Date: 19990916
Docket: C993161
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

INSURANCE CORPORATION OF BRITISH COLUMBIA

PLAINTIFF

AND:

CRAIG FRED LELAND, JEAP THRILLS SERVICES LTD., CRAIG FRED LELAND doing business as JEEP THRILLS SERVICES, JOHN DOE, NANCY PATRICIA LELAND, and L & S HOLDINGS LTD.

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE CLANCY

Counsel for the Plaintiff: F.G. Potts

Counsel for all Defendants, except John Doe: Vancouver, B.C. P.B. Gorgopa

Place and Date of Hearing: Vancouver, B.C. August 27, 1999

[1] Mr. Leland and his wife, Nancy Patricia Leland, carry on an automotive business in the District of Maple Ridge, British Columbia through a corporation, Jeap Thrills Services Ltd. ("Jeap Thrills"). Mr. Leland also operates through a proprietorship, Jeep Thrills Services ("Jeep Thrills"). Both entities have premises at 11570 Kingston Street, Maple Ridge, B.C.

[2] The following allegations are made in the statement of claim:

i) The defendant, John Doe, is an associate and agent of Mr. Leland;

ii) Mrs. Leland is a clerk or payroll supervisor. The identity of her employer is not disclosed;

iii) The defendant, L & S Holdings Ltd., is a corporation of which Mr. Leland is the sole officer, director and guiding mind;

iv) Mr. and Mrs. Leland are the sole officers, shareholders and guiding minds of Jeap Thrills and Mr. Leland is its sole director;

v) Insurance Corporation of British Columbia ("ICBC") was the insurer of 19 registered motor vehicle owners and three lessees of motor vehicles. It says further that 10 unidentified insureds were insured by it;

vi) The registered owners, lessees and unidentified insureds ("the claimants") made claims for loss or damage to their motor vehicles when they were stolen. In each case, the vehicles have either not been recovered or have been damaged during the theft. ICBC made payments to the claimants in compensation for their losses under their contract of insurance.

ICBC paid out $311,634.56 to the claimants. Consequentially, legal and beneficial ownership of the vehicles was transferred to ICBC. It is, accordingly, subrogated to the rights of the claimants and thereby entitled to immediate possession of the motor vehicles;

vii) There was a conspiracy among Mr. Leland, Jeap Thrills, Jeep Thrills, and John Doe to strip automobile parts from the stolen motor vehicles for the purpose of sale to unknown parties or for use in the various businesses of Mr. Leland;

viii) There were several schemes operated by Mr. Leland and his co-conspirators which were used to effect the theft and conversion of the motor vehicles;

ix) Mr. Leland has been charged with criminal offences in connection with the schemes.

[3] ICBC alleges theft, conversion and conspiracy against the defendants and that Mrs. Leland and L & S Holdings Ltd. have been unjustly enriched by the schemes.

[4] ICBC seeks a declaration that the assets of the defendants are impressed with a trust in its favour and that the defendants are liable to account for monies or assets and benefits obtained through the various schemes alleged. To the extent that the defendants have acquired money or assets for which they cannot account, ICBC claims entitlement to the equitable remedy of tracing and for an accounting. It claims for general, punitive or exemplary damages, interest and court costs.

[5] On June 22, 1999 Low J. granted an application for a Mareva injunction against Mr. Leland, Jeap Thrills and Jeep Thrills preventing those defendants from alienating assets.

[6] The defendants, other than John Doe, now bring applications to strike out certain paragraphs and partial paragraphs in the statement of claim and to set aside the Mareva injunction.

The Application to Strike

[7] The application is brought pursuant to Rule 19(24) of the Rules of Court which provides for striking out or amending the whole or part of a pleading on four grounds:

(a) it discloses no reasonable claim or defence as the case may be,
(d) it is unnecessary, scandalous, frivolous or vexatious,
(c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
(d) it is otherwise an abuse of the process of the court.

[8] Upon the hearing of the application, the court may grant judgment, order the proceeding to be stayed or dismissed and may order costs to be paid as special costs.

[9] In Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, the court confirmed that the test on an application to strike out a pleading is whether it is "plain and obvious" that the statement of claim discloses no reasonable claim. All of the facts alleged by the plaintiff in the statement of claim are assumed to be true. The complexity or novelty of the question or questions raised by the plaintiff should not constitute a bar to the trial taking place. The relevant portions of the statement of claim will only be struck if a cause of action based on the impugned allegations is bound to fail.

[10] The first issue raised by the defendants concerns the allegations of conversion and conspiracy. They submit that while the claim in conversion as against Mr. Leland is a proper plea, the claim of conspiracy is unnecessary and superfluous and merged into the tort of conversion. The defendants rely on Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd. (1991), 3 O.R. (3d) 684 (Ont. Gen. Div.) where the court considered pleadings which alleged both fraud and conspiracy. Lang J. held that where a tort is pleaded, the additional plea of conspiracy added nothing to the argument. He said at p. 689:

Where the tort is charged and an allegation of conspiracy is superfluous and will result in prolonged proceedings with no added advantage, the claim of conspiracy will be struck:

[11] The defendants rely as well on British Columbia (Milk Marketing Board) v. Bari Cheese Ltd., [1993] B.C.J. No. 1748 (QL) where the court discussed the above principle. There, however, the court was not dealing with an application to strike. At the end of the trial, the court said only, that in normal circumstances if the tort of deceit had been proven, it is unnecessary to consider conspiracy. That finding is consistent with the decision of the Supreme Court of Canada in Hunt v. Carey, supra. The following passage from that decision provides a complete answer to Sun Life, supra, which I decline to follow:

Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in para. 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants submission that "[u]pon proof of the commission of the tortious acts alleged" in para. 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This is a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge. (pp. 344-345)

[12] I conclude that the torts of conspiracy and conversion may be pleaded in the action. The allegations of conspiracy found in paragraphs 18, 19, 20 21, 22, 23, 24, 25 and 27 will not be struck out. The claim is not bound to fail.

[13] The defendants further seek to strike out allegations of unjust enrichment and constructive trust. After making the argument that an action in conversion is a purely personal action resulting in judgment for pecuniary damages only (Steiman v. Steiman et al (1982), 18 Man. R. (2d) 203 (C.A.), the defendants submit that the only proper remedy is a judgment for compensatory damages for conversion. The claims of unjust enrichment and constructive trust are inappropriate. I understand that argument to be a repetition of the merger argument advanced in connection with the claims in conspiracy and conversion. It cannot succeed for the same reasons. The claims of unjust enrichment and constructive trust do not merge with the claim in conversion. It is for the trial judge to decide whether the claims can succeed.

[14] An additional argument in connection with constructive trust and unjust enrichment is that the pleadings do not allege a fiduciary relationship between the plaintiff and the defendants, nor between the insureds and the defendants. The defendants suggest that, without such a claim, there can be no trust since a fiduciary relationship is a prerequisite to the establishment of a trust.

[15] The plaintiff referred the court to Lennox Industries (Canada) Ltd. v. Canada, [1987] F.C.J. No. 2 (Fed. Crt. Can. T. Div.), 34 D.L.R. (4th) 297. There, Reed J. held that stolen property is recoverable as are any fruits derived therefrom. The full passage from the judgment bears repetition:

> Not only is the stolen property recoverable but any "fruits" derived therefrom are recoverable as well: D.W.M. Waters, Law of Trusts in Canada (Toronto, 1974), at pp. 339 and 340; Banque Belge case). This is clearly so with respect to profits derived from misappropriated trust funds and it is equally so with respect to profits derived from the use of stolen monies. To hold otherwise would be to require a thief to return the principle (sic) amount of the funds stolen but allow him or her to keep profits derived from the use of those funds. It is also clear that when misappropriated funds, or the proceeds therefrom are mixed with the wrong doers own funds and monies are withdrawn from that mixed funds the wrongdoer will be deemed to have withdrawn his own funds first (the first out principle): Hallet's Estate (1878), 13 Ch. Div. 696, especially at p. 727; Re Oatway, [1903] 2 Ch. 356, especially at p. 360. These principles are the basis of the plaintiff's claim in the present case. (pp. 305-306)

[16] The plaintiff here alleges theft. The pleading alleging constructive trust and unjust enrichment is not bound to fail. The passage cited is a full answer, as well, to the additional argument of the defendants that since there was no breach of an equitable obligation by any of the defendants, the claim must fail.

[17] Next, the defendants seek to strike out claims for the equitable remedy of tracing, once again on the basis that no fiduciary relationship exists as between the plaintiff and defendants. The defendants rely on Re Diplock, [1948] Ch. 465 (Eng. C.A.). But, referring to the headnote, the court there found that:

> [o]ne whose money has been mixed with that of another or others may trace his money into the mixed fund (or assets acquired therewith) though such fund (or assets) be held, and even though the mixing has been done by an innocent volunteer, provided that (a) there was originally such a fiduciary or quasi-fiduciary relationship between the claimant and the recipient of his money as to give rise to an equitable proprietary interest in the claimant; (b) the claimant's money is fairly identifiable; and (c) the equitable remedy available, i.e. a charge on the mixed fund (or assets) does not work an injustice. (p. 467)

[18] That authority does not assist the defendants. On the contrary, it establishes that the plaintiff is at liberty to call evidence to bring itself within the principles laid down by the court. The claim for tracing is not bound to fail.

[19] Next, the defendants say that the claim in negligence brought against the defendant, Nancy Patricia Leland, found in paragraphs 44, 46 and 47 must fail. Those paragraphs allege that Ms. Leland owed a duty to the plaintiff to apprise herself of the nature of the business of Jeap Thrills, to keep herself informed and to act honestly, in good faith and in the best interests of Jeap Thrills. The plaintiff goes on to say that she knew or ought to have known of certain circumstances which would have put her on inquiry.

[20] There is substance to the complaint of the defendants. In Adga Systems International Ltd. v. Valcom Ltd. (1999), 43 O.R. (3d) 101 (Ont. C.A.), the court reviewed the law in respect of personal liability of directors of corporations and following Canada v. ScotiaMcLeod Inc. (1995), 129 D.L.R. (4th) 711 (C.A.) held:

> . . . officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. (at p. 112)

[21] The allegations of negligence against Ms. Leland do not allege a separate identity or interest, nor is there a separate allegation of tortious conduct. On the contrary, it is stated that, as an officer of Jeap Thrills, she owed a duty to the plaintiff. Accordingly, I would strike out paragraphs 44, 45, 46 and 47 of the statement of claim together with the claims for relief based on her negligence.

[22] That is not an end to the matter. The plaintiff may be able to properly plead a claim in negligence against Ms. Leland. The pleadings do disclose a connection between all of the parties, including Ms. Leland. In Horton Bay Holdings Ltd. v. Wilks, [1991] B.C.J. No. 3481 (QL) (C.A.), the court followed Minnes v. Minnes (1962), 39 W.W.R. 112 (B.C.C.A.) and held that if the statement of claim, as it stands or as it may be amended, discloses a question fit to be tried, it should not be struck out. Leave is granted to the plaintiff to amend the statement of claim to plead the negligence of Nancy Leland in a proper manner if it chooses to do so. If it is necessary for me to fix a time limit for the amendment, the plaintiff will have 14 days from the date of this judgment to effect the amendment.

[23] The defendants object, as well, to the use of the terms "chop shop", "scheme" and "co-conspirators". They are concerned with the pejorative nature of those terms. They rely on Sun Life, supra, where similar terms were struck out. In a case such as this where conspiracy to defraud and theft are alleged, I find that the terms are descriptive only. They should not be struck.

[24] Paragraph 11 of the statement of claim is attacked on the basis that it is irrelevant. It alleges that approximately one-third of the premium income of ICBC paid out each year is used to pay for claims involving loss or damage to property primarily in respect of motor vehicles. That allegation is said, by the plaintiff, to refer directly to its claim for punitive damages. That will be an issue before the trial judge. The paragraph should not be struck. It cannot be said at this stage that the claim for punitive damages is bound to fail.

[25] An interesting aspect of the defendants' application to strike involves a novel claim which the plaintiff wishes to put before the court. It will seek to have the court adopt what is known in the United States as the market share theory of liability. That theory arose from asbestos cases in that country. The claimants alleged an onset of asbestosis which occurred many years before the action was brought. According to the theory, if product liability is established and there were a number of producers shown to have produced that product

at the time of onset, then those producers must share liability in the same percentage as their market share. Counsel for ICBC advises that attorneys in the United States are engaged in attempts to expand the theory. An example of the type of claim advanced is found in Sindell v. Abbott Laboratories et al, 163 Cal. R.P.T.R. 132; 2 A.L.R. (4th) 1061.

[26] As I understand the submission of the plaintiff, the market share theory of liability will be argued in connection with paragraph 28 and subsequent paragraphs of the statement of claim on the basis that once the plaintiff proves the thefts of parts and vehicles and that any of the defendants have monies or assets in their hands for which they cannot account as having been acquired from sources other than thefts, then the monies or assets are impressed with a trust. That trust will be in favour of ICBC to the extent of 92.3 percent of its value since the plaintiff expects to prove that it has 92.3 percent of the insurance market in this province. Relying on Hunt v. Carey, supra, it is their submission that the claim should not be struck simply because it is novel.

[27] The defendants quite properly point out that the theory is not specifically pleaded. I can see nothing in the statement of claim which should be struck out if a claim based on the theory is bound to fail. The defendants have not applied to strike out any paragraphs on the basis that this claim must fail. I take the submission of the plaintiff therefore as simply notification to the defendants that the argument will be made. It is for the trial judge to decide whether it has been properly pleaded and if it can succeed.

[28] In paragraphs 22 and 23 of the statement of claim, the plaintiff alleges liability on the part of Mr. Leland on the basis that he aided and abetted Jeap Thrills, Jeep Thrills and John Doe in implementing the fraudulent schemes and that he encouraged John Doe to implement the schemes. No argument was advanced during submissions that persuades me that such a claim is bound to fail. Those paragraphs will not be struck out.

[29] The plaintiff agrees that some allegations should be struck. In Schedule A to the statement of claim the reference to stolen vehicles in the heading on page 1 should be deleted, as should the entire column in Schedule A quoted "Count No." In paragraph 26 of the statement of claim, the plaintiff agrees that the references to R.C.M.P. involvement following the words "Jeep Thrills" on line three should be struck. There will be an order striking out those provisions of the statement of claim.

[30] Listed vehicle no. 14 in Schedule A is shown as "no coverage." Reference to that vehicle can be struck since the plaintiff could have no subrogated interest. Vehicles numbered 23 through 32 are shown as unknown and the defendants object to their inclusion since there is no affirmative plea that they are ensured. There is a plea involving unidentified insureds in paragraph 12 of the statement of claim. There may be some element of misdescription but, if so, that can be cured by amendment. That part of Schedule A will not be struck out.

The Mareva Injunction

[31] In the order of Low J. made June 22, 1999, the defendants, Mr. Leland, Jeap Thrills and Jeep Thrills, were restrained from dealing with their assets on the terms set out in the order. The order was to remain in effect until final disposition of this action or until further order of the court. The named defendants were given leave to apply to set aside the order on giving 24 hours written notice of their intention to do so. They now bring that application.

[32] The Mareva injunction is an exception to the practice of the court of not requiring security before judgment. What is required for the obtaining of the injunction is a strong prima facie case. Once that has been established, then the court must balance the interests of the two parties in order to reach a just and convenient result. The factors considered will include the existence of assets within British Columbia for a domestic injunction such as this and "a real risk of their disposal or dissipation so as to render nugatory any judgment": Mooney v. Orr (1995), 100 B.C.L.R. (2nd) 335 at 349-51; see also: Aetna Financial Services Ltd. v. Feigelman,

[1985] 2 W.W.R. 97 at 118-119 (S.C.C.).

[33] There is, as well, authority for the proposition that exceptions to the principle that the court will not grant execution before judgment are cases where there is substantial evidence supporting an allegation of fraud or theft: Mills and Mills v. Petrovic et al, 30 O.R. (2d) 238, 118 D.L.R. (3d) 367 (Ont. H.C.).

[34] As pleaded, the plaintiff alleges schemes referred to as "the vehicle service scheme", "the switched numbers scheme" and "the chop shop scheme" implemented by Mr. Leland by himself or by his control and ownership of Jeap Thrills and Jeep Thrills, or through his agent, John Doe. As described, all of those schemes were wrongful or fraudulent. ICBC alleges a consequential loss of $311,634.56 on account of replacement of claimants' motor vehicles. Counsel advised that, ultimately, ICBC may seek to prove a much greater loss.

[35] The defendants submit that a good arguable case has not been established. They reiterate their arguments made in support of striking out certain paragraphs of the statement of claim. I dismissed those applications on the ground that they were not bound to fail. I go further and say that based on the affidavit material filed I am satisfied there is a strong prima facie case against those defendants caught by the terms of the injunction. The defendants allege that some of that evidence is inadmissible since it was given on information and belief without revealing the source. That objection was met by the filing of a second affidavit of Lynn Cousins dated August 3, 1999.

[36] The defendants characterize some of the evidence as pointing to the participation of the brother of one of the claimants in the fraudulent scheme. That allegation has been denied and is for the trial judge to resolve.

[37] The material shows that there are assets within the jurisdiction. The defendants say there is no evidence of any real risk that those assets will be removed from the jurisdiction before judgment is obtained and satisfied because Mr. Leland has lived in the area for 20 years and has no connection or ties to other jurisdictions. I agree with counsel for ICBC that the leaving of the jurisdiction by Mr. Leland is not the issue. If he is the author of, or a participant in, fraudulent schemes, the danger is that he will arrange for the removal of the assets, not that he will leave. I agree with Galligan J. in Mills and Mills, supra, that where there is evidence of fraud or theft it is not unreasonable -

> to permit equity to give a person who has been defrauded or stolen from by a defendant, some measure of relief that would not be available to a plaintiff in an ordinary action where fraud or theft are not issues. (p. 3).

[38] Low J. was alive to that principle. He said:

> Risk of removal or alienation of these assets is established merely by the evidence strongly suggesting fraudulent criminal activity by Mr. Leland. (p. 3).

[39] I decline to set aside the Mareva injunction.

Costs

[40] The defendants have been largely unsuccessful. Costs will be to the plaintiff in the cause.

"Clancy, J."

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The Honourable Mr. Justice Clancy