

Date of Release: January 9, 1995

No. C943158
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

S.C.)
[REDACTED] S, on her own behalf and as)
Guardian ad Litem on behalf of Q[REDACTED] MA[REDACTED]) REASONS FOR JUDGMENT
and CR[REDACTED] MA[REDACTED], and MA[REDACTED] LTD.)
PLAINTIFFS)

AND:

D[REDACTED] MA[REDACTED], J[REDACTED] J[REDACTED] MA[REDACTED],) OF
V[REDACTED] C[REDACTED], S[REDACTED] V[REDACTED] E,)
G.J.M. P[REDACTED], NLK C[REDACTED] G[REDACTED],)
W[REDACTED] N[REDACTED], W[REDACTED] L[REDACTED] AND T[REDACTED] K[REDACTED],)
327703 ALBERTA LTD., DA[REDACTED] NY[REDACTED], 335677 B.C. LTD.,)
McCARTHY TETRAULT, MA[REDACTED] V[REDACTED] S[REDACTED], MA[REDACTED],)
A[REDACTED], G[REDACTED] V[REDACTED] A[REDACTED] V[REDACTED] L[REDACTED], J[REDACTED],)
C[REDACTED], R[REDACTED] S[REDACTED], W[REDACTED] M[REDACTED],)
R[REDACTED] P[REDACTED], MA[REDACTED] M[REDACTED] A[REDACTED] J[REDACTED], MA[REDACTED],) MASTER BOLTON
A[REDACTED] V[REDACTED], MA[REDACTED] V[REDACTED] L[REDACTED] A[REDACTED] L[REDACTED] AND)
C[REDACTED], S[REDACTED] M[REDACTED] M[REDACTED], and MA[REDACTED],) (IN CHAMBERS)
M[REDACTED] & R[REDACTED])
DEFENDANTS)

Angela E. Thiele

Counsel for the plaintiffs

Steven Heringa

Counsel for the defendant,
McCarthy Tetrault

Date of Hearing:

December 20, 1994

1

The defendant McCarthy Tetrault has applied to strike out certain paragraphs of the statement of claim which relate to that firm.

The underlying action is complex and multi-faceted. The defendant D [REDACTED] Ma [REDACTED] is the former husband of the plaintiff S [REDACTED] C [REDACTED], and the father of the plaintiffs Q [REDACTED] and C [REDACTED] Ma [REDACTED]. Ms. C [REDACTED] commenced divorce proceedings against Mr. Ma [REDACTED] in January 1983. In March 1983 and again in May 1985, Mr. Ma [REDACTED] was ordered to pay a total of \$2,500 per month for spousal and child maintenance. Other orders have been made dealing with assets. The plaintiff Ms. C [REDACTED] alleges that the defendant D [REDACTED] Ma [REDACTED], in concert with the other defendants, entered into various conspiracies to prevent her from recovering on her judgments, which in the statement of claim she quantifies at \$315,986.32.

One of the prime parties to the alleged conspiracies is the defendant J [REDACTED] M [REDACTED], who is D [REDACTED]'s cousin. J [REDACTED] Ma [REDACTED] is a solicitor who practices in Alberta and who is alleged to have been associate counsel with the defendant McCarthy Tetrault from May 1989 to May 1990. J [REDACTED] M [REDACTED] is alleged to have helped D [REDACTED] Ma [REDACTED] to set up his affairs in such a way as to improperly shield assets from execution and also to present a false picture of impecuniosity on the maintenance enforcement applications. J [REDACTED] M [REDACTED] practiced with the Calgary office of McCarthy Tetrault. The Vancouver office of that firm represented D [REDACTED] Ma [REDACTED] at some times material to this litigation, through counsel, G [REDACTED] Q [REDACTED], who is said to have acted for D [REDACTED] Ma [REDACTED] in the divorce case and one of the appeals from the trial court. Ms. Q [REDACTED] is not named as a defendant in this proceeding,

but the plaintiffs have alleged that she owed to them "a fiduciary duty and a duty to take care in respect of the plaintiffs' interests." Other particulars are given in support of the claim against John McCarthy, and the statement of claim goes on to plead that McCarthy Tetrault (and various Alberta law firms in which John McCarthy was involved) are "jointly and severally liable to the plaintiffs for such damages as were occasioned to them by reason of the acts of [John McCarthy] and/or Q[ueen]."

4 The acts or omissions on which the plaintiffs base their claims derived through Ms. Q[ueen] are set out in paragraph 50 of the statement of claim:

" Further, the Plaintiffs say that Q[ueen] owed a fiduciary duty and a duty to take care in respect of the Plaintiffs' interests and that Q[ueen] was in breach of such duties, the particulars of which breaches, not all inclusive, are as follows:

- (a) filing affidavits in the matrimonial proceedings which she ought to have known or is deemed in law to know were false and/or fraudulent and in failing to make reasonable inquiries as to the truth or otherwise of such affidavits;
- (b) failing to warn the Plaintiffs of the conspiracy and/or other fraudulent acts of DRM and/or other of the Defendants in circumstances where she ought to have known or is deemed in law to know that such acts were contrary to law;
- (c) acting and continuing to act for DRM in circumstances where she ought to have known or is deemed in law to know of the fraudulent and illegal acts of DRM and thereby assisting DRM and other of the Defendants in perpetrating a

fraud upon this Honourable Court and on the Plaintiffs."

5 The only other references to Ms. Q [REDACTED] in the statement of claim are these:

- (i) in the section of the statement of claim which describes all the defendants, Ms. Q [REDACTED] is described as a partner of the defendant McCarthy Tetrault from November 1987 to March 1990, and as counsel for D [REDACTED] M [REDACTED] in the divorce action and one of the appeals,
- (ii) a passing mention in paragraph 30(j), which simply states that D [REDACTED] M [REDACTED], with the assistance of J [REDACTED] M [REDACTED], provided certain affidavits to the court "through Q [REDACTED], which contained false and misleading information", and
- (iii) a pleading that at all material times Ms. Q [REDACTED] was acting in the ordinary course of the business of McCarthy Tetrault.

6 Ms. Q [REDACTED] has filed an affidavit stating that in the course of her representation of D [REDACTED] M [REDACTED] in the Court of Appeal, she received documents "that indicated that prior affidavit material sworn by the client may be incorrect" and that she forthwith advised the court of that fact, handed up the documents

in question, and abandoned a position which the documents contradicted.

7 The elements of the statement of claim which McCarthy Tetrault seeks to have struck out in this present application, as disclosing no reasonable claim, are those which refer to the acts or neglect of Ms. Q[REDACTED] and its own vicarious liability for such.

8 In applications concerning the validity of pleadings, the court is required to accept as true all allegations of fact. Thus, for the purposes of this application, I accept as true all the allegations recited in paragraphs 4 and 5 of these reasons. The existence of a fiduciary duty or duty of care is not an allegation of fact, however, but a conclusion of law which must depend on proof (or for present purposes, allegations) of fact. And particulars of the breach of a duty are not relevant to the question of the existence of the duty. Thus, while I accept as a fact, for example, for the purposes of this hearing, that Ms. Quijano filed affidavits which she ought to have known were false, that fact is of absolutely no significance to the question of the existence of a duty of care to the plaintiffs.

9 The only allegations relevant to the existence of a "duty to take care" or fiduciary duty on the part of Ms. Q[REDACTED] are these:

1. The plaintiff Ms. C██ was involved in litigation with the defendant D████████████████████████████████.
2. Ms. Q████████████████████████████████ was the solicitor for Mr. M████████████████.

Further, it could arguably be relevant that at some material times Ms. Q████████████████████████████████ was associated in some way in the practice of law with the defendant J████████████████████████. But none of the other references to Ms. Q████████████████████████████████ are relevant to the existence of a duty; everything else relates to the circumstances in which she is alleged to have breached whatever duty may have existed.

10 Thus, the plaintiff's position is tantamount to an assertion that all counsel who represent litigants owe a fiduciary duty or a duty to take care to the other party to the litigation. This is patently absurd, as in the course of counsel's representation of her own client, much may be done that is intentionally and necessarily directed toward injuring the opposing party's interests. On the facts as pleaded here, it is, to borrow the emphatic language of Taylor, J.A. in *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1990) 40 B.C.L.R. (2d) 288, impossible that Ms. Quijano could owe a duty of care to Ms. C████████████████.

11 The impossibility arises out of the very nature of a solicitor's duty to her own client. But it is not necessary to base this decision solely on the special nature of the solicitor-

client relationship, which might suggest that counsel have a dispensation to damage the interests of others which is not afforded to less privileged mortals, and might not admit of the possibility of any exception to the general principle depending on the particular facts of a particular case.

12 The impossibility of the existence of a duty of care that I referred to in paragraph 10 above is an impossibility on these pleadings. Clearly, a solicitor will in some circumstances be held to owe a duty to persons other than her own client, and so may be a barrister. I do not intend to say that Ms. Q. could in no circumstances be held to owe a duty of care to Ms. C. But I do say that before such a duty can be found to exist, facts must be proved in evidence - and alleged in pleadings - which describe the relationship and the circumstances from which the duty arose.

13 Lord Denning has said that the essence of the duty arises from reliance: *Dutton v. Bognor Regis Urban Dist. Council*, [1972] 1 Q.B. 373, [1972] 2 W.L.R. 299, [1972] 1 All E.R. 462 (sub nom. *Dutton v. Bognor Regis United Bldg. Co.*) (C.A.). He said (at pp. 394-95):

" Nowadays since *Hedley Byrne*...it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. And I see no reason why a solicitor is not likewise. The essence of this proposition, however, is the *reliance*. In *Hedley Byrne*...it was stressed by Lord Reid...by Lord Morris of Borth-y-Gest...and by Lord Hodson...The professional man must

know that the other is relying on his skill and the other must in fact rely on it."

14 The reasons of Mr. Justice Taylor in *Kamahap* contemplate that reliance may not be the only test. He said (at p. 293):

" Something more must be shown, then, in order to impose a duty on one party to care for the purely economic interests of another, than that the former could foresee that his conduct might cause loss or damage to those interests.

What, then, may constitute that 'something more'?

While that question has yet to be definitively answered, it can safely be said that proof of reasonable reliance on the part of the one, which ought to have been known by the other, may in many cases suffice for this purpose. So, perhaps, may the assumption of a contractual duty to one person to do something for the benefit of a third, in circumstances such as those of *Ross v. Caunters*, although this is not really a duty related to the avoidance of loss or damage, and I think it too early to say with assurance that the decision states a principle of general application in the ordinary law of negligence."

15 It is not for me to speculate about what additional facts would support the existence of a duty of care in the case now before me. All that I can say is that on the facts as presently pleaded, no such duty could possibly be held to exist; the impugned paragraphs disclose no reasonable cause of action.

16 No amendments to cure the defect having been proposed, it is therefore necessary to strike out paragraph 50 of the statement of claim. Paragraph 49, which the applicant also sought to have

struck, relates to J. [REDACTED] M. [REDACTED], and as I was not addressed on this issue the pleading will stand. For similar reasons, those parts of paragraph 48 which relate to Mr. M. [REDACTED] will stand, but the references to Ms. Q. [REDACTED] will be stricken from that paragraph.

17 The applicant should have its costs of this motion if, but only if, it obtains an order for costs of the entire proceeding, and I therefore direct that costs be to the applicants, in the cause.

Dated at Vancouver, British Columbia, this 9th day of January, 1995.

"A. Neil Bolton"
A. Neil Bolton
Master