IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Securities Commission) v. Kelly,* 2011 BCSC 544

Date: 20110329
Docket: S091232
Registry: Vancouver

Between:

British Columbia Securities Commission

Plaintiff

And:

Ralph Bartholomew Edward Kelly

Defendant

Before: The Honourable Madam Justice Fisher

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:	H.A. Mickelson, QC J. Zeljkovich
Appearing on his own behalf:	R.B.E. Kelly
Place of Trial/Hearing:	Vancouver, B.C. March 25 & 28, 2011
Place and Date of Judgment:	Vancouver, B.C. March 29, 2011

[1] THE COURT: The plaintiff, British Columbia Securities Commission (the Commission), applies under rule 9-5(1)(d) of the Supreme Court Civil Rules to strike out a counterclaim filed by the defendant, Ralph Kelly, on the basis that it is an abuse of process of the court.

Background

[2] I will briefly review the background. The Commission brought this action to enforce a decision made on October 21, 2008, by a panel of the Commission. In that decision, the Commission found that Mr. Kelly had contravened provisions of the *Securities Act*, R.S.B.C. 1996, c. 418, and that he made various misrepresentations to investors and perpetrated fraud by knowingly converting $242,153 of investor's money for his own personal uses. The Commission made a number of orders. Those that are pertinent to these proceedings are an order that Mr. Kelly pay an administrative penalty of $200,000 and pay not less than $242,153.60 for any amount obtained directly or indirectly as a result of his contraventions of the *Securities Act*.

[3] Mr. Kelly chose not to attend the hearing before the commission as he did not recognize that it was properly constituted or that it had the authority to hold the hearing. He says that he issued requests to the Commission in the nature of *quo warranto* and when the Commission failed to deliver this up, he took the position that he "would find the attendees of the administrative tribunal to be not recognizable." He says that the Commission proceeded in *absentia* of him and in bad faith and made findings against him contrary to the rules of natural justice.

[4] Following the issuance of the decision, the Commission issued a news release that summarized the decision and was published on its website. The news release accurately summarized the decision. Mr. Kelly did not dispute this fact.

[5] Mr. Kelly had the right under s. 167 of the *Securities Act* to appeal the decision by seeking leave of the Court of Appeal. Under the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, an application for leave to appeal must be made within 30 days from the date the order appealed from was pronounced. Mr. Kelly did not take steps to exercise his right of appeal.

[6] On November 18, 2008, the Commission filed a requisition to register the decision with the Supreme Court of British Columbia under s. 163 of the *Securities Act*. The purpose of this action was to give the decision the same force and effect as if it were a judgment of the Supreme Court. The Commission subsequently made a demand upon Mr. Kelly for payment of the amounts owing under the decision but Mr. Kelly did not pay.

[7] On February 18, 2009, the Commission commenced this action seeking to enforce the

administrative penalty and the order to pay the $242,153.60. Mr. Kelly filed an appearance on April 7, 2009, and a statement of defence on April 30, 2009.

[8] The Commission then took steps to enforce the judgment against Mr. Kelly. Having considerable difficulty serving him, on October 19, 2010, the Commission obtained an order for substituted service for an examination in aid of execution. The following day, October 20, 2010, Mr. Kelly filed an amended response to civil claim as well as the counterclaim that is the subject of this application. In both his defence and the counterclaim, Mr. Kelly attacks the validity of the Commission's decision, alleging that it is *void ab initio*. In the counterclaim, he seeks damages for defamation in the amount of $12 million and punitive damages of $2 million.

Request for adjournment

[9] Mr. Kelly sought an adjournment of this application so that he could have an opportunity to retain new counsel. This was the third time he made this request. The Commission consented to the first two but opposed this request.

[10] This matter was originally set down for hearing on January 31, 2011, and then reset for February 16, 2011. On February 14, two days before the hearing, Mr. Kelly retained counsel, Mr. Huntsman, who appeared on his behalf. Mr. Kelly deposed that he had retained Mr. Huntsman to represent him on February 16th "and for the purpose of pursuing leave to appeal any subsequent decision or refusal to consider on the basis of timing to the Court of Appeal pursuant to s. 167(1) of the *Securities Act*." At the hearing, Mr. Huntsman sought and obtained another adjournment which was stated to be for the purpose of allowing Mr. Kelly an opportunity to seek a review or leave to appeal the Commission decision. In granting the adjournment, the court directed that the hearing take place no later than March 25, 2011. This date accommodated Mr. Huntsman's availability.

[11] Subsequently, Mr. Huntsman decided that he would not be able to represent Mr. Kelly. He notified counsel for the Commission of this on March 2, 2011, and on the same day Mr. Kelly filed a Notice of Intention to Act in Person. To date, Mr. Kelly has taken no steps to seek an extension of time for leave to appeal the Commission's decision in the Court of Appeal. Rather, on March 15, 2011, he filed a "Notice of Constitutional Question" in this action, seeking various forms of relief again related to the validity of the Commission's decision. Mr. Kelly advised opposing counsel that he would be seeking an adjournment of this application until such time as his constitutional question is answered. The date set for this hearing is apparently July 6 and 7, 2011. He is continuing to seek legal counsel with experience in securities and appellate matters.

[12] Mr. Kelly confirmed to me that the basis for his need to retain new counsel is to assist him in pursuing his remedies in the Court of Appeal. He had no answer to the issues raised by the application before me which pertains only to the counterclaim. I noted that all of the issues he has raised in his Notice of Constitutional Question and in his statement of defence are not the subject of this application and accordingly remain open for argument at the appropriate time. In these circumstances, I did not consider an adjournment to be appropriate and the matter proceeded.

[13] Following the Commission's submission, Mr. Kelly advised the court that he was feeling unwell and was unable to proceed. The matter was put over to Monday, March 28, 2011, and he was able to complete his submissions to me. This hearing took place by telephone with the consent of both parties.

Positions of the parties

[14] On behalf of the Commission, Mr. Mickelson submitted that Mr. Kelly's counterclaim is an impermissible collateral attack on the validity of the October 21, 2008 decision of the Commission. He says that Mr. Kelly ought to have exercised his right to appeal the decision by seeking leave of the Court of Appeal but failed to do so and he is now well out of time. While Mr. Kelly has indicated that he intends to make an application to seek leave out of time, he has taken no steps to proceed with such an application. In these circumstances, Mr. Mickelson argued that the counterclaim must be struck out as an abuse of process.

[15] Mr. Kelly submitted that he has the right to file a counterclaim under Rule 3-4 and the Commission invited this attack when it filed its claim in this court. He argued that the Commission acted contrary to the rules of natural justice when it proceeded with the hearing in his absence, the Commission was not properly constituted and its decision is *void ab initio*. Mr. Kelly confirmed that his counterclaim is based on the fact that he does not recognize the validity of the decision. He considers the Commission's actions to enforce what he alleges to be an invalid decision to be an abuse of process of the court and he says that taking proceedings based on an invalid decision brings the administration of justice into disrepute. He explained that he did not seek leave to appeal because he did not recognize the decision. At the end of his submission, Mr. Kelly again asked that this application be stayed until he is able to retain counsel and have his Notice of Constitutional Question heard.

The counterclaim

[16] In the counterclaim, Mr. Kelly alleges that the Commission's news release, which was founded and based upon the decision, communicated untrue, defamatory and libellous statements all referring directly to him. He alleges that the decision upon which the news

release was based was no decision at all, lacks any force or effect as being *void ab initio*, and is therefore an ill source upon which to base a news release for posting.

[17] Mr. Kelly attacks the validity of the hearing panel and hence the decision itself on two apparent grounds:

> (1) the hearing panel was an improperly established or constituted administrative tribunal as it was in panel without the representation of a chair being present, which he says is required under the *Securities Act* and the *Administrative Tribunals Act*; and
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> (2) the hearing panel was ill constituted, having been set by a chair of the Commission sitting at pleasure, which he says is *ultra-vires* the *Administrative Tribunals Act,* thereby acting contrary to the express intention of the legislature.

Collateral attack and abuse of process

[18] Rule 9-5(1) provides:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading [...] on the ground that
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> ...
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> (d) it is otherwise an abuse of the process of the court,
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> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[19] It is well settled that where a statutory appeal is provided for with respect to the decision of a tribunal, an individual is not permitted to start proceedings which collaterally attack that decision. In *Steven v. British Columbia (Ministry of Children and Family Development)*, 2008 BCSC 1656, the court stated at para. 51:

> [...] it is an abuse of the court process to use a civil action to collaterally challenge decisions of an administrative tribunal that are otherwise subject to a statutory right of appeal or review.

[20] This principle was also discussed in *Berscheid v. Ensign*, [1999] B.C.J. No. 1172 (SC), where the court said this at paras. 50-51:

> 50 It should be noted that there is a valid distinction between a judicial review and other types of proceedings which, for policy reasons, ought to be maintained: *O'Reilly et al v. Mackmin et al*, [1983] 2 A.C. 237 (H.L.). As our Court of Appeal has recognized, it would be a retrograde step to sublimate the process of judicial review with civil litigation: *Lawson v. British Columbia* (1992), 63 B.C.L.R. (2d) 334 (C.A.).
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> 51 As a result of this distinction between judicial review and civil litigation, a party cannot seek a remedy statutorily provided for by judicial review through civil proceedings. Such an evasion of the judicial review process is known as a collateral

> attack and is prohibited. Where the legislature clearly intends to confer jurisdiction on an appeal tribunal to hear and determine certain matters, the court lacks the jurisdiction to do so: *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.

[21] Claims were struck out as collateral attacks in a number of cases cited to me by Mr. Mickelson: *Varzeliotis (c.o.b. Alcyone News) v. British Columbia*, 2007 BCSC 620; *Cimaco International Sales Inc. v. British Columbia*, 2010 BCCA 342; *British Columbia (Securities Commission) v. Hrappstead,* 2009 BCSC 1162 and *Milne v. Ontario (Securities Commission)*, [2006] O.J. No. 953 (SC).

[22] In *Cimaco*, the plaintiff made claims in tort and contract against the provincial Crown and the Business Practices and Consumer Practices Authority. The plaintiff had been licensed as a travel agency regulated by the Authority. The Authority suspended the plaintiff's licence due to its failure to meet new requirements to post security. The plaintiff maintained that it was exempt from the new requirement and never received notice to the contrary. It sought damages for, *inter alia*, the Authority's suspension of its licence, alleging that the Authority engaged in defamation, misfeasance in public office, negligence, and acting for an improper purpose, without authority and contrary to the duty of fairness.

[23] These claims were struck out. The court held that there was an element of abuse of process throughout the claims since the plaintiff's essential complaint concerned a revocation of its licence, which was properly the subject of judicial review:

> When reduced to their essence, all of the claims fundamentally rest on the assertion that the Authority was wrong in its conclusion that the Regulation applied to Cimaco. However, instead of commencing judicial review proceedings, Cimaco commenced this action. [para. 46]

[24] With respect to the claim for defamation, the court said this at para. 49:

> The essence of Cimaco's claim is that the decision to uphold the license suspension was wrong, and thus publication of the decision was defamatory. This claim clearly strikes at the validity of the reconsideration decision. If Cimaco intended to challenge the decision, the proper venue was through judicial review. The claim must be struck as an abuse of process offending R. 19(24)(d).

[25] The *Milne* decision is very similar to the case at bar. There, the Ontario Securities Commission found, following a hearing, that the plaintiff failed to deal honestly and in good faith with his clients and had acted contrary to the public interest. The plaintiff attended the hearing but was not represented by counsel. The Commission made a number of orders against the plaintiff, including that he cease trading in securities for three years. The decision was posted on the Commission's website. Rather than appealing the decision, as was available under the *Ontario Securities Act*, R.S.O. 1990, c. S.5, the plaintiff commenced an

action against the Commission claiming damages in excess of $17 million for defamation, malicious prosecution, breach of fiduciary duty and invasion of privacy.

[26] The court struck out these claims as an abuse of process, describing the action as "no more than a collateral attack" on the Commission's decision:

> The plaintiff, in essence, was saying that he did not like the decision and therefore did not wish to suffer the effects of it. (para. 49)

[27] With respect to the plea of defamation, the court also concluded that it failed for these reasons, as set out in paras 33, 34 and 36:

> [33] Absolute privilege attaches to those communications or statements that take place during, incidental to, and in the processing and furtherance of judicial or quasi-judicial proceedings. As such, no action for libel or slander will lie for words spoken or written during the ordinary course of these proceedings. Absolute privilege applies to the official record of the proceedings and the oral opinions or written decisions as well as supplementary reasons of the court or quasi-judicial tribunal. The privilege is not affected by the fact that a judge or tribunal allows the proceedings to be broadcast to a larger audience. Brown, *The Law of Defamation in Canada*, (2nd ed.), Vol. 2, Release 2, at 12-33, 12-48, 12-61, 12-83.
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> [34] The OSC had a legitimate interest in bringing the decision to the attention of the investing public in accordance with its statutory mandate. It did so by posting a copy of the decision on its website.
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> ...
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> [36] There is a public interest in the OSC staff discussing and describing OSC decisions at professional conferences. These communications are protected by qualified privilege, which attaches to certain communications that arise in the course of discharging a public or private duty, or for the purposes of protecting some private interest, provided that they are made to a person who has some corresponding interest in receiving them. *Grenier v. Southam Inc.*, [1997] O.J. No. 2193 (Ont. C.A.) at para. 7.

[28] While the Commission does not rely on Rule 9-5(1)(a) to strike the counterclaim as disclosing no reasonable claim, these comments suggest that regardless of abuse of process, Mr. Kelly's defamation claim would be certain to fail within the well-known test set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[29] *Hrappstead* is also a similar case. There, the Commission issued a decision against the defendant in April 1999, which imposed a penalty for trading in securities without registration. This decision was registered with the Supreme Court. The defendant did not appear at the Commission hearing and did not appeal the decision. Some ten years later, the Commission commenced an action to renew the judgment. In response, the defendant filed a statement of defence and counterclaim alleging a number of things, including defamation and fraud by the Commission and its staff. The court held that the counterclaim was an abuse of process and collateral attack and was struck, as the defendant's complaints and concerns about the

Commission and its decision were properly the subject of an appeal.

[30] I cannot distinguish Mr. Kelly's counterclaim from these cases. All of his allegations are clearly based upon a collateral attack on the October 21, 2008 decision of the Commission. Mr. Kelly had no answer to the Commission's submission on collateral attack and all of his submissions confirmed that he does not, for a number of reasons, recognize that decision as valid. As in *Cimaco*, the essence of his defamation claim is that the Commission's decision was wrong and thus publication of the decision was defamatory. This claim clearly strikes at the validity of the decision. If Mr. Kelly intended to challenge the decision, the proper venue was through the statutory appeal process set out in the *Securities Act*, not in a civil proceeding such as this.

[31] Rule 3-4 permits a defendant in an action who wishes to pursue a claim within that action to file a counterclaim against the plaintiff. The counterclaim must accord with the rules regarding pleadings generally and is subject to applications under Rule 9-5.

[32] For all of these reasons, I have concluded that Mr. Kelly's counterclaim must be struck as an abuse of process of the court. Mr. Kelly's remedy, if he has one, is with the Court of Appeal.

[33] I will end by noting again that the issues Mr. Kelly raises are still alive in his statement of defence and Notice of Constitutional Question as those matters are not before me in this application. Mr. Mickelson referred me to some authorities to support a submission that Mr. Kelly's assertions that the Commission was improperly constituted are misconceived. I make no comment on those matters, which undoubtedly will be the subject of other proceedings.

[DISCUSSION RE COSTS]

[34] THE COURT: Well, my view is this. The reason that costs are awarded is to try to encourage people not to bring actions that are inappropriate. The Commission is entitled to its costs in any event of the cause but I will not order those costs to be paid forthwith. They can be paid in the ordinary course of the litigation. And those costs will be on the ordinary scale.

"Fisher, J"