

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: **Romfo v. 1216393 Ontario Inc.,**
2008 BCCA 45

Date: 20080118
Docket: CA035508

Between:

John Allan Romfo, Mary Dianne Romfo, Murray Fairweather, Doreen Fairweather, Robert A. Cunningham, Josephine M.J. Cunningham, Bruce Adams, Roxana Adams and David Perrella

Appellants
(Plaintiffs)

And

1216393 Ontario Inc., Tylon Steepe Development Corporation and Dennis Kretschmer

Respondents
(Defendants)

Before: The Honourable Madam Justice Rowles
(In Chambers)

F.G. Potts Counsel for the Appellants
C. Martin

J.B. Rotstein Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
20 December 2007

Place and Date of Judgment: Vancouver, British Columbia
18 January 2008

[1] **ROWLES, J.A.:** On 20 December 2007 I heard cross-applications in respect of an appeal brought by the plaintiffs in an action in which specific performance of agreements for sale of property was ordered against 1216393 Ontario Inc. and Tylon Steepe Development Corporation (the "corporate defendants") and an alternative claim against Dennis Kretschmer, the individual defendant, was dismissed. The plaintiffs' appeal from the dismissal of its alternative claim was prompted by the corporate defendants' appeal from the order for specific performance.

[2] In their motion the defendants have applied to strike the plaintiffs' appeal from the order dismissing the alternative claim against the individual defendant. The corporate defendants apply to have the plaintiffs' appeal as against them struck on the ground that no relief is or could be sought against them on the appeal. The defendants further contend that the plaintiffs' appeal was brought out of time. In their cross-motion, which was apparently brought as a precaution, the plaintiffs seek an extension of time within which to appeal that part of the judge's order which dismissed their alternative claim against the individual defendant, should such an extension be needed.

[3] The plaintiffs have now brought a further application seeking directions as to whether leave to appeal the order as to costs, made 4 December 2007, is required and, if so, for leave. That application, and the procedural issues that it raises, has yet to be argued.

[4] I will first set out the background. The plaintiffs brought an action against the corporate defendants claiming specific performance of agreements for the sale of strata lots in a proposed subdivision known as Crystal Waters on Kalamalka Lake, British Columbia. The plaintiffs pleaded in the alternative a claim against the personal defendant, Dennis Kretschmer, for negligent misrepresentation. At the relevant times, Mr. Kretschmer was a

director of Tylon Steepe Development Corporation and an agent for 1216393 Ontario Inc. in the marketing, developing and selling of the Crystal Waters strata lots.

[5] In reasons dated 14 September 2007, which may be found at 2007 BCSC 1375, the trial judge granted specific performance of the sale contracts as against the corporate defendants.

[6] It was the plaintiffs' position at trial that the claim against Mr. Kretschmer was a claim in the alternative, that is, if no liability attached to the corporate defendants, the plaintiffs would pursue their misrepresentation claim against the individual defendant. As appears from the following paragraphs in his reasons for judgment of 14 September 2007, the trial judge did not determine at that time the issue of the liability of the individual defendant for misrepresentation, leaving it to counsel to come back before him to argue that claim:

XII. PERSONAL LIABILITY OF MR. KRETSCHMER

[339] This was another point which was plead but not argued. I do not propose to make any ruling on this. If counsel wish to address this they may make appropriate arrangements. If not the claim will be dismissed.

XIII. CONCLUSION

[340] All of the plaintiffs are entitled to specific performance.

[341] The parties may make arrangements to argue the issue of damages or personal liability of Mr. Kretschmer. In the absence of that, the claim against Mr. Kretschmer personally is dismissed and there shall be no order for damages.

[7] On 11 October 2007, the parties appeared before the trial judge to settle the terms of the order and to argue costs.

[8] On 12 October 2007, the corporate defendants delivered their notices of appeal from the judgment ordering specific performance. Four notices of appeal were filed, one for each group of plaintiffs referred to in the judgment.

[9] On 17 October 2007, the parties again appeared before the trial judge to make further submissions respecting the trial order. During the hearing, the defendants took the position that the trial date on the order should be 14 September 2007. As may be seen from the transcript extract reproduced below, the trial judge did not agree.

THE COURT: What paragraph? I'm not clear where you are. That's all I -

MR. ROTSTEIN: First page of the order.

THE COURT: Yes.

MR. ROTSTEIN: Right above the words "this court further orders and declares that."

THE COURT: Yes. Yes.

MR. ROTSTEIN: Okay. The difficulty, My Lord, is this is just not correct. Because what -

THE COURT: What is not correct?

MR. ROTSTEIN: I'm coming to it. First the date of the order reflects the 17th of October, 2007.

What it really should be is the date of the order should be the date of judgment, not today. The date of judgment was the 14th of September. It says later on here.

-- and further submissions made by the parties on October 11th and October 17th.

Well, My Lord, we came before you on a notice of motion, not part of the trial. The notice of motion brought us before you. That was my friend's choice and that's how we're before you today and we were before you on the 11th. That changes how the order should read. The notice --

THE COURT: Does it matter?

MR. ROTSTEIN: Yes, it does, My Lord. It has to do with limitation times. It has to do with many issues including costs. Because if this is still part of a trial, that would be one thing. If this is an interlocutory application, which is the way it was brought, it's a different one. Different issue. Different costs. So I say the date of the order should be the 14th of September.

THE COURT: I'm just pausing there. I honestly am trying to remember what the practice is. just can't recall.

MR. ROTSTEIN: Yes, what I'm trying to say, My Lord, this isn't part of the trial, because we came before you on notice of motion.

THE COURT: Well, no, I'm not so sure about that. Because if you look at my reasons for judgment, I say that I leave certain things open.

MR. ROTSTEIN: Yes, My Lord.

THE COURT: Apart from costs, even apart from costs, and I say all parties can come back in front of me for a number of different things.

MR. ROTSTEIN: Then there was no purpose for the notice of motion.

THE COURT: Well, that might be the case. That might be the case. But notices of motion are — aside from giving you notice as to what they're going to argue. I guess it could have been done in a letter. But I don't know that that should make a difference.

MR. ROTSTEIN: Well, My Lord, all I know is that the procedure used was on an application.

THE COURT: Because, for example, I left it open. I even left it open to hear further final argument on points that had not been addressed.

MR. ROTSTEIN: Yeah.

THE COURT: For example, the personal liability of Mr. Kretschmer, because Mr. Potts — because in his argument he says, well, you don't have to address this if you find in favour of the company or against the company, and I didn't want to preclude anything without giving the opportunity for argument.

MR. ROTSTEIN: Yes. Well —

THE COURT: So ...

MR. ROTSTEIN: Even so, My Lord, it still should be — the date of the order shouldn't be the 17th of October. It's the 14th of September and then — and further submissions on whichever dates. If Your Lordship believes that this is part of trial, that would be appropriate. But if this is not part of trial, then different things flow from it. I then turn — and what I say, My Lord, is the date on the order should be the 14th of September and further submissions on other dates. That should be up there, not down here.

THE COURT: Well, I've got to say that my reaction is that this is part of a trial for the reasons that I gave you. I mean, subject to some authority being given to me that says I should hold otherwise.

...

THE COURT: All right. Well, here's my thinking. I don't think -- I think — I don't have to hear from, Mr. Potts, with respect to the date of the order. I think the date of the order should be today because of the fact that I said I wanted to hear from counsel on a number of matters and this is still part of the trial because of that. So the date of the order should be today.

[Emphasis added.]

[10] The formal order shows the date of judgment as 17 October 2007. The order provides for specific performance of the agreements for sale and dismisses the plaintiffs' claim against Mr. Kretschmer.

[11] On 22 October 2007, the parties filed appeals in which both the corporate defendants and the individual defendant were shown as parties. The relief sought includes the following:

[...] the Court of Appeal will be moved at the hearing of this appeal for an order that if the Defendants, 1216393 Ontario Inc. and Tylon Steepe Development Corporation, are successful in their appeals, the matter be remitted back to the Honourable Mr. Justice Myers to assess the liability of Mr. Dennis Kretschmer which was not pursued by the Plaintiffs once the corporate defendants were found liable.

[12] On 8 November 2007, the parties again came before the trial judge on the issue of costs. During submissions, counsel for the defendants asserted that the plaintiffs had abandoned the claim against the personal defendant. However, counsel for the plaintiffs made submissions to clarify his clients' position, as may be seen from the following extract from the transcript:

MR. POTTS [counsel for the plaintiffs]: My friend said the plaintiff abandoned the claim against Mr. Kretschmer. The claim was not abandoned at all. It was an alternative claim made in circumstances where if the claim has --

THE COURT: No, I say -- I recall that. I think you said, you put it to me in trial -- put it to him, you said to me in trial that it would be unnecessary for me --

MR. POTTS: Yes.

THE COURT: -- to make a finding with respect to Mr. Kretschmer's liability unless, and I can't remember the specific alternative --

MR. POTTS: Well, because the way --

THE COURT: -- and that's why I left it open. I didn't want to preclude anything on that.

MR. POTTS: Yes. They [sic] way it was pled, My Lord, was Mr. Kretschmer made certain representations which we said were binding on the corporate defendants. If for some reasons the court had ruled, well, he made the misrepresentations but the corporate defendants aren't bound, then there's the claim as against Mr. Kretschmer, and the submission that was made --

THE COURT: Right.

MR. POTTS: -- to you is that if you accepted the argument on specific performance, then there was no need to deal with Mr. Kretschmer, but that's hardly --

THE COURT: That's right.

MR. POTTS: -- abandoned, and in fact, there's been an appeal filed of the dismissal against Mr. Kretschmer for exactly the same reason: to keep it open in the event that the court determines that for some reason the corporate defendants aren't liable, and I might point out you did find that Mr. Kretschmer made the misrepresentations or made the representations that the plaintiffs alleged that he had made, and so if the claim against the corporate defendants on appeal doesn't survive, the claim against Mr. Kretschmer is still here, and that's hardly abandoned.

THE COURT: But I -- of course, I didn't dismiss the claim against him. If left it open for you to come back and argue, or I said unless -- unless counsel want to press the point.

MR. POTTS: You -- you left it open to be dealt with, and it was dealt with in the order when we came back before you.

THE COURT: All right.

MR. POTTS: So it's been dismissed.

THE COURT: All right.

[Emphasis added.]

[13] I come now to the applications which came before me on 20 December 2007.

[14] The corporate defendants and the individual defendant have brought an application for an order that the plaintiffs' appeals be struck or quashed pursuant to ss. 10(2), 14(1)(a), 20(a) and 23 of the **Court of Appeal Act**.

[15] The plaintiffs' application is for an order pursuant to ss. 10(1) and 23 of the **Court of Appeal Act** and Rule 52 of the **Court of Appeal Rules** that the time for the filing of the plaintiffs' notice of appeal, as set out in s. 14 of the **Court of Appeal Act**, be extended, should such an extension be necessary.

[16] It is convenient to mention here that the several notices of appeal filed by the defendants are the same, and that the notices of appeal filed by the plaintiffs are the same. Counsel for the parties have agreed that while their respective motions have been brought in relation to one appeal only, the result will be determinative of the same issues in respect of the other like-appeals.

[17] The corporate defendants' application to strike or quash the plaintiffs' appeal as against them is brought on the ground that no relief is or can be sought against the corporate defendants when the plaintiffs' appeal is from the order dismissing the claim against the individual defendant.

[18] In my opinion, the plaintiffs ought not to have joined the corporate defendants as parties to their appeal from the order dismissing the claim against the individual defendant for no relief on the appeal was sought against them. An analogous situation arose in **Safarik v. Ocean Fisheries Ltd.** (1993), 21 C.P.C. (3d) 395, [1993] B.C.J. No. 3019, (QL) (C.A.) in relation to a cross-appeal that had been filed. In that case, the petitioner obtained a judgment requiring the respondent, Ocean Fisheries Ltd. (OFL), to buy his shares of OFL. The petitioner's claims as against the personal defendants were dismissed. OFL filed a notice of appeal from the order against it. The petitioner filed a notice of cross-appeal seeking to vary the judgment against OFL, but the cross-appeal also sought to bring the personal defendants into the appeal in the following way:

(h) that if the appellant Ocean Fisheries Limited fails to complete the purchase of the aforesaid shares, the respondents by cross-appeal, Edward John Safarik, Edward Anthony Safarik Jr., Murray Robert Safarik and Douglas Richard Safarik, and Douglas Richard Safarik shall purchase the shares at the same price, plus interest, determined as aforesaid.

[19] There was no issue concerning the validity of the cross-appeal as against OFL, but an application was made to strike out the notice of cross-appeal as against the personal defendants. Based on **Morrison v. Coulter** (1991), 82 D.L.R. (4th) 568, 3 B.C.A.C. 24 (C.A.), Southin J.A. struck out as irregular the cross-appeal as against the personal defendants. The order under appeal by OFL did not turn on the validity of any claim made against the personal defendants.

[20] As Southin J.A. observed, however, the petitioner "had no intention of bringing any proceedings in this Court unless Ocean Fisheries brought proceedings" (at para. 3). OFL waited until the last day to file its notice of appeal. Southin J.A. went on to grant the petitioner's application for an extension of time within which to bring an appeal against the personal defendants.

[21] In this case, the plaintiffs' appeal against the corporate defendants is irregular in that the plaintiffs' notice of appeal does not seek any relief against them. Instead the relief sought is based on the appeal of the order dismissing the plaintiffs' alternative claim against the individual defendant. To the extent that the appeal is irregular as against the corporate defendants, it must be struck and the plaintiffs' notice of appeal must be amended accordingly.

[22] The plaintiffs brought a motion for an extension of time in filing the notice of appeal in the event that the time ran from the September judgment, rather than from the order dated in October. The plaintiffs, in my opinion, do not require an extension of time within which to appeal the order dismissing the claim against the individual

defendant as the appeal was filed with the time limited from pronouncement of that order. When I say that order, of course, I am referring to the dismissal of the claim as against the individual defendant.

[23] It is readily apparent the appeal brought by the corporate defendants and the appeal brought by the plaintiffs against the individual defendant are related and ought to be heard at the same time. Unless counsel wish to make submissions to the contrary, I direct that the appeals be heard together.

"The Honourable Madam Justice Rowles"