IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Toor v. Harding,*
2013 BCSC 1202

Date: 20130705
Docket: S125365
Registry: Vancouver

Between:

Amrit Toor and Intech Engineering Ltd.

Plaintiffs

And

**Thomas P. Harding, Ian Mulgrew,
Harold Munro, Kevin D. Bent, and
Postmedia Network Inc., d.b.a. Pacific Newspaper Group**

Defendants

Before: The Honourable Mr. Justice Ball

On appeal from: A decision from the Supreme Court of British Columbia, dated October 17, 2012, Vancouver Registry, Court File No., S125365

Corrected Judgment: The text of this judgment was corrected on the cover page on July 9, 2013

Reasons for Judgment

Counsel for Plaintiffs:	R.A. McConchie
Counsel for Defendant, Thomas P. Harding:	D.F. Sutherland
Counsel for Defendants, Ian Mulgrew, Harold Munro, Kevin D. Bent and Postmedia Network Inc., d.b.a. Pacific Newspaper Group:	S. Dawson
Place and Date of Hearing:	Vancouver, B.C. December 4, 2012
Place and Date of Judgment:	Vancouver, B.C. July 5, 2013

I. INTRODUCTION

[1] This appeal arises in a defamation action which concerns the allegedly defamatory comments made by the defendant Harding about the plaintiffs. The individual plaintiff testified in an expert capacity in a motor vehicle accident action. The comments which were made by the defendant Harding were made in an interview with the defendant Mulgrew whose news article was edited and published by the remaining defendants. The defendants except Harding will be referred to below as the "Vancouver Sun defendants".

[2] All of the defendants have applied to have the words representing the meanings of the "comments" pruned or removed from the notice of civil claim. The words which the defendants sought to have removed are "biased" and "unethical". The defendants application is brought pursuant to Rules 9-5 and 9-6 of the Rules of Court.

[3] In oral reasons pronounced on October 17, 2012 the application to have the words pruned was dismissed. This appeal is taken from that decision.

[4] In her reasons Master Scarth framed the application by the defendant Harding as:

> 1. The Court being asked to perform the gatekeeper function of a trial judge; and,
>
> 2. The Court being asked to make a preliminary determination as to whether the impugned words "unethical" and "biased" are capable of bearing the defamatory meanings pleaded.

[5] The defendants submit that the impugned words are not capable of the meanings alleged in paras. 15 and 19 of the notice of civil claim and should be pruned. In the alternative, they argue the order should be made on the just and convenient basis.

[6] The plaintiffs oppose the appeal and the application on the basis that the impugned words are within the natural and ordinary meanings of the defamatory statements allegedly made and published.

II. LITIGATION BACKGROUND

[7] The alleged defamation relates to testimony given by the plaintiff Toor before a jury as an expert forensic engineer in a motor vehicle case, *Walker v. John Doe & ICBC*, Vancouver Registry No. M085239 (B.C.S.C.). Counsel for the plaintiff in that action was Mr. Harding. Mr. Harding made submissions about Mr. Toor in closing argument of that action to the jury. Those comments gave rise to an application by ICBC for a mistrial. The trial judge granted the mistrial. Following the order for the mistrial, Mr. Harding gave an interview to Mr. Mulgrew. Mr. Mulgrew then published an article which contained Mr. Harding's comments in the Vancouver Sun newspaper. Those comments are alleged to be defamatory. It is unnecessary for the purposes of this appeal to repeat the entire contents of the alleged defamatory comments or the newspaper publication which followed. I will review those comments which are germane to these reasons.

A. Decision of the Master

[8] The Court below reviewed the facts and then answered three questions:

> 1. Whether the application to prune should be considered under Rule 9-5 or Rule 9-6?
>
> The Master concluded that Rule 9-5(1)(a) was more appropriate than Rule 9-6, the latter resulting in litigation by installments or slices, an approach which could produce the opposite of judicial economy.
>
> 2. Whether the impugned words are reasonably capable of a defamatory meaning in relation to the plaintiffs?
>
> The Master found those words would be given the meaning alleged when considered by a reasonable person or ordinary intelligence and not the deduction of some unusual meaning, citing *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 516 (C.A.) at para. 10. Master Scarth reviewed the alleged statements made by Mr. Harding and found there was a connection between Mr. Toor to the motor vehicle accident.
>
> 3. Whether a reasonable person could consider that a witness who gives ludicrous testimony for one party is doing so because he is biased in favour of the other party.

> The Master found that the defendants did not meet the onus of establishing that it is plain and obvious that a reasonable person would not arrive at the meanings pleaded.

[9] The Master at para. 21 also found the same conclusions applied to the republication by the Vancouver Sun defendants.

[10] Finally, the Master wrote at para. 22:

> In dismissing the application today, I am mindful that, except in the clearest of cases, the gatekeeper function of a trial judge is best reserved for trial, to be performed in the context of the evidence as a whole.

III. GROUNDS OF APPEAL

[11] Mr. Harding submits the Master erred by declining, as a matter of law, to remove the portion of the case represented by the impugned words. He submits that given there are limited defences available, the defendant in a defamation action is in an unusually difficult position. Mr. Harding submits that the meaning the impugned words are capable of having is a question of law, while the meaning words have in the mind of a reasonable reader is a question of fact. Mr. Harding argues the Master erred in her application of the former question of law as the basis of this appeal.

[12] Counsel cited several cases, including *Lund v. Black Press Group Ltd.*, 2007 BCSC 559. In that case the Court stated at para. 4:

> In determining whether it is plain and obvious that defamation pleadings disclose a reasonable cause of action, the court will assess whether the words complained of are reasonably capable of bearing the meanings alleged. In making such an assessment, the court will determine whether reasonable persons of ordinary intelligence would read the words complained of as lowering the plaintiff in the estimation of right thinking members of society and cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem 0citation omitted].

[13] As with distinguishing factors between many cases, the details are critical. The pleadings in *Lund* contain conclusions about the improper exercise of influence of a political organization committing a breach of public trust or lying not factually supported by the descriptions in the pleadings. The lack of connection between the alleged exercise of political influence and the actions of the plaintiff in *Lund* was patently obvious. It was a plain and obvious case quite unlike the case now before

this Court. In this case, the Master concluded the defamation went to the capacity of the expert witness in question to give expert testimony.

[14] Counsel for the Vancouver Sun defendants reiterated the argument and also cited a number of cases including: *Abermin Corporation v. Granges Exploration Ltd. et al.* (1990), 45 B.C.L.R. (2d) 188 (C.A.); *Northland Properties Ltd. v. Equitable Trust Co.* (1992), 71 B.C.L.R. (2d) (124) (S.C.), both dealing with an appeal from a Master. I will discuss that issue further below. Counsel also reviewed the contents of the statement attributed to Mr. Harding in the notice of civil claim including those words which counsel asserted were complimentary to the plaintiff.

[15] The submission for the defendant was that Mr. Harding made positive or complimentary comments about Mr. Toor including that Mr. Toor was previously called as an expert by Mr. Harding and that Mr. Toor often testified for plaintiffs. It is submitted these positive comments would not permit anyone reading the newspaper article to conclude that the comments in the article were capable of meaning that the plaintiff was biased or unethical.

[16] The recent Court of Appeal decision in *Johnstone v. Gardiner*, 2012 BCCA 184 weighs against this submission.

IV. PLAINTIFFS' SUBMISSION

[17] Counsel for the plaintiffs submits that Rule 9-6 is not appropriate to support this application relying on *Lund* and *Millito Estate (Re)* (1984), 52 B.C.L.R. 269. Counsel argues that this is not a plain and obvious case for striking or pruning the impugned words. In their view, if there is doubt it must be resolved by permitting the pleading to remain for trial. The review of this Court is not to be of single words taken in isolation but as a broad matter of impression: see *Mantini*. Definitions of the impugned words were provided from a number of sources. It is strongly suggested the recognized usage and meaning of the impugned words was within the meanings for the defamatory statements spoken by Mr. Harding when considered by persons of ordinary intelligence whose considerations include the context of the words and their mode of publication.

V. DISPOSITION

[18] *Abermin Corporation* is authority for the proposition that an appeal from a Master on a purely interlocutory matter should not be entertained unless the order is clearly wrong. However, when the Master's order is vital to the final issue in the case, a rehearing is an appropriate form of appeal. Unless there is an application for the admission of fresh evidence the rehearing proceeds on the basis on the material before the Master.

[19] In the rehearing, the judge hearing the appeal may substitute his or her own view for that of the Master. The question remains then: should the Court substitute a different opinion than that of the Master? The "plain and obvious test" for striking a pleading and dismissing an action is a very stringent test. According to *Johnstone,* it is rarely applied. It is interesting to note in that recent case the Court of Appeal dealt only with Rule 9-5(1)(a) and the Court of Appeal made no reference to Rule 9-6. The Court was clearly aware of the two rules.

[20] Upon review of all of the material cited by counsel I am of the view that the decision of the Master should be upheld as this is not a plain and obvious case where the pleadings should be struck or pruned under either Rule 9-5 or 9-6. I am satisfied that the meanings of the impugned words present a genuine issue to be decided at trial.

[21] The appeal is dismissed with costs payable to the plaintiffs.

"Ball J."