IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20120326
Docket: S12384
Registry: Duncan

Between:

Alice Wai Kwan Hung

Plaintiff

And:

**Beverlee Lynn Sellars and
David Edward Heans**

Defendants

Before: The Honourable Mr. Justice Bracken
(appearing via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff appearing via teleconference:	M. W. McKeachie and J. K. Pelton
Counsel for the Defendants appearing via teleconference:	P. M. MacNeil
Date and Place of Trial/Hearing:	March 19, 2012 Duncan, B.C.
Date and Place of Judgment:	March 26, 2012 Duncan, B.C.

[1] **THE COURT:** The plaintiff applies to strike a jury notice that was issued by the defendants in an action for damages for injuries received in a motor vehicle accident.

[2] The trial was initially set for November 28, 2011, at Duncan, British Columbia. A notice of trial was filed on November 23, 2010, but no jury notice was served and the trial was scheduled to be heard by a judge sitting alone.

[3] In early November 2011, the plaintiff required an adjournment of the trial, which was consented to by the defendants. In accordance with Supreme Court Practice Direction PD25, a new notice of trial was required unless otherwise ordered. Accordingly, the defendants filed a new notice of trial on February 14, 2012, resetting the matter for trial on May 28, 2012. On February 16, 2012, the defendants filed and delivered a notice requiring trial by jury.

[4] The plaintiffs rely on the decision of *Hoare v. Firestone Canada Inc.* (1989), 42 B.C.L.R. (2d) 237 (C.A.), a case in which the same issue was decided, albeit under the old rules of the Supreme Court. In *Hoare v. Firestone*, the action was initially dismissed on a summary application, but reinstated upon appeal, and a second notice of trial was delivered by the plaintiff, along with a notice requiring trial by jury. The defendant applied to strike the jury notice. The application was initially dismissed as being filed outside of the time limit to apply to strike out a jury notice under the old rules. On appeal, the application to strike the jury notice was allowed.

[5] The court relied upon *Guenette v. B.C. Electric Railway Co.*, [1944] 3 W.W.R. 67, [1944] 3 D.L.R. 379 and *Gombar v. B.C. Electric Railway*, [1951] 3 W.W.R. (N.S.) 276, both cases from the B.C. Supreme Court.

[6] At para. 14 of *Hoare v. Firestone*, the court stated:

> [14] The learned judge very properly emphasized the importance of the right to elect for jury trial. But on a broad consideration of the rules and authorities which has been possible in these appeal proceedings I have concluded that the election is intended to be made once only, at a particular stage, and for good reason. If the trial may be before judge and jury, rather than judge alone, that is generally an important consideration for both parties

> in preparation of the case and perhaps, indeed, in the selection of counsel. It is, I think, for these reasons that the rules require the election to be made, once and for all, soon after the action is set down, instead of leaving the parties free to elect thereafter on the basis of later developments.

[7] The court went on to state at paras. 16 and 17 as follows:

> [16] Those cases suggest, however, that a party seeking to elect for jury trial after expiry of the period limited by the rules must satisfy the court either that the wish, or intention, to do so existed during the period so limited, or that it was prompted in fact by a fundamental change in circumstances.
>
> [17] It would not appear, according to the reasoning in those cases, to be enough that a party allow the period limited by the rules to pass without considering the matter of mode of trial, and sometime thereafter seek to elect for trial by jury on the basis of a first-time consideration of the matter. In *Gombar*, Wilson J. (as he then was) says [at page 280] that litigants cannot be allowed "to revive lapsed rights on the sole ground that they have, since they allowed the rights to lapse, changed their minds". I think it implicit in that view that a party who had no interest at the appropriate time in having the action tried by jury cannot rely on later change in circumstances as grounds for re-election. But in any event the change in circumstances relied on would, in my view, have to be one which so materially altered the character of the proceedings as to render an action clearly appropriate for trial by jury which, as originally brought, clearly was not.

[8] The court held that an opportunity to issue a new notice of trial cannot automatically carry with it a renewed right to file and deliver a jury notice. While the court in *Hoare v. Firestone* did not close the door completely to the delivery of a jury notice upon delivery of a new notice of trial or outside the time limits allowed for challenge to the jury notice, the court held the intention of the rules was that a party wishing to have a trial by jury should give notice promptly, after filing the first notice of trial.

[9] The defendants say they were simply following the rules of court which now exist and require that a jury notice can be filed within 21 days of delivery of a notice of trial and served within 30 days of service of a notice of trial.

[10] The rule respecting the filing and delivery of a jury notice under the old rules that was considered in *Hoare v. Firestone* is essentially identical to the current Rule 12-6(3). The old rules did not require service of a new notice of trial if the trial

was adjourned, nor for that matter do the new rules; however, Practice Direction 25 does.

[11] The imposition of a new procedural requirement should not alter the principles set out in *Hoare v. Firestone*. The rationale articulated in that case has, in my view, the same force under the current rules as it did under the old rules.

[12] The plaintiff also referred to *Pelech v. Pelech* (1977), 3 B.C.L.R. 115, where the court held the words "the notice of trial" under pre-1977 rules meant the notice of trial filed when the matter was first set down for trial. Here the new notice was filed in February of this year for a trial set in May. The action has been outstanding for many months now, and the short notice that the trial will now be by jury rather than by judge alone will quite likely require some considerable reorganization by the plaintiff to set up for a jury trial rather than a judge alone trial. It may be, as pointed out in *Hoare v. Firestone*, that different counsel would be selected to conduct a trial where a judge is sitting with a jury. It may also be that additional witnesses or different witnesses may be required where the trial is to be before a jury rather than a judge.

[13] As noted, the authorities have held the election whether the trial be by judge alone or by judge sitting with a jury contemplates that the election will be made promptly after the first notice of trial. Some latitude is possible where a party seeks to make an election outside the time limited by the rules in certain restricted circumstances.

[14] In some cases, such as removal from the fast track process where there is no right of a jury trial, the parties can make the election upon a new notice of trial being filed: see *Dunn v. I.C.B.C.*, 2005 BCCA 641.

[15] In this case, a jury notice, in accordance with the principle in *Hoare v. Firestone* and *Pelech v. Pelech*, could have been filed and served after the first notice of trial that was issued in this action. The jury notice should have been filed and delivered within the rules after the date of the first notice of trial, which was

November 23, 2010. Therefore, the notice requiring trial by jury in this case which was filed February 16, 2012 is struck out as being filed outside the time allowed by Rule 12-6.

[16] That is my decision in the matter. I would suggest costs in the cause, unless there is some other submission? Ms. Pelton?

[17] MS. PELTON: I'm certainly satisfied to have the matter dealt with as costs in the cause.

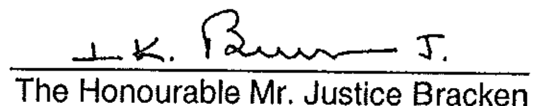
[18] THE COURT: Mr. MacNeil, any comments with respect to costs?

[19] MR. MacNEIL: No, no, no comments, My Lord.

[20] THE COURT: All right. Thank you, then costs will be in the cause and thank you.

[21] MS. PELTON: Thank you.

[22] MR. MacNEIL: Thank you, My Lord.



The Honourable Mr. Justice Bracken