IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120104
Docket: M95149
Registry: New Westminster

Between:

Kin Ning Tong

Plaintiff

And:

Sharon Ann Lanser, GMAC Leaseco Corporation/La Compagnie GMAC Location and Infocus Commerce Solutions Ltd.

Defendants

Before: Master Keighley

Oral Reasons for Judgment

In Chambers
January 4, 2012

Counsel for Plaintiff:	S.J. Turner
Counsel for Defendants:	S.W.K. Urquhart
Place and Date of Hearing:	New Westminster, B.C. January 4, 2012
Place and Date of Judgment:	New Westminster, B.C. January 4, 2012

[1] **THE COURT:** This is an application by the defendant Sharon Ann Lanser to have this matter removed from Rule 15-1, the fast track, in the sense that that defendant seeks an order that the provisions of that rule no longer apply to this action.

[2] The application is brought very much on the eve of trial. The trial of this matter, which is scheduled for 10 days, is to begin on January 9th, five days from now.

[3] The underlying action arises out of a motor vehicle accident which occurred more than eight years ago. The accident, counsel indicated, occurred on November 3rd of 2003.

[4] This action was commenced almost on the expiration of the two year limitation period, on the 1st of November, 2005, and in it the plaintiff claimed some significant injuries, injuries to the neck, shoulders, back, chest, right hand, leg, left knee, left ankle, bruising, an indication that he suffered from headaches, insomnia, sleeplessness, fatigue, depression, and perhaps some other complaints that I am unaware of at this point.

[5] The defendant filed a defence denying liability on January 12th of 2006.

[6] The plaintiff filed a notice of trial on the 28th of September of 2007 setting the matter down for what was at that time anticipated to be a five day trial beginning January 5th of 2009.

[7] Very promptly thereafter as the rule required, defence counsel delivered a notice requiring trial by jury on the 18th of October, 2007.

[8] On or about February 28th, 2008, the parties entered into a consent order in another action, also commenced in this registry, to have that matter tried together with and at the same time as this matter. At the end of that year, in December of 2008, plaintiff's counsel withdrew.

[9] On the 5th of January, 2009, an application to adjourn the trial was brought before Justice Josephson, who did adjourn the trial and ordered a pre-trial conference to be held on February 4th of 2009 to fix a new trial date.

[10] That pre-trial conference was dealt with by my colleague Master Caldwell, who on the 4th of February, 2009, directed that the trial should be set for March 15th, 2010, for five days, that costs thrown away in the actions be awarded to the defendants in any event of the cause, and that a further pre-trial conference be scheduled for the 28th of April, 2009.

[11] Master Taylor presided over that further pre-trial conference. He ordered that a further pre-trial be scheduled for July 2nd and that the defendants be awarded the jury fees paid in the amount of $1,000 as a result of the adjournment of the January 5th, 2009 trial in addition to costs thrown away in the actions.

[12] On or about July 22nd of 2009, Ms. Lindsay, who currently is counsel of record for the defendants in this matter, came on board and filed a notice of appointment of change of solicitor.

[13] It appears that previous defence counsel filed a requisition rescheduling the pre-trial conference from July 2nd, 2009, to October 29th, 2009, and that took place on the 22nd of June of that year.

[14] The firm of Slater Vecchio, which now represents the plaintiff, although not at that time on record for the plaintiff, contacted defence counsel on or about October 21st, 2009, requesting a 30 day adjournment of the pre-trial conference scheduled, as I indicated, for October 2009, as they were awaiting the production of certain records before making a determination as to whether they would come on the record for the plaintiff.

[15] Defence counsel did not consent to the adjournment of the pre-trial conference, but it appears that a further pre-trial conference was in any event held on January 12th, 2010. In the intervening period, Slater Vecchio had determined to take the plaintiff's retainer and sought to adjourn the January 12th, 2010 pre-trial.

[16] Some discussion then took place, or perhaps more accurately correspondence passed between counsel with respect to the possibility of adjourning the trial scheduled for March of 2010.

[17] It appears that on February 3rd, 2010, I, presiding over the pre-trial conference, ordered that the trial scheduled for March 15th, 2010, and by that time the estimate had been for 10 days rather than five, be adjourned; that costs of the application be awarded to the defendants in any event of the cause; and that the next trial date be peremptory on the plaintiff.

[18] The firm of Slater Vecchio then filed a formal notice of appointment of change of solicitor on the 15th of March, 2010, and on the 13th of July, 2010, plaintiff's counsel filed a notice of trial scheduling the matters for 10 days of trial commencing January 9, 2012, the current trial date.

[19] On August 4, 2010, defence counsel filed a notice requiring trial by jury in this action, and that was followed by a similar notice in the other action on October 4.

[20] An examination for discovery of the plaintiff had been held on June 18th, 2007, and a continuation of that discovery was held on the 25th of August last year.

[21] In September of 2011, Master Caldwell heard an application by the defendants to have the evidence of an expert, Dr. Maloon, taken by video deposition, as the defence had been advised that Dr. Maloon would not be able to attend the trial. That application was opposed by the plaintiff. The order was granted by Master Caldwell, as were the costs of that application to the defendants in any event of the cause.

[22] I have recited some details with regard to the history of this matter in perhaps more detail than usual, as it seems to me that the processes and procedures involved have been somewhat more complex than usual. To date there have been seven pre-trial conferences, three applications to court, and the trial has been rescheduled twice at the request of the plaintiff. In this regard, the last two trial dates, including the current date, were scheduled based on estimates of 10 days.

[23] Costs have been awarded in any event of the cause to the defendant on two occasions as a result of interlocutory applications as well as costs thrown away with respect to the adjournment of the trial scheduled for January of 2009, including lost jury fees.

[24] The parties attended a further trial management conference of this matter on December 13th of last year.

[25] Material filed on behalf of the defendants in support of this application indicates that the defence expects the plaintiff to call evidence from eight experts. The defendants indicate that regardless of the evidence to be led from those experts, the defendants would seek to cross-examine certain of them as well as others, and their list amounts to 14 experts, some of whom were, the defence believes, to be called on behalf of the plaintiff.

[26] The defendants have served reports of seven experts and intend to call, they say, five experts at trial as well as lay witnesses and evidence supporting the making of a surveillance DVD.

[27] Liability is in issue, and I gather significantly in issue, and it is the position of the defence that the plaintiff suffered a significant back injury in July of 2002 when he fell off a ladder onto a concrete surface, suffering a burst fracture at the L1 vertebrae. The defendants say that it has been their position throughout this litigation that the plaintiff's ongoing complaints were the result of this fall and not the result of the relatively minor motor vehicle accidents on which these claims are based.

[28] Now, the notice of fast track, which is the subject of this application, was delivered to defence counsel on November 22nd, 2011. That is one month and 16 days prior to the scheduled trial date.

[29] Rule 15-1, or at least the material portions thereof in relation to this application, reads as follows:

> When rule applies
>
> (1) Subject to subrule (4) and unless the court otherwise orders, this rule applies to an action if

> (a) the only claims in the action are for one or more of money, real property, a builder's lien and personal property and the total of the following amounts is $100,000 or less, exclusive of interest and costs:
>
> (i) the amount of any money claimed in the action by the plaintiff for pecuniary loss;
>
> (ii) the amount of any money to be claimed in the action by the plaintiff for non-pecuniary loss;
>
> (iii) the fair market value, as at the date the action is commenced, of
>
> (A) all real property and all interests in real property, and
>
> (B) all personal property and all interests in personal property
>
> claimed in the action by the plaintiff,
>
> (b) the trial of the action can be completed within 3 days,
>
> (c) the parties to the action consent, or
>
> (d) the court, on its own motion or on the application of any party, so orders.

Rule 15-1(3) reads:

> Damages not limited
>
> (3) Nothing in this rule prevents a court from awarding damages to a plaintiff in a fast track action for an amount in excess of $100,000.

Sub (5) reads:

> Conflict
>
> (5) These Supreme Court Civil Rules apply to a fast track action but in the event of a conflict between this rule and another rule, this rule applies.

Sub (6), the subsection upon which this application is based, reads as follows:

> When rule ceases to apply
>
> (6) This rule ceases to apply to a fast track action if the court, on its own motion or on the application of any party, so orders.

Sub (10) reads:

> Trial to be without jury
>
> (10) A trial of a fast track action must be heard by the court without a jury.

[30] Now, Rule 15-1 is not entirely new. It has evolved from two rules under the former *Supreme Court Rules*, Rule 66 and Rule 68. The net result of the rule and the

limited jurisprudence which has considered its interpretation since its implementation is that the rule applies to claims for $100,000 or less; claims which may be tried within three days; claims where the parties consent to the action being governed by the provisions of the rule; or cases where the court, of its own volition or on the application of any party to the litigation, orders that the rule will apply.

[31] There seems to be no question now that the provisions of the rule are disjunctive and that there is no requirement that all of the enumerated considerations be in place.

[32] The rule, as was the case with its predecessors, was designed to provide a streamlined, expedited and simplified procedure for governing the trial of simpler and perhaps less valuable claims. As such, the predecessor *Rules* expressly brought into the *Supreme Court Rules* a consideration of the "proportionality" considerations now enshrined in the new *Supreme Court Civil Rules*.

[33] Rule 15-1 in its present form seeks to place certain limits or controls on pre-trial procedures with a view to considerations relating to proportionality.

[34] Sub (7) of Rule 15-1 provides that the parties to litigation, unless the court otherwise orders, may not bring on an interim or interlocutory application in the proceeding unless a case planning conference or a trial management conference has been conducted in relation to the action. The idea being that the parties should first have an opportunity to discuss, with the assistance of the court, the issues in general terms and the specific necessity for such an application.

[35] I have already referred to the provision of the rule which excluded the possibility of a jury trial for a fast track action. That provision was of course incorporated to allow the parties, with respect to the resolution of simpler claims, to avoid the expense incidental to a jury trial, particularly a lengthy jury trial.

[36] Subsection (11) of the rule limited, at least on a preliminary basis, the duration of examinations for discovery, again with a view to forcing the parties to

simplify the issues and with a view to reducing the expense to be incurred as a result of lengthy examinations for discovery.

[37] Subrules (12) and (13) sought to ensure an early resolution of simpler claims by directing that examinations for discovery be completed at least 14 days before the trial date and requiring that the trial be set for a date not later than four months after the date upon which the rule became applicable to the action.

[38] Quite significantly, in subrule (15), as was the case with the former fast track rules, the costs recoverable by the successful party in a fast track proceeding are limited, subject to the discretion of the court to award costs otherwise.

[39] Now, Rule 15-1 envisaged with respect to simpler cases, as I characterized them, a simplified procedure which would, if followed from an early stage in the litigation, result in significant cost savings and an earlier resolution of the dispute than might otherwise be possible.

[40] Considerations of proportionality have less application to the facts upon which this application is based than otherwise might be the case. This application is brought, as I indicated, more or less on the eve of trial. The opportunity for cost savings with respect to pre-trial procedures has been lost. The only savings might be from a shortening of the trial by a reduction in the number of experts upon which the plaintiff may rely, or upon the fact that if the rule continues to apply to this case the trial must be before a judge alone rather than before a judge and jury.

[41] Now, as to the basis for the application, I have in front of me the affidavit of Heather Ogmundson, who is a paralegal in the employ of the solicitors representing the plaintiff. She says that she is advised by Mr. Turner, counsel for the plaintiff, and verily believes that Mr. Tong, the plaintiff, has instructed Mr. Turner to limit his claim to $100,000 exclusive of costs and disbursements. Those instructions were the subject of correspondence between counsel.

[42] I am told by Mr. Turner in submission that, as a result of those instructions, the plaintiff has determined to rely on a smaller group of experts in support of his

claim and that, if I recorded his comments accurately, the plaintiff will likely be seeking something in the order of $50,000 to $60,000 for non-pecuniary damages, something like 10,000 for specials and the balance, up to $100,000, for various other contingencies.

[43] There is nothing before me in terms of evidence which would allow the court to make a determination as to what the likely range of an award would be in the plaintiff's circumstances.

[44] The defendants' position very simply put, not simply put by Mr. Urquhart but simply summarized by me, is that throughout this litigation the defendants have approached their defence of the claim, have planned their strategy and have governed their preparation in anticipation of a 10 day jury trial, and indeed continued to be governed by such considerations up to the delivery of the fast track notice in November of last year and indeed after that date.

[45] Mr. Urquhart says that the only real reason for bringing this application is to deny the defendants an opportunity, which he says is the right of the defendants – they had complied with the *Rules* with regard to such – to have these matters tried before a judge and jury. They say that there is really no other reason for delivering the fast track notice at this late date, as the pre-trial procedures, with respect to which the rule makes significant provision, are completed.

[46] The defence says that the plaintiff should have brought on an application to have the jury notice struck and that essentially the delivery of the notice of fast track in this case is a back door application to strike the jury notice.

[47] I do not mean this decision to make any general pronouncement with respect to the power of this court to order a jury trial where it is established to the court's satisfaction that the claim brought by the plaintiff is for $100,000 or less. I am not satisfied that such is the case in this litigation. Although the plaintiff's counsel may well be instructed to limit the plaintiff's claim, the court, of course, retains this discretion, or the jury, as we well know, retains its power to award a different amount, and although arguments with respect to proportionality may influence the

court significantly at an early stage in the litigation, they have less impact on the eve of trial when the opportunity for the parties to avail themselves of the cost-saving measures set out in the rule has now passed.

[48] My colleague Master Caldwell considered a somewhat similar application in the case of *Uribe v. Magnus*, 2009 BCSC 1230. In that case Master Caldwell considered an application under the previous rule, 68. With respect to the issue of proportionality, he said in part at para. 14:

> The concept of proportionality is now formally ingrained in our law by the terms of Rule 68. It is hard to imagine that a simple claim which the plaintiff's counsel himself admits will not exceed $50,000 and which more likely falls in the $30,000 to $40,000 range can justify the overall expense of a three day jury trial. While I accept the submissions of defendant's counsel that the defendant has been prejudiced by the late date of the plaintiff's application, the denial of a jury trial, the fact that they have prepared for a jury trial and the fact that they have had to undertake various steps and procedures which would not have been necessary had the matter been commenced subject to Rule 68 or placed into that rule at an earlier date I am satisfied that these issues can be compensated for by the appropriate order of costs to the defendant while at the same time maintaining and protecting the purpose and mandatory nature of Rule 68.

[49] I am not satisfied that the issue of costs might necessarily be dealt with the same way under Rule 15-1.

[50] I am looking at the digest in the White Book, the decision in *Majewska v. Partyka* (2010), 5 B.C.L.R. (5th) 53; 87 C.P.C. (6th) 266, a decision of the British Columbia Court of Appeal. The digest indicates as follows:

> Where it is expected that the trial of a fast track action will exceed the fast track limit, the party who wants to avoid the prescribed cost caps should apply for an order that this rule ceases to apply to the action.

Suggesting to me that there are some significant limitations upon the award of costs over and above the limits prescribed by Rule 15-1(15); that the significant costs incurred the defendants in this litigation to date and the costs awarded to them in certain respects as a result of their success in interlocutory applications may go uncompensated if this matter remains on the fast track. I say "may" as that is a matter for the trial judge to resolve.

[51] In the result, I am satisfied that the application should be granted. This matter will be removed from the provisions of the fast track, Rule 15-1.

[52] What about costs?

[53] MR. URQUHART: Your Honour, I think the usual rule is the winner gets costs, in our submission. We have won today.

[54] THE COURT: Do you have any authority for that proposition, Mr. Urquhart?

[55] MR. URQUHART: I think it's a general proposition of law.

[56] THE COURT: Good. Thank you.

[57] MR. TURNER: That's fine. That's the rule.

[58] THE COURT: All right. Costs to the defendants in any event of the cause. Now, gentlemen, I would have preferred to reserve on this matter to give you perhaps some more coherent decision than these circumstances allow, but I am mindful of the fact that you are just a couple of days away from trial. That might not have served you well.

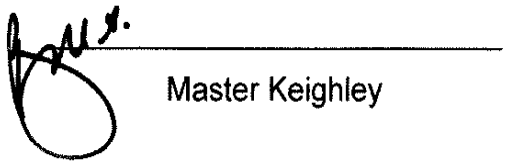
[59] MR. URQUHART: Thank you, Your Honour. In the event the reasons are ordered, I imagine you will reserve the right to edit them?

[60] THE COURT: I will.

[61] MR. URQUHART: Thank you.

[62] THE COURT: Thanks, gentlemen.

[63] MR. TURNER: Thank you, Your Honour.



Master Keighley