

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: **KRG Insurance Brokers (Western) Inc. v. Shafron,**
2007 BCCA 471

Date: 20071001
Docket: CA33390

Between:

KRG Insurance Brokers (Western) Inc.

Appellant
(Plaintiff)

And

Morley Shafron and Shaw Insurance Agency Ltd.

Respondents
(Defendants)

And

Shaw Sabey & Associates Ltd. and Prosperous Financial Insurance Services Ltd.

Defendants

Before: The Honourable Madam Justice Huddart
The Honourable Mr. Justice Thackray
The Honourable Mr. Justice Chiasson

T. Delaney and C. Martin Counsel for the Appellant

D. W. Buchanan, Q.C. and V. S. Dixon Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
14 November 2006

Place and Date of Judgment: Vancouver, British Columbia
12 February 2007

Written submissions received: 3 April, 20 July,
16, 20, 21 & 24 August 2007

Place and Date of Supplementary Reasons: Vancouver, British Columbia
1 October 2007

Supplementary Reasons for Judgment of the Court:

[1] In this action, the appellant, Mr. Shafron's former employer, sued him and his new employer, Shaw Insurance Agency Ltd., for damages, alleging breach of contract and fiduciary duty by Mr. Shafron and the vicarious liability of Shaw. On 12 February 2007, this Court allowed the appeal and remitted the matter to the trial court for an assessment of damages.

[2] On 3 April 2007, the appellant wrote to the Registrar of the Court asking the Court to:

. . . advise whether it was the intention of the panel to grant judgment against both defendants or

only Mr. Shafron. Alternatively, counsel for the parties will be prepared to appear before the panel to make further submissions on this issue or alternatively, provide written submissions to the panel.

[3] On 18 April 2007, the Deputy Registrar issued the following memorandum to the parties:

On February 12, 2007, this Court released its decision in this matter. The appeal was allowed and the case referred to the Supreme Court for an assessment of damages.

On April 3, 2007, counsel for the appellant wrote requesting clarification whether it was in the intention of the Court "to grant judgment against both defendants or only Mr. Shafron". He stated also:

The reasons for judgment ... are silent whether our client has recovered judgment against both ... Morley Shafron and ... Shaw Insurance Agency Ltd. or only Mr. Morley Shafron. The issue of the liability of Shaw Insurance Agency Ltd. was not really addressed or argued before the panel.

Although the Notice of Appeal named both Mr. Shafron and Shaw as appellants, in paragraph I of its factum the appellant stated:

This appeal is against a judgment dismissing the plaintiff's action against its former owner and employee. The plaintiff ... alleges Morley Shafron breached contractual and fiduciary obligations to not compete with the appellant upon leaving his employment.

The appellant's "former owner and employee" is Mr. Shafron.

The only reference in the factum to Shaw was in the factual narrative. There was nothing in the factum or in oral argument on the appeal concerning any liability of Shaw to the appellant.

In its statement of claim, the appellant alleged that Shaw had profited from the wrongful acts of Mr Shafron and was "vicariously liable for these wrongful acts". The trial judge made no determination concerning the availability of this cause of action and no findings of fact that might have been relevant to the assertions of the appellant.

There was nothing before this Court on which judgment could have been granted against Shaw. The intention of the Court was to grant judgment against Mr. Shafron only.

[4] On 20 July 2007, the appellant filed an application seeking the order of a justice in chambers granting leave to make further submissions to the Court, but the Registry advised this was not the proper procedure to be followed in such matters. The appellant says that it was advised to write to the Registrar of the Court "to seek leave to make further submissions regarding this matter" and questions the Registrar's jurisdiction to make such a ruling. The Registrar does not make such rulings. The Registry was correct advising the appellant to write to the Registrar and ask that the request be referred to the division of the Court that heard the appeal, which is the usual practice of the Court in such matters (for example, see *R. v. Hummel*, 2003 YKCA 4) and what the Registrar did in this case.

[5] On 16 August 2007, the appellant wrote to the Registrar of the Court stating that it desired to make further submissions concerning the liability of Shaw. It stated that it had asked to do so in its 3 April 2007 letter, but that letter contains no such request. The respondents opposed the appellant's application. Further correspondence was delivered to the Registry and has been considered by the Court.

[6] In allowing the appeal, the Court concluded that Mr. Shafron was in breach of contract, but not in breach of fiduciary duty. The appellant's position, as outlined in its correspondence to the Registry, is that Shaw is vicariously liable for Mr. Shafron's breach of contract because it benefited from it. It relies on authorities that so hold in the context of a breach of fiduciary duty and asserts that the same is true for breach of contract. The respondents disagree. The appellant asks this Court to re-open the appeal, to hear submissions on the liability of Shaw and to decide the issue.

[7] The trial judge dismissed the action against Shaw without the need to decide the issue of the possible vicarious liability of Shaw. As noted, there were no submissions in this Court concerning the liability of Shaw. Because the notice of appeal included Shaw as a respondent and because the same counsel represented both parties, we remit the issue to the trial court. It would be useful to have findings of fact about the relationship and the benefit of the court's view of the law on the subject.

"The Honourable Madam Justice Huddart"

"The Honourable Mr. Justice Thackray"

"The Honourable Mr. Justice Chiasson"