Date: 20041102
Docket: C992466
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

Oral Reasons for Judgment
The Honourable Mr. Justice Masuhara
November 2, 2004

BETWEEN:

JOSE AUGUSTO RIBEIRO

PLAINTIFF

AND:

THE CITY OF VANCOUVER, POLICE SERGEANT LACON, POLICE SERGEANT BOUTIN, POLICE CONSTABLE DIMOCK, POLICE CONSTABLE BEZANSON, POLICE CONSTABLE GIBSON, POLICE CONSTABLE CHU, POLICE CONSTABLE STEWART, POLICE CONSTABLE SCALLY, POLICE CONSTABLE JACKSON, POLICE CONSTABLE ALFRED, POLICE INSPECTOR GREER and POLICE ACTING STAFF SERGEANT S. MILLER

DEFENDANTS

Counsel for Plaintiff appearing by teleconference	F.G. Potts C. Martin
Counsel for Defendants appearing by teleconference	T.M. Zworski

[1] **THE COURT:** This is an appeal by the plaintiff of a decision made by a master of this court.

[2] The plaintiff requested production of documents in several categories, and they are, namely:

1. The complete employment records of the defendant police officers;

2. Complaints and/or reports relating to the use of force, particularly lethal force by the Vancouver Police Department in respect of dealings with mentally ill people;

3. Minutes, correspondence and other communications as between any of the above and the provincial mental health advocate and the Vancouver Richmond Health Board in respect to the Vancouver Police Department dealings with mentally ill persons;

4. Minutes of meetings and communications relating to the disposition of all complaints relating to the use of force against mentally ill persons;

5. Reports, recommendations and communications relating to the use of alternative or non-lethal resources as an application of force in emergency situations; and

6. All reports, correspondence and internal memorandum relating to the death or wounding of mentally ill persons by the Vancouver Police Department.

[3] In respect to this type of an appeal, the standard of review is a matter that needs to be considered as a first step.

[4] Although Rule 53(6) of the ***Rules of Court*** does not indicate the nature or scope of an appeal of a master's decision, the issue was considered in ***Abermin Corp. v. Granges Exploration***, and in that case Macdonald J. held that the standard of review on appeal and the nature of appeal depend on the type of application that was before the master and stated:

> An appeal from a Master's order in a purely interlocutory matter should not be entertained unless the order was clearly wrong. However, where the ruling of the Master raises questions which are vital to the final issue in the case, or results in one of those final orders which a Master is permitted to make, a rehearing is the appropriate form of appeal. Unless an order for the production of fresh evidence is made, that rehearing will proceed on the basis of the material which was before the Master. In those latter situations, even where the exercise of discretion is involved, the judge appealed to may quite properly substitute his own view for that of the Master.

[5] In the case of ***Ho v. Ming Pao Newspapers***, Mr. Justice Hood considered, for the purpose of assessing the standard of review and scope of appeal, what should be considered a purely interlocutory matter and stated at ¶ 13-14:

> In my view, ***Abermin***, and its source cases, make it clear that the test should only apply where the

> Master's discretion is exercised in a purely interlocutory matter, that is in routine matters, such as pleadings, interrogatories, mode of trial, etc. However, it is otherwise, and even in the case of such a routine matter, if the Master's decision may affect the outcome of the proceedings, or as put in the cases, raises a question vital to the final issue of the case, the test should not be applied; for the decision in such case is not in fact interlocutory. A re-hearing should be held, either on the basis of the material for the Master or that material together with fresh evidence allowed in by the court. Further, if the appellant tribunal is of the view that the Master's decision will result in injustice being done, it has both the power and the duty to remedy it....
>
> In the case at Bar, the Master's decision deals with evidence relevant to the issues between the parties, and obviously of some importance on the outcome of the action. And in my opinion, the proceedings before me constituted a re-hearing, on the material which was before the Master, and I am free to substitute my judgment in place of that of the Master, if my view differs from his. Further, if I am wrong, then in my view the Master's decision is clearly wrong.

[6] In ***Martell v. Ewos***, the court defined interlocutory in this way:

> ... a purely interlocutory matter is one in which the Master's decision does not limit a judge's discretion in determining or disposing of an issue at trial.

[7] The plaintiff in this case argues that its request for production of documents was not a purely interlocutory matter because it deals with evidence relevant to the issues between the parties and obviously of some importance to the advancement of the plaintiff's claim.

[8] The defendant says that the application was an interlocutory one and that the mere fact that the order deals with an issue of importance to the plaintiff or that the effect of the order may limit the exploration of what the plaintiff believes would be helpful or valuable potential evidence is not sufficient to transform an interlocutory order into one which is vital to the final issue in the case.

[9] I agree with the defendant's characterization of the matter. In my opinion the application before the master was purely an interlocutory one. Although the question in ***Ho*** also concerned the production of documents, in my opinion the nature of the documents was quite different than in the case at bar.

[10] In ***Ho***, the court characterized a particular document being sought as follows:

> In my view, the contents of the letter, its assertion against the directors of the Association, as well as the Association itself, of wrongful conduct, including embezzlement of funds, not only may, but surely should, enable the defendants to advance their own case, and perhaps as well, damage the case of the plaintiffs.

It was on the basis of this characterization of the document in question that the court characterized the proceeding as not being a purely interlocutory one.

[11] In ***Ho***, the document in question was beyond being relevant; it was the basis of the cause of action. The letter being sought in ***Ho*** was clearly the key document for the association's counterclaim against the plaintiffs in that case.

[12] In my opinion, the same cannot be said of the documents here. While the documents sought by the plaintiff are clearly important to the plaintiff, that fact cannot turn them into the key documents in the case or into the actual basis for the cause of action. Every relevant document in the case will be important to one side or the other and documents will usually be of some importance to the outcome of the cause of action. Without more, however, in my opinion, the general request for the production of documents cannot transform from an ordinary interlocutory application into something else.

[13] The request for production of documents in this case seems to fall squarely within the definition of "interlocutory" provided by the court in ***Martell***. The master noted in that case that:

> ... given the time that is left before the trial commences, and the fact that there are discoveries to be conducted, that it is well open to the plaintiff to renew its claim for production of documents without ... significant detriment occurring to the plaintiff.

[14] It seems apparent from this analysis the application was not a final one, nor one that would necessarily bind the hands of a trial judge since it was left open to the plaintiff to reapply.

[15] On the basis of the foregoing, I find that the application before the master was purely interlocutory. As such, the standard of review from the decision should be whether it was clearly wrong.

[16] Turning then to the master's decision in this case. I find the plaintiff's submissions clearly meet the test on the basis that the master did not follow nor make mention of ***Baiden v. The Vancouver Police Department***, a judgment of Mr. Justice Romilly, even though the record shows that this case was cited by plaintiff's counsel during the course of the hearing.

[17] Relying on ***L.D.F. v. a Psychiatrist*** and ***Harris v. Sweet***, the court determined:

> ... all that should be produced are results of disciplinary matters resulting from specific complaints which relate to a like incident as occurred relating to the plaintiff.

The court stated in regard to the request for all employment records that:

> I am not satisfied that the entire employment record of each of the individual defendants is in any way relevant to the matters before the court.

These comments ignore the decision in ***Baiden*** in which Mr. Justice Romilly determined that multiple documents, including the complete employment records of the defendant police officers, were producible to the plaintiff.

[18] The facts of ***Baiden*** are striking in their similarity to the facts in the case at bar. In that case, the plaintiff sued, amongst others, the Vancouver Police Department, the City of Vancouver and the individual police officers who had alleged -- wrongfully trespassed on his property and wrongfully assaulted or negligently injured him. The plaintiff sought the complete employment records of the police officers -- or the defendant police officers. It appears from the decision that the Statement of Defence contained a general denial by the police of any wrongdoing, and on that basis the plaintiff sought information regarding the credibility, skill and competence of the police officers in question.

[19] In this case, the plaintiff makes similar accusations of trespass and injury to his person. The defendants in their Statement of Defence have issued a general denial of the allegations of wrongdoing and state that they "applied

commonly used police procedures and tactics" and that they were authorized by law to act as they did.

[20] In response to the plaintiff's request for documents in ***Baiden***, the court held at ¶ 16 to 23:

> I agree with the submission of the counsel for the plaintiff that the blanket denial of the allegations of the police in the Statement of Defence places the plaintiff in the position of needing to know the competence, skill and credibility of the police officers. In my view it is therefore imperative to know if any of these police officers were involved in similar incidents in the past or since March 7, 2002.
>
> With respect to the allegations against the City of Vancouver, the plaintiff must know whether or not these particular police officers had the skill and knowledge to conduct themselves in a way that was consistent with the guidelines [of] use of force and whether, in spite of having such skill and knowledge, they conducted themselves on previous or subsequent occasions in such a way as to disregard such guidelines and rules.
>
> It is therefore important that the disciplinary records kept by the ... Police be disclosed, as these records may, directly or indirectly, be evidence of:
>
> (a) Previous conduct inconsistent with the Statement of Defence;
>
> (b) Credibility of the police officers; and
>
> (c) Similar fact evidence.
>
> It is possible that proper discovery could develop evidence of a system or pattern of conduct that might be admissible at trial against one or more of the defendants. The question is not whether it will be admissible at trial, but that it may be.

> In my view the plaintiff is entitled to discovery with respect to similar facts so that the plaintiff may be in a position to make a proper submission at the trial on a *voir dire* on the question of admissibility of similar fact evidence....
>
> There may be evidence disclosed in the said files that is made particularly relevant by paras. 15, 19 and 20 of the Statement of Claim in that the City of Vancouver may be liable for creating or contributing to an environment within the City of Vancouver whereby allegations of misconduct by police officers are treated in a tolerant fashion so that police officers who engage in such misconduct might come to expect that such misconduct would be treated in a tolerant manner....
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> In my view, the production of such documents is consistent with the common law set out in this jurisdiction over many years whereby every document that relates to the matters in question in the action which not only would be evidence upon any issue but which it is reasonable to suppose contains information which may, not must, either directly or indirectly enable the party requiring the evidence to advance their own case or to damage the case of its adversary, must be disclosed.
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> On the basis of the foregoing, the plaintiff's application for disclosure is therefore granted with costs.

[21] In the case at bar, however, the master refused to order production of the entire employment records and refused to order production of any of the other categories of documents sought by the plaintiff.

[22] In my opinion, this decision cannot be sustained in light of ***Baiden***. The circumstances of ***Baiden*** are clearly on point with those of the case at bar and it must be considered by me.

[23] In my opinion, as well, the judgment of Mr. Justice Romilly in ***Baiden*** also applies to the other categories of documents sought by the plaintiff. Mr. Justice Romilly made his order for production of documents based on the fact the defendants had made a general denial of the allegations, thus requiring the plaintiffs to look for any evidence relating to the three categories listed in paragraph 18 of ***Baiden***.

[24] The facts in the case at bar are similar. The defendants generally deny the allegations and rely on the defence of legal authorization and usual procedure. These defences open the same grounds of inquiry as those faced by the plaintiff in ***Baiden***, and although Mr. Justice Romilly was not faced with exactly the same requests as those that were made here, his statements are applicable, especially as they concern the need for evidence regarding previous inconsistent conduct, credibility and similar fact.

[25] So in summary, the case of ***Baiden*** has not been distinguished in the case that was before me and it was simply not a matter that was considered and appears to have been ignored during the initial inquiry. I find that that case was one which was binding, and considering the materials relied upon by the plaintiff, as well as during the case before me, they indicate that documents may exist that relate to the

circumstances of this action. Further materials relied upon by the defendant seem to be limited by the opinion of persons contained in those materials which this court does not recognize in terms of the determination of relevance or commentary with respect to the topic matter of the certain documents as characterized by such persons.

[26] Accordingly, the order as sought by the plaintiff relating to the production of certain documents is approved and granted as set out in the Notice of Motion of February 3, 2004, namely, in subparagraph 1(h) and subparagraphs 2(d), (h), (j) and (k).

[27] With respect to subparagraph item 2(c), this item was adjourned generally. Defendants' counsel argued that he was not prepared to argue this item during the course of the appeal and that the matter with respect to this subject ought to be brought forward in the normal manner, and I so order with respect to that item.

[28] That concludes my ruling on this matter.

[29] MR. POTTS: My Lord, Frank Potts for plaintiff. As to the issue of costs, in the court below the master ordered that each party bear its own costs. We seek an order for costs in the court below and in this court, as well.

[30] THE COURT: I think the order with respect to costs at this point would be in the cause.

[31] MR. POTTS: Both in the court below and here, My Lord?

[32] THE COURT: I am sorry. In the court below, the plaintiff is entitled to costs. The costs with respect to this would be in the cause.

[33] Any further comments?

(DISCUSSION BETWEEN THE COURT AND COUNSEL RE STAYING THE ORDER UNTIL APPLICATION TO STRIKE OUT PLEADINGS IS HEARD)

[34] THE COURT: All right. Well, I think at this stage, having heard the submissions and knowing now that you have a case management meeting with Madam Justice Kirkpatrick on November the 16th, I am prepared to grant the stay with respect to items 2(d), (h), (j) and (k) to that date where then the matter can be brought before Madam Justice Kirkpatrick.

[35] However, in regards to the employment records, which is item 1(h), and with respect to Mr. Potts' reference to the nine files that are contained in a memo plus the incident documents, as per Mr. Zworski's comments, those should not pose any difficulties for production. So to that extent, those items will be produced and the production of the other

items will be stayed until November the 16th when the matter is being brought before Madam Justice Kirkpatrick.

[36] MR. POTTS: My Lord, there's one final matter. Appellant also sought an order verifying -- an affidavit verifying proper production, and you'll recall the submissions on that related to the failure to list and the plaintiff's concerns about someone being responsible. That's not been dealt with, My Lord, and I think it should be one way or another, with respect.

[37] THE COURT: Right. I am at this stage -- you have leave to bring that application again, but at this point I am not granting such an order. If that becomes an issue again, you have leave to bring the matter back.

"The Honourable Mr. Justice Masuhara"