COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***ICBC v. Patko,***
2008 BCCA 65

Date: 20080218
Docket: CA034815

Between:

Insurance Corporation of British Columbia

Appellant
(Plaintiff)

And

Jonathen James Patko

Respondent
(Defendant)

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Smith

F.G. Potts
R.N. Hamilton — Counsel for the Appellant

G. Battista
G. Chen — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
November 13, 2007

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

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Mr. Justice Mackenzie
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction:

[1] The plaintiff ICBC appeals from the order of the British Columbia Supreme Court pronounced by Madam Justice Fisher in chambers on 15 February 2007 dismissing its application for an injunction restraining ICBC from paying to the defendant Jonathen Patko (J. Patko) the sum of $200,000. As evidenced by a settlement agreement made between the parties on 15 January 2007, ICBC agreed to pay that sum to J. Patko to settle his claim for damages for injuries and other losses suffered as the result of an accident in August 1986. This accident was caused by the negligence of ICBC's insured, J. Patko's mother, Janet.

[2] ICBC claims that J. Patko was involved in another accident that occurred on 27 January 2005 involving a vehicle leased to him, operated by him, and insured by ICBC. ICBC alleges that J. Patko provided false

information to ICBC with respect to this accident. On 10 January 2007 ICBC commenced this action against J. Patko and his uncle Frank Patko (F. Patko), alleging losses suffered as a result of their fraud in providing the false information. ICBC says that as a result of that fraud it paid out almost $56,000 to settle claims arising from the January 2005 accident. It also claims punitive damages.

[3] ICBC says the injunction to stop it from paying the 1986 settlement funds owing to J. Patko was necessary, and that if it was not granted there was a real risk J. Patko would dissipate his settlement monies and would then be unable to satisfy ICBC's claim to recoup the payments it made on account of J. Patko's alleged fraud in 2005.

[4] The issue before the learned chambers judge was whether a "*Mareva*" injunction should be issued to prevent J. Patko from receiving all or part of the settlement funds. The judge considered the primary question to be whether the nature of J. Patko's alleged fraud was sufficiently serious to bring it within the "fraud exception" to the general rule prohibiting prejudgment execution (reasons para. 13).

[5] After examining the evidence and reviewing the authorities, the learned chambers judge was not persuaded that there was a real risk the asset would be dissipated (para. 42). She was thus not satisfied that there was a factual basis on which a *Mareva* injunction could be granted. As a result, the chambers judge dismissed the application.

[6] However, the judge granted a partial stay of her order to protect ICBC's position pending appeal.

[7] The entered order from which this appeal is taken provides:

> 1. The Plaintiff's application for an injunction pending resolution of this action, restraining the payment of the sum of Two Hundred Thousand Dollars ($200,000) from the Plaintiff herein to Jonathen James Patko in respect of a settlement of Supreme Court Action No. M033505, Vancouver Registry, wherein the said Jonathen James Mahovlich also known as Jonathen Patko is Plaintiff, Janet Patko also known as Janet Mahovlich and John Patko are Defendants and the Insurance Corporation of British Columbia as Third Party is hereby, on the terms set out herein, dismissed;
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> 2. This Order is hereby stayed until and including February 23, 2007 and the Plaintiff herein is authorized to not pay to the Defendant Jonathen James Patko the sum of One Hundred Thousand Dollars ($100,000) of the settlement funds until the expiration of this stay, on condition that:
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> (a) One Hundred Thousand Dollars ($100,000) of the settlement funds shall forthwith be paid in trust to the law firm Murphy Battista for the Defendant, Jonathen James Patko;
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> (b) The remaining One Hundred Thousand ($100,000) Dollars of the settlement funds shall be held by Lindsay Kenney LLP, the solicitors for the Plaintiff, and shall be placed into an interest-bearing trust account, with the interest accruing for the benefit of the Defendant, Jonathen James Patko, pending further Order of the Court or expiry of the stay herein ordered;
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> (c) Upon payment of the Settlement Funds as set out in (a) and (b) herein, Lyle Harris, Esq. of the law firm Harris Brun shall be released from all undertakings relating to the settlement funds and shall be at liberty to finalize the settlement reached between the Plaintiff herein and the Defendant, Jonathen James Patko, in Supreme Court of British Columbia Action No. M033505, issued out of the Vancouver Registry.
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> 3. The Defendant, Jonathen James Patko shall have his costs of this application.

[8] On 7 March 2007, Madam Justice Levine granted ICBC leave to appeal the judgment of Madam Justice Fisher pronounced 15 February 2007. Madam Justice Levine also ordered that the stay and the conditions of the

order dated 15 February 2007 remain in force pending the hearing and determination of this appeal. The order was entered on 21 March 2007.

[9] For the following reasons, I would dismiss the appeal and set aside the partial stay ordered by Madam Justice Fisher and continued by Madam Justice Levine.

II. Facts:

[10] The facts on which the *Mareva* injunction application was based are as follows. In 2005, J. Patko leased a 2004 Ford F150 truck, insuring it in his name with ICBC under a policy in effect from 5 January 2005 to 4 January 2006.

[11] At about 2:15 a.m. on 27 January 2005, J. Patko's truck collided with a hydro pole. The vehicle was seriously damaged in the collision. Three occupants were in the truck at the time, one of whom was Amanda Hunt, a friend of J. Patko's. Although injured in the accident, all three occupants fled the scene before police arrived.

[12] Later that day, at about 5:45 p.m., J. Patko telephoned ICBC to report the accident. He told the claims adjuster that he was at home on the night of the accident and that his uncle, F. Patko, was driving the truck when the accident occured. F. Patko later gave a statement to ICBC in which he stated that he had borrowed the truck from J. Patko and was giving two women – one of whom was a friend of J. Patko's (Ms. Hunt) – a ride home. Ms. Hunt gave a statement confirming that F. Patko was driving at the time of the accident.

[13] F. Patko and the two women filed bodily injury claims. J. Patko filed a claim for the total loss of the truck. ICBC paid J. Patko's claim for the damage to the truck, the bodily injury claims of the two women and property damage to B.C. Hydro and the City of Port Coquitlam. It did not pay F. Patko's claim. The total amount paid out by ICBC was $55,818.40.

[14] ICBC began an investigation into the circumstances of the accident. In addition to the appellant's investigation, the police initiated an investigation into the identity of the driver of the truck. The investigators were aware that if J. Patko was the driver at the time of the accident, he would have been in breach of the terms of a curfew imposed upon him pursuant to a recognizance of bail.

[15] In their investigation, the police obtained evidence showing that J. Patko had been at a cabaret on the night of 27 January 2005. They also obtained a statement from Ms. Hunt admitting that J. Patko was driving the truck that night, and explaining that she lied to ICBC because she did not want to get J. Patko into trouble for breach of his curfew. In March 2005 the police charged J. Patko with breach of his recognizance. In July 2006, J. Patko pleaded guilty to that charge.

[16] In this action, ICBC claims that J. Patko, and not F. Patko, was driving the truck at the time of the accident. ICBC claims that J. Patko lied to ICBC because he did not want to be charged with a breach of his recognizance of bail. ICBC claims that J. Patko and F. Patko "wrongfully and maliciously conspired together in a joint enterprise to deceitfully cheat, hoodwink, defraud and injure" ICBC, and to that end, caused, required or conspired with each other to report falsely that F. Patko was driving the truck at the time of the accident. ICBC says that the false statements rendered J. Patko's insurance void and, as a result, it is entitled to be indemnified by J. Patko for the amount paid out under the insurance. It also claims punitive damages of up to $100,000.

III. The Chambers Judge's Reasons:

[17] The learned chambers judge referred to the court's jurisdiction to grant an interlocutory injunction provided by s. 39(1) of the ***Law and Equity Act***, R.S.B.C. 1996, c. 253. She reviewed the law concerning the grant of an injunction to freeze assets before judgment, and summarized what the applicant must show:

(a) the plaintiff must demonstrate that it has a strong *prima facie* case;

(b) the plaintiff must show that there is a real risk of assets being dissipated before a judgment is obtained;

(c) in British Columbia the plaintiff need not demonstrate an improper purpose to the anticipated dissipation of assets;

(d) the dissipation of assets must have the effect of hampering or defeating the plaintiff's attempts to realize on any judgment that may be obtained; and

(e) the risk of dissipation may be inferred from evidence showing the plaintiff's strong *prima facie* case (paras. 33-38).

She held that the court should take a flexible approach considering the interests of both parties:

> [37] Applying the flexible approach in ***Mooney v. Orr***, the court may consider the interests of both parties, taking into account a number of factors, including the strength of the plaintiff's case, the nature of the transaction giving rise to the action, the risks inherent in that transaction, the amount of the claim, the defendant's assets and the history of the defendant's conduct.

[18] The chambers judge held that the defendant's alleged fraud was serious; that if ICBC proved its claim, the plaintiff's insurance would be void, and ICBC would be entitled to indemnity from him; and that on the evidence the judge could infer that the defendant was a dishonest person who could not be trusted.

[19] However, she held that the evidence would not support an inference of a real risk that the defendant would dissipate the monies payable to him so that ICBC would be frustrated in its attempts to realize on the judgment it might obtain.

IV. Appeal:

[20] ICBC alleges a number of errors. It says the judge erred in holding that the defendant was obliged to show a real risk that the defendant would dissipate the asset. It says the judge erred in holding that ICBC had failed to show there was a real risk that the defendant would dissipate the asset. It says the judge erred in distinguishing degrees of fraud, and in holding that the defendant's fraud was not serious enough to establish the appellant's right to an injunction. ICBC says the judge erred in relying upon authorities not referred to or relied upon by either party. And it says the judge erred in failing to distinguish between ICBC's roles in the 1986 tort action and the 2007 fraud action.

[21] For his part, the defendant contends that the judge did not err in following the flexible approach described in ***Mooney v. Orr*** (1994), 100 B.C.L.R. (2d) 335, [1995] 3 W.W.R. 116 (S.C.) (***Mooney No. 2***) and submits that this Court should not interfere with the judge's exercise of her discretion.

V. Analysis:

[22] The granting or refusal of a *Mareva* injunction is a discretionary order. The onus on a party seeking to appeal a decision based on the exercise of judicial discretion is a substantial one: ***A.B. v. British Columbia (Securities Commission)***, 2004 BCCA 249 at para. 11. The order will not be interfered with unless the judge erred in principle, clearly and demonstrably misconceived the evidence, or made an order which has resulted in a clear injustice: ***Canadian Brodacasting Corporation v. C.K.P.G. Television Ltd.*** (1992), 64 B.C.L.R. (2d) 96 (C.A.), cited in ***Silver Standard Resources Inc. v. Joint Stock Co. Geolog,*** (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196, [1998] B.C.J. No. 2298 (QL) (C.A.) at para. 11.

1. Must the applicant show a real risk that assets will be dissipated?

[23] ICBC asserts that Madam Justice Fisher erred in law by failing to follow established British Columbia authority holding that victims of fraud may apply for and obtain an injunction as security for their damages sought in the litigation without having to show that there is a real risk the defendant will dissipate assets.

[24] In my view, Madam Justice Fisher did not err in her interpretation of the authorities. Madam Justice Fisher

applied the "flexible approach" from ***Mooney No. 2***, the leading case with respect to the test for granting a *Mareva* injunction in British Columbia. The approach in that case was approved by this Court in ***Silver Standard Resources Inc. v. Joint Stock Co. Geolog***, *supra*. This approach has been recently affirmed by a five-judge panel of this Court in ***Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.***, 2007 BCCA 481, [2007] B.C.J. No. 2182 (QL).

[25] Under the flexible ***Mooney No. 2*** approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: ***Mooney No. 2*** at para. 43. In order to obtain an injunction, the applicant must first establish a strong *prima facie* or good arguable case on the merits. Second, the interests of the two parties must be balanced, having regard to all the relevant factors, to reach a just and convenient result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment: ***Mooney No. 2*** at para. 44.

[26] The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach: ***Tracy*** at para. 45. In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted": ***Silver Standard*** at para. 21. Thus, though a party may apply for and obtain an injunction as security for damages sought in the litigation without showing that there is a real risk the defendant will dissipate assets, in most cases a real risk of dissipation must be established before a party will be granted a *Mareva* injunction in British Columbia.

2. Did the judge err in holding that ICBC had failed to show there was a real risk that the defendant would dissipate the asset?

[27] Madam Justice Fisher held that ICBC had made out a strong *prima facie* case of fraud against Mr. Patko. ICBC argued that having established a strong *prima facie* case of fraud, the onus was on the defendant to show that his assets would not be dissipated before ICBC could execute on its judgment for fraud. The defendant filed no affidavit evidence as to his assets or other means. ICBC says the judge should have inferred the risk of dissipation.

[28] In cases alleging serious fraud, the risk that assets will be dissipated may be inferred from the evidence related to the plaintiff's strong *prima facie* case: ***Netolitzky v. Barclay****,* 2002 BCSC 1098 at para. 31*.* This inference is permissive, not mandatory. The existence of a strong *prima facie* case of fraud does not lead inevitably to a finding that there is a real risk of dissipation of assets.

[29] In determining whether such a risk exists, the court must assess whether, in all of the circumstances, the defendant will deal with the assets in a manner that will interfere with or defeat the plaintiff's attempts to realize on any judgment it might obtain: ***Caisse Populaire Laurier D'Ottawa Ltée. V. Guertin et al****.* (1983), 36 C.P.C. 63, [1983] O.J. No. 2221 (QL) (Ont. H.C.J.) at para. 17, cited in ***Netolitzky*** at para. 27.

[30] In this case, Madam Justice Fisher considered the evidence and the authorities. There was no evidence showing that the defendant had dissipated any assets since ICBC commenced its suit. Although ICBC established a strong *prima facie* case of fraud, the law in this province does not impose an onus on the defendant to show that his assets would not be dissipated before ICBC could execute on a judgment.

[31] Importantly, Madam Justice Fisher was not able to conclude, based on the circumstances of this case, that there was a real risk of dissipation of assets before judgment could be obtained. She held that the fraud alleged to have been committed by J. Patko was different in kind or degree from the frauds allegedly committed in such cases as ***ICBC v. Leland*** (1999)*,* 91 A.C.W.S. (3d) 49, [1999] B.C.J. No. 2073 (QL) (S.C.) and ***Netolitzky***. In those cases the trial judge was able to infer that there was a real risk of dissipation of assets. Madam Justice Fisher noted that in ***Leland*** and ***Netolitzky*** the alleged frauds "involved substantial taking of assets from the plaintiffs in a manner where the fraud was concealed and from which a clear inference could be drawn that the defendant would continue to act in the same way" (para. 40). Here, the alleged fraud committed by J. Patko did not involve any complex taking of property from which inferences could be drawn that the fraud would continue. Rather, the alleged fraud "involved lies and misleading statements for the apparent purpose of avoiding criminal prosecution

and obtaining insurance for the damage to his vehicle" (para. 42).

[32] Madam Justice Fisher declined to infer in the circumstances that there was a real risk that the asset would be dissipated so as to frustrate the judgment. She found that J. Patko's conduct, though demonstrating a propensity for dishonesty (para. 42), was not sufficient to support the inference of a real risk that the asset would be dissipated. The drawing of inferences is part of the judge's fact finding function. I can see no basis for concluding that the judge erred in refusing to draw the inference of risk.

3. Did the Judge err in holding that the defendant's fraud was not sufficiently serious to establish the appellant's right to an injunction?

[33] In her reasons for judgment the learned chambers judge said:

> [13] The issue is whether a Mareva injunction should be issued to prevent Jonathen Patko from receiving all or part of the settlement funds. The primary question is whether the nature of the alleged fraud in this case is of sufficient seriousness to place it within the fraud exception to the general rule prohibiting prejudgment execution, and to support an inference that Mr. Patko will dissipate the funds.

[34] ICBC asserts that the learned chambers judge erred in drawing a distinction based on the seriousness of the fraud alleged or established by the evidence.

[35] On my reading of her reasons, Madam Justice Fisher essentially asked whether the circumstances of fraud alleged in the case at bar were similar to those cases of fraud in which a real risk of dissipation was inferred.

[36] Madam Justice Fisher began from the principle that, as noted above, a judge may infer a real risk of dissipation of assets from a *prima facie* case of fraud. This inference is permissive, not mandatory. She then compared various cases in which the risk of dissipation was inferred to the circumstances in the case at bar. She was not persuaded that the circumstances in this case led to the inference that there was a real risk of dissipation of assets. As a result, she declined to draw the permissive inference. It was reasonably open to the judge on the evidence before her to reach this conclusion. I can see no basis on which this Court could say that a palpable and overriding error of fact was made.

4. Did the judge err in relying upon authorities not referred to or relied on by either party?

[37] Madam Justice Fisher referred to some case authorities not cited to her by either party. There was no legal error in her doing so. Though it is improper for a judge to decide a case on issues that were not argued (***Pacific Wash-A-Matic Ltd. v. R.O. Booth Holdings Ltd.*** (1979), 105 D.L.R. (3d) 323 (B.C.C.A.)), a judge may seek assistance on the argued issues beyond the authorities that counsel provides. It was proper for Madam Justice Fisher to consult, refer to or rely on additional authorities.

5. Did the judge err in failing to distinguish between ICBC's roles in the 1986 tort action, and the 2007 fraud action?

[38] ICBC settled Mr. Patko's tort claim after this action against him was commenced. The trial judge drew the inference that ICBC overlooked the fraud claim in making the settlement and the injunction application was motivated by embarrassment in making the settlement in the circumstances. This was not an inference advanced by counsel for Mr. Patko at trial and it appears to have occurred to the trial judge later. ICBC points out that it had a duty to its insured defendant in the tort action, Mrs. Patko, to use reasonable diligence to settle Mr. Patko's claim against her, and ICBC could have breached its good faith duty to her if it had delayed settlement because of its fraud claim against Mr. Patko. ICBC submits that there was no ulterior motive in advancing its application for an injunction and ICBC would have made this position clear to the trial judge if counsel had been given the opportunity to do so. The adverse inference drawn by the trial judge was an error, but in my view, it does not materially call into question her overall analysis of the issue.

[39] I would also observe that there was evidence in this case on which ICBC could have denied liability to indemnify its insured J. Patko, because of his consumption of alcohol. If it had denied liability on that basis, ICBC would have been obliged to pay out all of the claims it in fact paid, except for the costs of investigation. It would then have been in the position of having to seek recovery from its insured of those sums.

[40] In those circumstances, ICBC would have had no basis for refusing to pay J. Patko the proceeds of its earlier settlement with him. And it would have had no basis for seeking to enjoin payment to him of the monies he was owed. There is no reason why ICBC should be in any better position against its insured by reason of a denial of liability based on fraud, than a denial of liability based on consumption of alcohol.

VI. Conclusion:

[41] I agree with the statement of Madam Justice Fisher that "[t]o extend the fraud exception to these particular circumstances would not…be just and equitable" (para. 48). The granting of a *Mareva* injunction is an extraordinary remedy. To infer a real risk of dissipation of assets from the circumstances of this case would be to expand the scope of the *Mareva* injunction beyond its permissible limits.

VII. Order:

[42] For the reasons as set out above, I would dismiss the appeal and set aside the partial stay ordered by Madam Justice Fisher and continued by Madam Justice Levine. I would also direct that the settlement funds of $100,000 plus accrued interest held by ICBC's solicitors be paid to the respondent, or his solicitors.

[43] The respondent is entitled to the costs of the appeal.

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Mackenzie"

I agree:

"The Honourable Mr. Justice Smith"