Angus and Peter J. Brady, collectively referred to as the "BCSC Defendants", for an order that the plaintiff, Gilbert Kenneth Wong and the numbered company 0512974 B.C. Ltd. post security for costs in favour of the BCSC Defendants in the amount of \$120,000 and that the action be stayed against the BCSC Defendants until such time as security for costs is posted with the Registrar of the Court, and if the plaintiffs fail to post security for costs within 90 days of the Court's order, that the BCSC Defendants shall have leave to apply to dismiss the action against them.

[2] The other defendants, Mutual Fund Dealers Association of Canada and Wendy Royle, were not represented at the hearing but the Court was advised they were in support of the BCSC Defendants' application.

[3] The plaintiff Mr. Wong was the president and chief operating officer of the corporate plaintiff 0512974 B.C. Ltd. for the entire time that the numbered company, also known as Foresight Capital Corporation (hereinafter referred to as the "numbered company" or "Foresight") operated under the *Securities Act*, R.S.B.C. 1996, c. 418. Mr. Wong retains those titles today and was also the numbered company's compliance officer from June 1997 to August 2001.

[4] There were compliance problems with the numbered company since the first compliance report in December of 1997. As a result of compliance deficiencies, Foresight signed an agreed statement of facts and undertaking in May of 2000, in which it acknowledged its compliance failure to that date. Things did not improve over the following year. A further negative compliance examination report was filed in November of 2000. Foresight's file was referred to the enforcement division of the BCSC and the Capital Market Division of BCSC considered in parallel imposing administrative conditions on Foresight.

[5] The Capital Market Regulation Division imposed restrictions on Foresight's registration in June of 2001. Those restrictions dealt with breaches of the rules relating to the sale of exempt products, such as securities sold without a prospectus, and required Mr. Wong to step down as compliance officer.

[6] Although a new compliance officer was hired in October 2001, in November 2002, Mr. Naeen Tyab, the majority shareholder of Foresight, along with Mr. Wong as minority shareholder, provided an undertaking and guarantee to the BCSC. In exchange for being given until December 15, 2002, to find a buyer for Foresight, they would guarantee the company's

arms length debts and undertake to wind up Foresight if no purchaser was found. Foresight ceased operations in December 2002 and was dissolved in July 2005.

[7] The same compliance failures resulted in a notice of hearing in December of 2004, and the hearings came before the commission during 2005 and then to 2006.

[8] In a 2 to 1 split decision released February 2007, 2007 BCSECCOM 101, all members of the commission panel found one of Foresight's representatives had committed numerous breaches of security rules dealing with exempt products, and that Foresight and Mr. Wong were responsible for those breaches for the failure to provide adequate oversight. The majority excused Foresight and Mr. Wong from legal liability concluding that their breaches had been substantially dealt with by the May 2000 agreed statement of facts and undertaking and the June 2001 restrictions. The dissent would have found both Foresight and Mr. Wong liable as the June 2001 registration conditions from the Capital Market Division were for public protection and should not bar a prosecution by the enforcement division for deterrence and punishment purposes in respect to the same compliance failures. The dissent concluded at para. 608:

The fact that the deficiencies were eventually rectified does not mean that BCSC staff cannot or should not bring an enforcement action. That is particularly so in a case such as this one where there is good evidence that Foresight and Wong made no real effort to perform or improve the performance of the required compliance functions prior to Wong's resignation as compliance manager.

[9] On December 12, 2008, Mr. Wong and Foresight filed a writ of summons and on December 29, 2009, they filed a 380-page statement of claim in the present action. The plaintiffs claim over \$15 million based on approximately 32 different alleged causes of action including criminal misconduct, breach of trust, abuse of public office, charter breaches, negligence, and malicious prosecution.

I. THE SECURITY FOR COSTS AGAINST THE CORPORATE PLAINTIFF

[10] The plaintiff claims that there are assets held by the Securities Commission on behalf of Foresight. However, Mark Wang, Legal Services Manager for the Securities Commission, filed an affidavit that indicated the monies referred to by Foresight are to provide funds to pay clients on certain classes of BCSC's registrants in the event of certain types of defaults of one of those registrants. The monies that are available to pay for clients of Foresight presently amount to \$4,576.28. I therefore do not consider that amount of money to be available to Foresight. I am satisfied that Foresight has no assets and consequently no ability to pay costs should their claim fail.

[11] It is generally settled that with respect to the corporate plaintiffs, security is generally ordered unless the court is satisfied that there is no arguable defence: *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Co.* (1993), 76 B.C.L.R. (2d) 231 (C.A.), at para. 16.

[12] The governing principles for awarding security for costs against a corporate plaintiff are set out in *Kropp (c. o. b. Canadian Resort Development Corp.) v. Swanese Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 (C.A.):

17. In *Keary Development v. Tarmac Construction*, [1995] 3 All E.R. 534, the English Court of Appeal considered s 726(1) of the Companies Act 1985, reviewed a number of authorities applying that provision or its predecessors, and then set out the principles which emerged from those cases. The principles are stated at pp. 539-542, and may be summarized in this way:

1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
7. The lateness of the application for security is a circumstance which can properly be taken into account.

18. In my view, those principles as more fully articulated and explained in *Keary* are a useful guide to the application of [the equivalent of what is now s. 236 of the *Business Corporations Act*] in British Columbia.

[Emphasis added.]

[13] The corporate plaintiff has not adduced evidence of the ability of the two shareholders, Mr. Tyab, who was the sole shareholder of Foresight in November 1996 and majority shareholder in November 2002, and Mr. Wong, who is only described as a shareholder, respecting their ability to post security for costs.

[14] The evidence does not satisfy me that Foresight's impecuniosity is in any way connected with the prosecution in respect of which it sues. Foresight was already deregistered

with the BCSC before the hearing even took place.

[15] With respect to the merits of this action, that will be discussed in more detail when considering the application for security for costs against Mr. Wong.

[16] I am satisfied here that the application for security for costs was brought at the very outset of this case.

[17] The corporate defendant has failed to disclose what assets it has or whether or not it could borrow money or raise funds for the defence of the present application.

[18] After considering all the factors articulated in *Kropp*, I am satisfied that the corporate plaintiff should be ordered to pay security for costs. The plaintiff has not raised the issue of no arguable defence.

II. SECURITY FOR COSTS AGAINST THE INDIVIDUAL PLAINTIFF

[19] The evidence is clear that the plaintiff Mr. Wong lacks sufficient assets to cover the magnitude of costs that could be awarded in this case. The Land Title Office and Personal Property Security searches do not disclose any assets in his name. Furthermore, there is a PPSA search that reveals an unpaid *Income Tax Act* debt on behalf of Mr. Wong.

[20] Mr. Wong alleges that the defendants' conduct, particularly the malicious prosecution and the allegations that are still alive on the internet, have led to his impecuniosity. However, any allegations of wrongful conduct after Foresight was wound up in 2002, including the December 2004 Notice of Hearing which led to the prosecution which forms the substantial basis of the plaintiff's claim, could not have caused the winding up. Furthermore, any cause of action said to arise from wrongful conduct alleged to have occurred prior to 2002 is statute barred and therefore not properly at issue in this action. I am therefore satisfied that any impecuniosity asserted by the plaintiff was not caused by wrongful conduct at issue in this action.

1. Is the claim oppressive in its nature and scope?

[21] In January of 2007 Mr. Wong, one month before the release of the reasons for the decision of the panel under the *Securities Act* prosecution, published offensive and defamatory statements about members of the BCSC Defendants, many of whom were senior members of the bar.

[22] In the blog posting, Mr. Wong alleges that the BCSC investigation was conducted in an incompetent manner, that the lawyers engaged in "illegal behaviour" and that Mr. French "lied

at least ten times under oath". Mr. Wong also refers to the investigation prosecution as a "witch hunt", alleges that former senior compliance officer George Coleman was "paid off and sent far away" and that prosecutors and witnesses "lied under oath". He claims that his liability was "pre-meditated" and equates the Foresight prosecution with the "Martensville Satanic sex scandal" and "racial profiling". Mr. Wong also uses quotes and photographs to equate Foresight's prosecution with the story of David and Goliath, including David cutting off Goliath's head.

[23] The statement of claim, like the blog before it, clearly shows that the plaintiff is unrestrained in his vexatious and oppressive attacks on BCSC and those who acted for it. The statement of claim is 380 pages, is replete with irrelevant facts, is structured in such a way that it makes serial allegations of over 30 causes of action, including criminal, illegal and grievously unprofessional conduct without any effort to connect those allegations with the underlying facts, thus leaving it for the defence to determine which causes of action are truly live with respect to each factual allegation. The statement of claim appeared to be designed to be oppressive.

[24] Mr. Wong's conduct is similar to that of the plaintiff in *J.D.L. v. C.L.L.*, [1999] B.C.J. No. 803 (S.C.). It is designed to punish the BCSC Defendants for carrying out their statutory mandate to protect the public from non-compliant companies like Foresight. In *J.D.L.*, the court ordered the plaintiff to post security for costs.

2. The defence will be extraordinarily expensive

[25] The BCSC Defendants argue that this will be an extraordinarily expensive case to defend because the plaintiffs' claim alleges serious criminal and professional misconduct. Furthermore, the scope and size of the claim, as already described, make it difficult for the defendants to know what case to meet. Finally, the plaintiffs' relentless approach to this litigation, his post-hearing motions and the security prosecutions lead one to conclude that this case will be a particularly difficult and taxing experience for the BCSC Defendants. In *Lawrence v. Sandilands*, 2003 BCSC 211, the plaintiff sued a number of lawyers. One of the actions was dismissed as an abuse of process as being essentially a re-litigation of issues which were decided against him previously, which determination he steadfastly refused to accept (at para. 97). In respect to the second action, Wedge J. concluded at para. 133:

...special circumstances exist in this case such that an order against Mr. Lawrence is warranted. The merits of his claim are, as noted, doubtful. The costs of the litigation will be substantial. Mr. Lawrence has already failed to pay special costs of approximately \$51,000 awarded against him by Martinson J. in May 2001.

3. The claims are devoid of merit

[26] The defendants say that a combination of the plaintiffs being impecunious and a weak claim constitute special circumstances justifying an order for security for costs. Although it is inappropriate for this court to go into any great detail and to rule on the possibility of success or failure of the plaintiffs' claims, something must be said to put the plaintiffs' claim in context.

(a) Limitation period.

[27] The allegations in the statement of claim stretch back to 1997. The defendants' claim that the defamation action and the claim for *Charter* damages for direct damages to personal property are governed by s. 3(2) of the *Limitation Act* R.S.B.C. 1996, c. 266, which bars such claims alleged to have arisen prior to December 12, 2006, which is two years prior to the filing of the writ: *Bush v. Vancouver (City)*, 2006 BCSC 1207. Other claims which crystallized prior to December 12, 2002, including claims for negligent investigation, malfeasance and all other *Charter* damages are statute-barred by s. 3(5) of the *Limitation Act*.

(b) Collateral attack

[28] A number of the plaintiffs' claims constitute collateral attack on administrative decisions which the plaintiffs accept by electing not to avail themselves of appeals or statutory reviews. Such collateral attacks constitute abuse of the court's process: *Cimaco International Sales Inc. v. British Columbia*, 2010 BCCA 342, at paras. 40-62.

[29] The plaintiffs statement of claim, rather than plead material facts in a summary way as required by the *Supreme Court Rules*, sets out in great detail the plaintiffs' version of events in a purely chronological order. Many of the facts pleaded are part of the narrative and are irrelevant to any of the causes of action. The causes of action are not tied to allegations and material facts capable of supporting them. Rather than analyzing the facts and the law in making allegations of material facts sufficient to raise a specific cause, the plaintiffs simply chronicled in their statement of claim their version of the evidence, leaving it for the defendants to determine which of 30 causes of action could be said to arise in each of those chronologically factual allegations which fill the 380 pages of the statement of claim.

[30] The statement of claim as a whole is prolix, and the facts alleged in a multitude of places disclose no cause of action.

(c) Claims which the objective evidence demonstrates have no merit

[31] Of those allegations that would be permitted to proceed, the BCSC Defendants have a statutory immunity pursuant to s. 170(1) of the *Securities Act*: "for any act done in good faith in the (c) performance or intended performance of any duty, or (d) exercise or the intended

exercise of any power". Thus for the plaintiffs to succeed, they must prove bad faith.

[32] The plaintiffs claim for malicious prosecution was brought within the limitation period. The legal test for malicious prosecution was confirmed by the Supreme Court of Canada in *Miazga v. Kvello Estate*, 2009 SCC 51. It requires that the prosecution be pursued without "reasonable and probable cause" and there must also be "proof that the defendant's conduct ... was fuelled by malice ... for a primary purpose other than that of carrying the law into effect" (at paras. 55-56).

[33] Malice requires a plaintiff to prove "that the prosecutor *wilfully* perverted or abused the office of the Attorney General or the process of criminal justice." (*Miazga*, para. 80) (Emphasis is original.)

[34] The plaintiffs' task to prove actual, subjective, malicious intent by each of the defendants which it seeks to find liable, is a most difficult one. The fact that Mr. Wong and Foresight were not ultimately found liable is not sufficient to meet the test for malicious prosecution. This is especially so since the dissent found that although Mr. Wong did not engage in any failures by commission, his errors of omission were sufficient to ground liability: "failing to ensure that Foresight had in place adequate systems and controls for compliance and for the supervision of its employees, and in failing to supervise Bock, Wong permitted or acquiesced in the contravention by Foresight of section 48 of the Rules and so also contravened section 48." (at para. 542).

[35] The plaintiff Mr. Wong alleges throughout that the BCSC Defendants participated in a malicious smear campaign against him by providing both confidential and defamatory information about him and Foresight to newspaper reporter David Bains. The plaintiff has not, however, joined David Bains as a defendant.

[36] Throughout, the plaintiff mischaracterizes the evidence. He is convinced that the defendants are conspiring against him and that their conduct is motivated by malice.

[37] It is clear that Mr. Wong lacks sufficient assets to cover the magnitude of costs that could be awarded against him. The claims themselves are oppressive in their nature and scope. The defence in this case will be extraordinarily expensive, and there are real issues with respect to limitation periods with respect to all claims save and except malicious prosecution. There is little evidence to support a claim for malicious prosecution.

[38] I accept the fact that to deny the plaintiff the right to prosecute his case is a very serious step to take and that requiring Mr. Wong to post security will most likely mean that he cannot proceed with this lawsuit. However, I am satisfied that the merits of the plaintiff's claim are

doubtful, the cost of litigation would be substantial and after weighing and considering all the evidence, I am satisfied that there are special circumstances that justify an order for security for costs against Mr. Wong personally.

III. QUANTUM

[39] The draft bill of costs was presented at \$148,749.60. If the plaintiffs fail to prove the allegation of criminal activity that may attract special costs. The defendants say a discount of 20% of their draft bill would mean a figure of approximately \$120,000 for security for costs. I am satisfied that that is an appropriate amount and I so order. There will be a stay of proceedings until the security for costs is posted in a form satisfactory to the Registrar.

[40] If the plaintiffs fail to post security for costs within 90 days of this order the BCSC Defendant shall have liberty to apply to dismiss the action against them.

The Honourable Mr. Justice F.W. Cole