IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ruloff Capital Corporation v. Hula,*
2023 BCSC 1171

Date: 20230710
Docket: S211878
Registry: New Westminster

Between:

Ruloff Capital Corporation, Walter Ruloff,
Brymak Holdings Ltd. and Daniel B. Klemke

Plaintiffs

And

Errol Hula, Karen Hula, T.S. (Tony) Frost aka Anthony Stephen Frost,
Hulavision Inc., Keith E. Spencer, Keith E. Spencer Law Corporation,
Geoffrey Cowper, D. Geoffrey Cowper Law Corporation,
Fasken Martineau DuMoulin LLP, David N. Corbett,
Peter Feldberg and William Westeringh

Defendants

Before: Master Keighley

Reasons for Judgment

Counsel for the Plaintiffs:	N.W. Nichols
Counsel for the Lawyer Defendants:	C. Dennis, K.C. R. Power
No other Appearances	
Place and Date of Hearing:	New Westminster, B.C. June 20, 2023
Place and Date of Judgment:	New Westminster, B.C. July 10, 2023

The Application

[1] This is an application brought by the defendants Fasken Martineau DuMoulin LLP, Keith E. Spencer, Keith E. Spencer Law Corporation, Geoffrey Cowper, D. Geoffrey Cowper Law Corporation, David N. Corbett, Peter Feldberg and William Westeringh (the “lawyer defendants") for an order pursuant to Rule 12-6(5)(a) of the *Rules of Court* for an order that the trial of this action be heard by the court without a jury.

[2] The applicable provisions of the rule read as follows:

> Court may refuse jury trial
>
> (5)Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply
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> (a)within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
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> (i)the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
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> (ii)the issues are of an intricate or complex character, or
>
> (iii)the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action…

[3] Although the application does not specifically reference Rule 12-6(5)(a)(ii), the rule, the focus of the lawyer defendants’ submissions invokes that provision.

[4] This action was commenced by the Notice of Civil Claim filed February 28, 2019. On November 5, 2019, the plaintiffs filed an amended Notice of Civil Claim (the “ANOCC”) which runs to 104 pages. The ANOCC is drafted in somewhat colloquial, casual style which may, in future, give rise to applications to particularize or otherwise clarify the various claims made. Those are issues for another day.

[5] On May 3, 2023, the plaintiffs simultaneously delivered a Notice of Trial and a Notice Requiring Trial by Jury. It is the latter notice which the lawyer defendants seek to “set aside". The trial is unilaterally scheduled by the plaintiffs to commence on November 18, 2024 for 19 days.

[6] The lawyer defendants say that civil juries are “intended for simple cases" (*United Services Funds v. Richardson Greenshields of Canada Ltd. 1987,* 16 B.C.L.R (2d) 196). They say that this case is anything but a simple one. The plaintiffs say that the lawyer defendants acted in breach of their professional responsibilities and ethical duties. Those, say the plaintiffs, are issues which properly instructed juries are capable of resolving.

Background to the Application

The Plaintiffs’ Claim

[7] The plaintiffs say that Errol Hula is a director and the controlling mind of Hulavision Inc. (together referred to as “Hula"). They say that Hula asserted that it had a potential claim against NBC, the broadcaster, for breach of a nondisclosure agreement and infringement of intellectual property rights.

[8] Ruloff Capital Corporation and Brymak Holdings Ltd. (together referred to as “Ruloff") entered into a litigation funding agreement (“LFA”) with Hulavision Inc. on July 7, 2009, whereby Ruloff would pay all of the legal expenses of the NBC litigation in exchange for 50% of the net amount recovered from NBC.

[9] The law firm Fasken Martineau DuMoulin LLP (“Fasken") represented Ruloff and Hula with respect to the LFA. The plaintiffs say that some five months after the joint retainer was entered into, Hula, with the assistance of Fasken set in motion a scheme to oust Ruloff from its position under the LFA, to cancel its 50% share and to pay a California attorney on a contingency basis only 15% of any recovery and boosting Hulavision's share of the recovery to 85%, in violation of the terms of the LFA. On January 31, 2010, Hula gave notice of termination of the LFA which purported to take effect one year thereafter on January 31, 2011. Ruloff, through its counsel, Jeff Scouten (“Scouten”), objected to the notice. The plaintiffs say that the notice of termination is not valid having been made on the false and baseless ground that Ruloff had not provided adequate financial support to prosecute the action against NBC, whereas Ruloff had paid and was continuing to pay every account issued by Fasken.

[10] After Ruloff raised its objection, Hula and Fasken, the plaintiffs say, both in word and deed over the next two years misled Ruloff and Scouten to believe that Hula withdrew the notice of termination and would honour Ruloff's rights under the LFA.

[11] The plaintiffs further say that pursuant to a supplementary agreement made on May 11, 2011, Hula and Fasken induced Ruloff to make further payments totaling $1,664,052 to pay the services of a lawyer in the United States to prosecute the case against NBC. This payment was made, the plaintiffs say, at a time when Hula and Fasken regarded the LFA to be terminated but who nonetheless sought to continue extracting payments from Ruloff to fund the litigation. The plaintiffs say that the defendant Keith E. Spencer ("Spencer") was instrumental in encouraging Hula and its representatives to continue with the fraudulent scheme whereby payments to fund the litigation were extracted from Ruloff while secretly maintaining the validity of the notice to terminate the LFA.

[12] The defendants maintained that Spencer maintained this fraud for almost a year and inducing Ruloff to pay the sum indicated for legal expenses until a "surprise lawsuit" whereby Hula, and a California court, sought to have a judge rescind the LFA.

[13] The plaintiffs say that Fasken, of which firm Spencer was a member, acted for both Ruloff and Hula in a joint representation and had a positive duty of full and timely disclosure to both.

[14] The plaintiff says that this is a simple case, Fasken, and its lawyers, failed in its duty to make full disclosure on at least two occasions (with respect to whether the notice of termination was effective and with respect to the institution of legal proceedings in California) and the result was that Ruloff first suffered large ongoing loss and damage. The plaintiffs say that the lawyer defendants simply failed to do anything about the transgressions of its lawyers and a civil jury is certainly capable, say the plaintiffs, of determining whether a fraud was perpetrated and if so by whom.

The Lawyer Defendants' Position

[15] The lawyer defendants consist of the law firm, Fasken, as well as the following Fasken lawyers connected with the file: a) Keith E. Spencer, a lawyer in Fasken's Vancouver office, and his law corporation; b) Geoffrey Cowper, K.C., a lawyer in Fasken's Vancouver office, and his law corporation; and c) David Corbett (former Fasken managing partner), Peter Feldberg (current Fasken managing partner) and William Westeringh, K.C. (Fasken managing partner of the British Columbia region).

[16] In terms of the other defendants, Errol Hula and Karen Hula (together referred to as the "Hulas") are represented by Harper Gray LLP. The defendant Tony Frost ("Frost") the alleged third member of the Hula group is represented by McKenzie Lake Lawyers LLP. The twelfth defendant, Hulavision, was dissolved on June 1, 2015, and has not filed a Response to Civil Claim.

[17] With respect to the ANOCC, the lawyer defendants note the following allegations which will require proof at trial:

> a) that Fasken acted in conflict of interest and wrongfully favoured the Hula group and that each of the lawyer defendants breached fiduciary duties owed to Ruloff;
>
> b) that the Hula group and Spencer (the latter a non-party to the LFA) breached obligations to perform the LFA in good faith;
>
> c) that the Hula group perpetrated a fraud on the Ruloff group;
>
> d) that Spencer is liable in unlawful conduct conspiracy or motive conspiracy;
>
> e) that Spencer is liable for "unconscionable conduct", which the lawyer defendants say is an apparently novel claim in law;
>
> f) that the Hulas, Frost and Hulavision engaged in a conspiracy to commit fraud;

g) that the Hulas, Frost and Spencer are vicariously liable for the acts and/or omissions of Hulavision and that Hulavision is vicariously liable for the acts and/or omissions of the Hulas, Frost and Spencer;

h) that each of the lawyer defendants is vicariously liable for the acts of the other(s); and

i) that each of the defendants isjointly and severally liable for any damages suffered by the plaintiffs.

[18] On the basis of those allegations, the plaintiffs seek the following heads of damages:

a) compensatory special damages of over $12.2 million regarding legal fees incurred by the plaintiffs in the course of the LFA and in defence of the California lawsuit;

b) compensatory damages for “direct and indirect physical, mental and emotional distress, and pain and suffering due to stress";

c) aggravated damages, “having regard for the repeated and ongoing misconduct of the defendants”; and

d) two separate awards of punitive damages: a first award of $1.6 million and a second award of “at least seven times the amount of the aggregate compensatory damages", in order to sanction the defendants’ “reprehensible conduct".

[19] The basis for an award of punitive damages is set out in over 20 pages of the ANOCC, including:

> Spencer and Fasken, as lawyers, are granted the highest privilege in law and equity and in the community: a position of trust. When lawyers abuse the trust reposed in them, the punitive sanctions ought to be swift, heavy and public. For years Spencer and Fasken have hid their abuse of trust behind one cloak or another, trying wrongfully to use the privilege of law to cover up their abuse of their privileged position. ...

> Further, the MOST egregious, heinous and unpardonable harmful reprehensible misconduct is the cover up of the wrongs COUPLED with deliberately abusing the legal privilege granted lawyers to protect clients as the cloak to cover up the fraud and other wrongs listed above. The sky is the limit to these punitive damages to sanction this utmost reprehensible misconduct for the abuse of trust.

[20] The lawyer defendants deny the entirety of the plaintiff's allegations and say that Spencer's role in advising Hulavision was known to, consented to and encouraged by the Ruloff group which was at times represented by its own counsel, presumably Scouten.

[21] In addition to issues raised by the plaintiff in the ANOCC, the defendants' pleading raises the following additional issues to be dealt with at trial:

a) whether the plaintiffs' claim was statute barred as of March 22, 2016;

b) whether the plaintiffs caused or contributed to any damages they are found to have suffered, by

(i) retaining six or more law firms in respect of the same matter, leading to increased legal fees, and

(ii) failing to obtain costs in the California lawsuit;

c) whether any damages award should be apportioned pursuant to the *Negligence Act*;

d) whether the plaintiffs have failed to mitigate any damages suffered, including by failing to follow advice from their own legal counsel; and

f) whether this action is an abuse of process as it seeks recovery for the Ruloff Group's costs in the California lawsuit.

[22] The Hulas and Frost, while denying the plaintiffs' allegations, also raise the following:

> a) whether the plaintiffs are estopped from bringing this claim by virtue of a previous action in this Court; and
>
> b) whether, as the defendant Hulavision was dissolved in June 2015, any action can be taken against Hulavision or (by virtue of piercing the corporate veil) against its directors.

Legal Basis

[23] The lawyer defendants acknowledge that the plaintiffs are *prima facie* entitled to choose the mode of trial, but say that there are some cases which are simply too complex to leave in the hands of a jury.

[24] It is not, say the lawyer defendants, enough for a jury to understand the evidence as it is being given which is often a difficult enough task on its own. The jury must also retain its understanding of the evidence throughout a long trial and then during a time-constrained period of deliberation, analyse the evidence and decide the numerous issues which arise in the case. In the case of *Wipfli v. Britten*, 1981 CanLII 615 (BCSC) at para. 31, McEachern, C.J.S.C., (as he then was) said:

> This case cries out for unhurried and thoughtful consideration. There must be a weighing of alternatives, and an opportunity to reflect upon these alternatives. ...
>
> With deference, I also refer to what I said in *Henry v. Knickerbocker*... :
>
> > A judge deciding this case without a jury would, after hearing the evidence and reviewing his notes or a transcript, assess and consider all the evidence, including the many medical reports and the submissions of counsel. He would probably draft and re-draft a judgment several times, and he would make countless calculations to test and verify the reasonableness of his conclusions. Like any conscientious jury, he would agonize over his conclusions, but he would do so at a leisurely pace and he would not be under pressure of time or the personal comfort of himself or others in making the kind of calculations which should be made to test the reasonableness of his conclusions.
> >
> > (emphasis added)

[25] In the case of *Andersen v. Porter et al*., 2000 BCSC 1000 at para. 14, Wilson J. set out factors which might indicate intricate or complex issues as including the following:

> a) multiplicity of parties and duration of trial;
> b) multiplicity of standards of care;
> c) apportionment of fault; and
> d) novel applications of the law.

[26] The lawyer defendants note that cases alleging solicitor's negligence have been termed “difficult legal puzzles" which are more appropriately decided by a judge and jury. In the case of *Cederland v. Bilkey*, 2001 BCSC 1152, para. 22, Master Patterson said:

> Except for the pleadings there is no evidence before the court by way of affidavit concerning the question of complexity. However, it is nonetheless my view that this is a matter best heard by a judge without a jury for all the reasons which Sigurdson, J. has set out in *Lopushinsky*, including the opportunity for a judge to reflect on the evidence and to be able to put together the pieces of this difficult legal puzzle without the pressures of time that might be affecting a jury.

[27] The lawyer defendants also note that negligence cases which are markedly less complex than the case at bar have been withdrawn from a jury including a case centred on the allegation of a missed limitation period: *Keddy-Waldie v. Lawson*, 2014 BCSC 1711, as well as a case centred on an allegedly improvident settlement where liability had been admitted and the sole remaining question was that of damages: *Sigalet v. Cedrone Law Corporation*, 2017 BCSC 1458. In this case, the lawyer defendants say that the ANOCC raises a variety of causes of action each of which will require careful consideration of the elements making up the cause of action, any available defences and how the evidence applies to each of those elements and any defences. The plaintiffs say the lawyer defendants seek large damage awards which will require careful consideration of the evidence and of the applicable legal tests.

[28] There are also, say the lawyer defendants, a number of other legal and factual issues arising from the unique background of this case, including limitation

defences, questions of abuse of process and estoppel, as well as questions of causation, apportionment, mitigation (or lack thereof), contribution and indemnity. Many of the factors identified in the *Andersen* case *supra,* as indicative of an "intricate or complex matter" are present in this action including:

a) multiplicity of parties and the duration of trial: a 19-day trial involving four sets of counsel and 12 named defendants;

b) apportionment of fault: as is raised in the lawyer defendants' response, to the extent the Ruloff Group is found to have suffered any damages there will be live issues at trial as to apportionment of liability for those damages. The complexity inherent in an exercise of apportionment was considered by C.J.S.C. McEachern in *Wipfli*, *supra,* at para. *33:*

> For the reasons which I have already mentioned, I believe some of the issues in this case are intricate or complex or both. I need only mention three matters... (2) The issue of apportionment of fault. Are all these disabilities properly attributable to the failure of some or all of the defendants to diagnose twins, or was it solely the fault of the obstetricians, or of the anaesthesiologist, or of the pediatricians, or of the hospital staff? And if some or all are liable, in what percentage should fault be apportioned?

c) multiplicity of standards of care: here, each of the 12 named defendants is alleged to be liable in negligence, which gives rise to the same complexity concerning "various duties and standards of care" as was noted in the case of *Sidhu v. Hiebert*, 2020 BCSC 183 by Forth J. at para. 58:

> I agree with Nissan's submission that the number of defendants in this case and the various duties and standards of care that apply to each of them, including with respect to each of the different Nissan Defendants, would be very difficult for a jury to keep track of.

d) novel applications of the law: the lawyer defendants say that the ANOCC advances two claims not known in law: a breach of "professional legal duties", and a claim that Spencer is liable for "unconscionable conduct". Further, there is a novel legal allegation that Spencer, a lawyer, not a party to the LFA, could be liable for breach of duty of honest contractual performance.

> Normally, say the lawyer defendants, this doctrine would apply only to the parties of a contract and the issues will require careful consideration of the jurisprudence to decide whether it should be extended to apply to the facts of this case.

[29] The lawyer defendants also say that while the presence of some of these factors in isolation may not be sufficient by themselves to raise concern over intricacy or complexity, the courts must consider difficulties which may arise in the interplay of issues in accessing the complexity of the case. As Forth J. in *Sidhu v. Hiebert*, *supra*, said at para. 58:

> Finally, complexity must be assessed cumulatively, with the whole of the trial in mind ... while it may be the case that individual issues viewed in isolation could be tried conveniently with a jury, attention must also be paid to difficulties that are likely to arise from the interaction of and between different issues. Put differently, where multiple issues are to be considered, the interplay between otherwise relatively uncomplicated issues can make them intricate or complex in nature.

[30] In this case, the “interplay” referred to by Forth J., is as the lawyer defendants say, “amplified by the sheer volume of issues that emerge from the plaintiffs’ 104-page pleading".

[31] I made reference earlier in these reasons for judgment to the somewhat casual and colloquial style of drafting evidence in the ANOCC. In some instances, it is unclear which claims are being advanced against which defendants and why. Indeed, the complexity of this case and the multiplicity of parties may leave the trial judge with an all but impossible task in crafting a charge to the jury. However much care is taken in the crafting of the charge I can foresee numerous instances in which the jury will return with questions with respect to the evidence or the application of appropriate law to it. For example, the assertion of solicitor-client privilege by Fasken is characterized by the plaintiff as a “ruse" a “cover up" and a “malicious and heinous breach of abuse". It seems to me that this issue alone will be sufficient to overwhelm a jury as it engages issues of an intricate and complex character. A member of the

jury may be more influenced by the tone of the allegations than by the legal principles behind an assertion of privilege.

[32] As counsel for the lawyer defendants says at paragraph 33(d) of his submissions, the plea of “trying wrongfully to use the privilege of law to cover up their abuse of their privileged position" founds the plea that the “sky is the limit to these punitive damages to sanction this utmost reprehensible misconduct for the abuse of trust", which itself is a further demonstration of an issue of an intricate or complex character that will overwhelm the jury (i.e., how is the jury to interpret “the sky is the limit"?).

Result

[33] I am satisfied that the number and nature of issues raised in this litigation render it an “intricate or complex" matter.

[34] It seems to me that the interests of justice will be best served in this case by allowing a judge to reach factual and legal conclusions after making those “countless calculations”, referred to by McEachern C.J.S.C. in the case of *Wipfli, supra*, to test and verify the reasonableness of his or her conclusions. I am not confident that a jury will fairly achieve that result.

[35] The trial of this action will be heard by the court without a jury. The lawyer defendants will have their costs of this application in the cause as against the plaintiffs.

“Master Keighley”