IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Regan* v. *City of Whitehorse*, 2004 YKSC 62

Date: 20040917
Docket No.: S.C. No. 00-A0140
Registry: Whitehorse

Between:

D.G. REGAN AND ASSOCIATES LTD.

Plaintiff

And

CITY OF WHITEHORSE

Defendant

Before: Mr. Justice L.F. Gower

Appearances:
James R. Tucker — For the Plaintiff
Daniel S. Shier — For the Defendant

REASONS FOR JUDGMENT

Introduction

[1] This application by the plaintiff, D.G. Regan and Associates Ltd. ("Regan"), raises an interesting question of whether a party may ask questions at an examination for discovery about a witness' state of mind when the plaintiff alleges an intentional tort. Counsel for both sides were unable to provide any authorities directly on point, leading each of them to suggest that the answer to that question is self-evident, possibly even trite, and in their favour.

Positions of the Parties

[2] Regan's counsel has pleaded the tort of misfeasance in a public office by the Municipal Council of the City of Whitehorse. He says this misfeasance occurred in decisions made by the Council in 1999 and 2000 which were adverse to his client. He submits that if he is not allowed to ask why the members of Council made those decisions, he will be prevented from obtaining evidence which might establish the Council intentionally acted in bad faith.

[3] Counsel for the City is diametrically opposed. He says the reasons why the members of Council voted the way they did on the two decisions at issue should be limited to a review of the minutes of the Council meetings where those decisions were made. The City's counsel says the plaintiff should not be allowed to probe into the minds of the individual Council members for the reasons why they voted in favour of each decision, thereby invading the privacy of their own personal deliberations.

[4] According to the material filed on this application, the minutes for the Council meeting in 2000 have been disclosed to the plaintiff, however there is no reference to a similar disclosure regarding the 1999 minutes.

Public Misfeasance

[5] The tort of misfeasance in a public office is now relatively well recognized by Canadian courts. A recent statement of the law in this area was made by Iacobucci J., speaking for the Supreme Court of Canada, in *Odhavji Estate* v. *Woodhouse*, [2003] 3

S.C.R. 263. Iacobucci J. summarized, at para. 32, the intentional and subjective nature of the tort:

> To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[6] Earlier, at para. 28, Iacobucci J. clarified that a public officer's mere knowledge of harm is insufficient to establish the tort of misfeasance in a public office. In particular, the public officer may make a decision in good faith knowing that it is likely to adversely affect an individual or group. What is additionally required for this tort is an element of bad faith or dishonesty. That is, the public officer must deliberately engage in conduct knowing it to be inconsistent with the obligations of their office.

[7] At para. 29, Iacobucci J. went on to speak about the mental element of the tort:

> The requirement that ***the defendant must have been aware*** that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to ***each officer who blatantly disregards his or her official duty***, but only to a public officer who, in addition, ***demonstrates a conscious disregard*** for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some ***awareness of harm*** there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff …
>
> (emphasis added)

[8] In the House of Lords decision of *Jones* v. *Swansea City Council*, [1990] H.L.J. No. 51, Lord Lowry was adjudicating an appeal on an alleged tort of misfeasance in public office by Swansea City Council against Mrs. Jones. At issue was a particular decision of Council respecting the commercial use of her leased property. Although Lord Lowry did not specifically deal with the question before me, he noted that at trial three of the Swansea City Councillors had been called as witnesses and had said "they voted for what they considered to be good reasons"; they had not been instructed by anyone how they should vote; and there had been no group decision on the voting. Lord Lowry commented, "The judge accepted this evidence and it was, in my opinion, clearly open to him to do so."[1]

Qualified Privilege

[9] In the case before me, the City's counsel raised the issue of qualified privilege in favour of the members of Council. He referred to the Supreme Court of Canada case of *Prud'homme* v. *Prud'homme*, [2002] 4 S.C.R. 663, at para. 49, where the House of Lords decision in *Horrocks* v. *Lowe*, [1975] A.C. 135 (H.L.), p. 152, was quoted as follows:

> My Lords, what is said by members of a local council at meetings of the council or of any of its committees is spoken on a privileged occasion. The reason for the privilege is that those who represent the local government electors should be able to speak freely and frankly, boldly and bluntly, on any matter which they believe affects the interests or welfare of the inhabitants. They may be swayed by strong political prejudice, they may be obstinate and pig-headed, stupid and obtuse; but they were chosen by the electors to speak their minds on matters of local concern and so long as they do so

[1] *Jones* v. *Swansea City Council*, cited above, at p. 5 of the Quicklaw report

> honestly they run no risk of liability for defamation of those who are the subjects of their criticism.

However, as the minutes of the Council's meeting in 2000 have already been produced to the plaintiff, if there was any claim of qualified privilege by the Council members at that meeting, it has been waived by this disclosure. Further, qualified privilege is generally asserted as a defence in defamation actions. As defamation has not been pleaded by Regan, the claim of privilege seems inapplicable.

[10] I am not aware whether the minutes from the 1999 meeting of Council have also been disclosed, or whether they even exist. The requests made by the plaintiff's counsel at the examination for discovery of the City's witness do not include a request for the minutes of the 1999 meeting. The City's counsel did not argue that qualified privilege should specifically attach to the 1999 meeting, if not the 2000 meeting. However, not only would that seem to be inconsistent, given the disclosure of the 2000 minutes, it may also be inapplicable, given the absence of any allegation of defamation.

Evidence of State of Mind

[11] *Phipson on Evidence*, 13th Edition, Sweet and Maxwell, 1982, discusses evidence of intention at p. 175. There it is noted that intention, which is a state of mind, can never be directly proved, but must be inferred from other facts. Although intention was at one time thought a matter incapable of proof "now it is recognized that the state of a man's mind is as much the subject of evidence as the state of his digestion". The text continues that state of mind may be proved:

> … not only by [a party's] ***direct testimony***, or declarations out of court …, but also circumstantially by acts and events

> previous or subsequent to the transaction; as well as, against himself, by his own ***admissions***.
>
> (emphasis added)

[12] On the other hand, *Phipson* continues at p. 176 that where intention is irrelevant, evidence of that intention will be excluded:

> Thus, where a person has a right to do an act, the intention or motive with which it was done cannot in general be inquired into.

Conclusion

[13] I note that the statement of defence filed by the City is essentially limited to a general denial of the allegations. It does not demur that the members of Council were authorized in any particular way to make the decisions alleged. Therefore, at present, the tort of misfeasance by a public officer is clearly at issue and the City has been unable to demonstrate generally that the requests sought by the plaintiff are irrelevant. Therefore, I am inclined to grant the plaintiff's application, subject to the following clarifications.

[14] At the hearing of this application, Regan's counsel only argued for the alternative relief in the notice of motion, seeking an order that the City provide the responses to the requests. I note from the affidavit material filed on this application that there are only three requests apparently outstanding. The City's counsel has provided responses to the others. There is a fourth request which was only partially answered by the City's counsel and although that was not specifically raised by Regan's counsel in this application, I will note it here because it appears to remain relevant. In each case, I will refer to the specific request and follow with my ruling:

[15] **Request #1**

> Re: To find out the reason why the City did not give D.G. Regan a three-year contract in April of ’99, as recommended by the Public Works Committee earlier that year.

This question is relevant to the alleged tort of misfeasance in public office. The witness should endeavour to provide an answer. However, it may be difficult to do so since it will require the witness asking each member of Council who voted against Regan at that meeting. The answers will therefore necessarily be hearsay and based upon information and belief. Consequently, I make no determination here as to the admissibility of that evidence at trial.

[16] **Request #6**

> Re: To advise when the decision to award the 2000 Mosquito Control contract was addressed by Council and voted upon why the individuals supported giving the contract to Solar Cycle over D.G. Regan.

This is the question which was partially answered by the City’s counsel in referring to the minutes of the meeting in 2000. However, the response did not say why the decision was made. For the same reason as with Request #1, I find it is relevant to the alleged tort of misfeasance in public office and the response should be provided, if possible. Again, I make no determination as to the admissibility of that evidence at trial.

[17] **Request #7**

> Re: To advise whether the people who favoured Solar Cycle were aware that if Council did not award the 2000 Mosquito Control contract to

> D.G. Regan that they would be depriving D.G. Regan of the profits it would gain in performing the 2000 Mosquito Control contract.

The response to this request seems self-evident. The members of Council voting in favour of the alternative bidder must have been aware that, in so doing, Regan would not receive the contract and therefore could not benefit from it. Therefore, a response is not required.

[18] **Request #8**

> "Re: To inquire of those individuals who supported the motion to give the contract to Solar Cycle whether they knew at that time that Council would be acting incorrectly or beyond the power of Council in awarding the 2000 Mosquito Control contract to Solar Cycle over D.G. Regan."

Again, I find this question is relevant to the alleged tort of misfeasance in public office. Candidly, I doubt that the answers which may be forthcoming will be of any assistance to the plaintiff, but the plaintiff is nevertheless entitled to the responses. I make the same qualification as to the admissibility of this evidence as I did with my directions for Requests #1 and #6.

[19] The plaintiff's notice of motion asks that I determine a date by which the responses should be provided. Given that I anticipate the City's witness may have some difficulty in contacting all the relevant members of Council to obtain the necessary information, I direct that the defendant provide the responses to the plaintiff by 5:00 p.m. on October 29, 2004, failing which this action shall continue as if no appearance had

been entered or no statement of defence had been filed. Of course, the parties are at liberty to agree in writing to an extension on that deadline if necessary.

[20] As the plaintiff did not seek costs on the motion, none are awarded.

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GOWER J.