SUPREME COURT OF YUKON

Citation: *Dana Naye Ventures v. Canada (Attorney General)*, 2011 YKSC 20

Date: 20110304
S.C. No. 10-A0032
Registry: Whitehorse

Between:

DANA NAYE VENTURES

Plaintiff

And

ATTORNEY GENERAL OF CANADA and BUSINESS DEVELOPMENT BANK OF CANADA

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Peter Sandiford	Counsel for Dana Naye Ventures
Anusha Aruliah	Counsel for the Attorney General of Canada
Charles Willms	Counsel for Business Development Bank of Canada

REASONS FOR JUDGMENT
(Application to Strike out Statement of Claim)

INTRODUCTION

[1] The Attorney General of Canada ("AG") and Business Development Bank of Canada ("BDC") bring an application to strike out the plaintiff's Amended Statement of Claim pursuant to Rule 20(26)(a) of the *Rules of Court* on the ground that it discloses no reasonable claim. The issue is whether Dana Naye Ventures ("DNV") has sufficiently plead the allegation of publication in its defamation claim.

FACTS

[2] DNV is a not-for-profit financial institution that provides developmental financing, assistance and business services to small and medium size entrepreneurs in Yukon and northern British Columbia.

[3] DNV has filed an Amended Statement of Claim alleging that on or about November 2009, the Crown's servants and agents including BDC, published a study entitled "Study on the Business Service Environment in the Yukon Territory" ("the report") that was communicated to at least one other person other than DNV. DNV's allegation of publication tracks the wording in *Grant v. Torstor Corp.*, 2009 SCC 61, but provides no further detail such as to whom the publication is alleged.

[4] DNV alleges that there are 17 defamatory statements contained in the report all of which particularize deficiencies, bad management and failure to provide business services on the part of DNV.

[5] The AG filed an Amended Statement of Defence stating that, at the request of DNV, the Crown provided the report to DNV only and advised DNV that the report was an internal document not to be distributed.

[6] The BDC filed an Amended Statement of Defence on August 31, 2010, denying that the Crown published the report to a third party. The original BDC Statement of Defence filed July 15, 2010, admitted delivering the report to the Department of Indian Affairs and Northern Development but denied that it published the report to a third party. BDC stated that it did not authorize or anticipate republication of the report to a third party.

[7] In this application, DNV raised two additional issues. Firstly, it says that BDC cannot withdraw its admission of delivery of the report to the Crown except by consent or with leave of the court pursuant to Rule 31(5)(c). No consent or leave has been granted.

[8] Secondly, I ordered the AG to file a Preliminary List of Documents no later than December 10, 2010. Counsel for DNV advises that certain documents listed in the affidavit of Karen Dove, dated August 25, 2010, have not been included in the Preliminary List of Documents. As there is no specific application filed giving notice to the AG, I have declined to address this issue at this time. Counsel are at liberty to raise the issue in the future.

ISSUES

[9] The first issue to be determined is whether the pleadings of DNV disclose a reasonable claim in law. A subsidiary issue is whether DNV can make use of an admission made by BDC in a previous pleading that has subsequently been amended.

ANALYSIS

[10] The law on an application to strike is set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and can be summarized as follows:

1. it is only in plain and obvious cases where the case is absolutely beyond doubt that a claim should be struck out;
2. the mere fact that a case is weak or not likely to succeed are not grounds for striking it out;
3. if the action involves serious questions of law or if facts are to be known before rights are definitely decided, the rule should not be applied;

4. a statement of claim may be amended;

5. the allegations in the statement of claim are accepted as true for the purpose of the application;

6. the statement of claim should be struck out only if the action is certain to fail because it contains a radical defect;

7. if there is a chance that the plaintiff might succeed, the plaintiff "should not be driven from the judgment seat".

[11] The law of defamation and the essential elements of the claim have recently been stated in *Grant v. Torstar Corp.*, cited above, at para. 28:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. ... (my emphasis)

[12] The defendants submit that the plaintiff has failed to state the third person(s) to whom the words were published and that this constitutes a radical defect in the statement of claim. They submit that DNV should not be allowed to proceed on a "fishing expedition". I add here that it is apparent that only the Crown knows who the persons are that may have received the report.

[13] In support of their submission, the defendants rely upon the case of *Wesson v. Campbell River (District)* (1985), 63 B.C.L.R. 327 (C.A.). In that case, the plaintiff alleged that the defendants published the libel to "divers (sic) persons" and "to affiliates and members of the Defendant Legion." The defendants applied for particulars of when, by whom and to whom the words were published. The Court ordered that the particulars

be provided following the completion of the examinations for discovery of the defendants. On appeal, the Court of Appeal ordered that the particulars be provided before completion of examinations for discovery and, if they were not forthcoming, one judge considered that this would likely bring the action to an end. The Court also suggested that the material "raise[d] no more than a speculation of publication."

[14] I do not consider this decision to be binding upon this Court for the following reasons:

1. the *Wesson* decision is based on an application for particulars after some discoveries of the defendants had been completed. It is not an application under Rule 19(24)(a) of the British Columbia *Rules of Court* which is the same as our Rule 20(26)(a).
2. The words "fishing expedition" may have been appropriate for the facts in *Wesson* but are not appropriate for the case at bar.
3. the *Wesson* decision is not a decision under Rule 19(24)(a) and therefore does not set out the appropriate law as stated in *Hunt v. Carey Canada Inc.*

[15] The defendants also rely on certain judgments in the Alberta Queen's Bench such as *Abrams v. Johnson*, 2009 ABQB 575, at paras. 33 – 41. Without any reference to *Hunt v. Carey Canada Inc*, and relying upon the *Wesson* case, cited above, the Alberta Queen's Bench is of the view that defamation actions are a special exception that must be pleaded with particularity or the claim will be struck out. The Court in *Abrams* set out its view of the law of defamation as follows at para. 41:

> This case law establishes that a defamation action is an anomaly to the usual rule for striking pleadings. In such an

> action the particulars must be set out in the claim: the publication made by the defendant, the words published by the defendant, which plaintiff was defamed by the publication, the time and place of the publication, the manner of the publication, and to whom the publication was made. When particulars are unknown, the supporting material on the motion must establish a prima facie case of publication and depose that no further particulars are available. Failing such precision in the pleadings and materials filed, the action may be struck, and it will be struck when the court perceives the action to be a "fishing expedition".

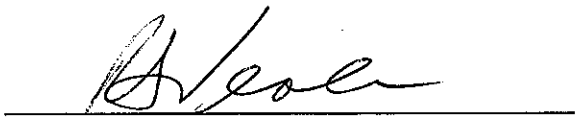
[16] In addition to not being a binding precedent on this Court, I am of the view that *Hunt v. Carey* is the appropriate law to be applied on an application to strike. I therefore accept the pleading that there has been publication to another person other than DNV on the facts in this case and there is no basis upon which the DNV claim should be struck.

CONCLUSION

[17] The defendants' application is therefore dismissed. The plaintiff may make a further amendment to include the admission of BDC that it delivered the report to the Department of Indian Affairs and Northern Development. In my view, there is no valid reason that an admission by a defendant should not be considered as part of the claim. Nevertheless, it should be added as an amendment so that the record is clear.

[18] I make no finding with respect to the issue of what constitutes publication when documents are delivered by one government office or agency to another as that is a matter of law best resolved at a trial of the action.

[19] DNV may speak to costs, if necessary.



VEALE J.