

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pirie v. Armstrong et al*,
2004 BCSC 1346

Date: 20041021
Docket: 03/2221
Registry: Victoria

2004 BCSC 1346 (CanLII)

Between:

Dougann Pirie

Plaintiff

And:

Hugh John Armstrong and Wright Armstrong

Defendants

Before: The Honourable Mr. Justice Bouck

Reasons for Judgment

Counsel for the Plaintiff:

D.J. Mildenberger

Counsel for the Defendants:

A.A. Macdonald

Date and Place of Trial:

20041007
Victoria, B.C.

INTRODUCTION

[1] On this Rule 18A summary trial, the defendants apply for an order dismissing the action. The plaintiff contends the issues are such that it is unsuitable to decide them under Rule 18A. The plaintiff says the defendant solicitor gave him negligent advice or failed to advise him properly.

FACTS

[2] On 3 May 2001, Mr. Pirie and his common law partner Jayne Simpson signed a contract to buy property at 6470 Somenos Road, Duncan, B.C., for the price of \$375,000. The contract required a deposit of \$2,000 on signing and a further \$8,000 on 16 May 2001. The completion and possession date was 1 June 2001.

[3] On 11 May 2001, Mr. Pirie and Ms. Simpson retained the defendant Hugh John Armstrong, Barrister and Solicitor, to act on their behalf in completing the transaction. On 14 May 2001, Mr. Pirie informed Mr. Armstrong that he was advancing all the monies for the purchase. He also said that he wanted to enter into a co-ownership agreement with Ms. Simpson in order to protect his investment in the property should they later agree to its sale. He told Mr. Armstrong that Ms. Simpson agreed in principle with this proposal. He asked

Mr. Armstrong to draft an agreement for signature before the closing date of 1 June 2001.

[4] Mr. Armstrong advised Mr. Pirie that at least one of the parties would have to obtain independent legal advice with respect to the agreement's terms. Following Mr. Pirie's instructions, Mr. Armstrong drafted the agreement. Its purpose was to serve as an agreement pursuant to s. 120.1 of the **Family Relations Act**. That section deals with agreements between partners who are not married.

[5] Mr. Pirie spoke to Ms. Simpson after 10 May 2001 about the proposed agreement. She said that if asked she would not sign such a document. She suggested to him that they should either separate from each other and refuse to close the property transaction or work to improve their relationship. In her affidavit of 3 February 2004, she said that Mr. Pirie never discussed the idea again until months after the closing.

[6] On 31 May 2001, Mr. Pirie and Ms. Simpson executed the closing documents. Both signed the mortgage contract to finance the property purchase. It had a principal amount owing of \$322,087.50. Also included in the closing documents was Mr. Armstrong's statement of account referring to the co-habitation agreement. It used the following words:

"... taking instructions, to attending to preparation of

Co-ownership Agreement; to taking instructions to proceed no further ...". Mr. Pirie and Ms. Simpson signed the statement of adjustments that mentioned the agreement by way of a debit for \$100. Evidently, Mr. Pirie paid the full balance due on the closing date of 1 June 2001, including the \$100 he owed Mr. Armstrong for drafting the agreement.

[7] Mr. Pirie commenced a family law action against Ms. Simpson on 22 August 2001. It concerned Mr. Pirie's dispute with Ms. Simpson over occupancy of the home they bought on 1 June 2001. In these proceedings, Mr. Armstrong filed Mr. Pirie's 7 September 2001 affidavit that he had relied upon in the family law action. In that affidavit Mr. Pirie deposed he was unable to present the agreement to Ms. Simpson until 29 May 2001 and she refused to sign it.

[8] On 3 April 2002, the parties settled their differences arising from the family law proceedings and Mr. Pirie paid Ms. Simpson \$16,000 in return for a transfer of the property into his name.

[9] On 27 May 2003, Mr. Pirie brought this action against Mr. Armstrong seeking damages for negligence, breach of a fiduciary duty and breach of contract. In his Statement of Claim Mr. Pirie contends that Mr. Armstrong failed to:

1. provide Mr. Pirie with a marriage agreement that protected Mr. Pirie's interests, or;
2. advise Mr. Pirie that he, Mr. Armstrong, had not prepared the marriage agreement in accordance with Mr. Pirie's instructions, or;
3. advise Mr. Pirie that he, Mr. Armstrong, had a conflict of interest in acting for both Mr. Pirie and Ms. Simpson, or;
4. advise Mr. Pirie to alter the form of the contract of purchase and sale prior to the closing date.

ISSUES

[10] Did Mr. Armstrong commit any breach of contract, act of negligence or breach of a fiduciary duty in relation to these issues?

ANALYSIS

1. **Mr. Armstrong's Alleged Failure to Provide Mr. Pirie with the Co-habitation Agreement Protecting Mr. Pirie's Interests.**

[11] Mr. Pirie contends that Mr. Armstrong breached his contract to provide him with an agreement that would have protected his interests. There are at least two sides to

every contract. In this case, Mr. Pirie was on one side and Ms. Simpson was on the other. There is no way that Mr. Armstrong could provide Mr. Pirie with a signed copy of an agreement protecting Mr. Pirie's interests if Ms. Simpson refused to sign the document, and she did refuse.

[12] Therefore, Mr. Armstrong did not breach his contract as a solicitor with Mr. Pirie as a client concerning this allegation.

2. Mr. Pirie's Claim that the Draft Agreement did not follow Mr. Armstrong's Instructions.

[13] In his affidavit, Mr. Pirie does not mention any provisions of the draft agreement that were not in accordance with his instructions. It follows that on this issue, Mr. Pirie's claim for breach of contract, negligence or breach of a fiduciary duty cannot succeed. In any event, Mr. Armstrong delivered an agreement to Mr. Pirie who then tried to get Ms. Simpson's approval. If Mr. Pirie did not like the terms of the draft agreement he should have asked Mr. Armstrong to redraft it. He did not.

3. Mr. Pirie's Claim that Mr. Armstrong was in a Conflict of Interest.

[14] An allegation of conflict of interest appears to be more in the nature of a political term than it is a legal one. A

better legal term seems to be a breach of a fiduciary duty. Black's Law Dictionary, 7th Ed., page 523, defines a fiduciary duty in these words:

A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).

[15] The question then is, did Mr. Armstrong breach this duty he had to Mr. Pirie?

[16] Mr. Pirie deposes that:

"Mr. Armstrong did not suggest that he may have been in conflict of interest due to his representation of Ms. Simpson on the purchase of the property."

In other words, Mr. Pirie alleges that Mr. Armstrong failed to meet the standards of a fiduciary in these circumstances.

Mr. Pirie seems to say that Mr. Armstrong did not act "with the highest degree of honesty and loyalty" towards him because Mr. Armstrong failed to tell him that he could be in a conflict of interest because he was also representing Ms. Simpson on the property transaction.

[17] Mr. Pirie's affidavit conflicts with Mr. Armstrong's statement of facts in his affidavit where he said:

"I further advised him (Mr. Pirie) that any agreement as between he and Jayne Elizabeth Simpson should ultimately be referred out so that at least one of the parties could obtain independent legal advice."

[18] Normally, this clash of evidence would make the issues unsuitable for disposition under Rule 18A(8)(b)(i). However, if I can find other facts in other affidavit material supporting Mr. Armstrong's version, then I can resolve this issue: Rule 18A(11)(a)(i).

[19] A claim involving the issue of breach of a fiduciary duty might have some chance of success if there was any evidence proving that Mr. Armstrong drew the agreement favouring Ms. Simpson and both parties signed it. However, Ms. Simpson did not sign the document. She deposed that she refused to do so because it was too favourable to Mr. Pirie.

[20] Even if Mr. Pirie's complaint about Mr. Armstrong's conduct is true, it did not cause any harm to Mr. Pirie. Mr. Pirie's loss occurred when Ms. Simpson refused to sign the agreement. Thus, the conflict of interest allegation has no legal merit.

4. Mr. Armstrong's Alleged Failure to Advise Mr. Pirie that he Refuse to Complete the Property Purchase Contract.

[21] In his affidavit, Mr. Pirie asserts that:

"Had I been properly advised that refusing to close on the property was a possible course of action, I would have done so before increasing the deposit to a total of \$10,000."

[22] Had Mr. Pirie asked Mr. Armstrong whether he could refuse to complete the sale before 1 June 2001, Mr. Armstrong would be duty bound to inform Mr. Pirie of the consequences. One of these consequences could have been a forfeiture of the deposit. Another could have been an action by the sellers for specific performance or damages. It is difficult to be certain since the photocopy of the contract is unreadable.

[23] Lawyers have no pro-active duty to constantly advise their clients as to the ways they can break valid contracts. To do so might be a breach of ethical behaviour as that conduct falls within the tort of interfering with contractual relations. All that lawyers can do is tell their clients of the consequences that may occur if the clients choose to break a contract.

[24] Furthermore, as with the co-habitation agreement, there were also two different parties to the property purchase contract, the sellers and the buyers. Mr. Pirie was just one of the buyers.

[25] Mr. Pirie could not alter the contract without the approval of Ms. Simpson and the sellers. It seems certain

that Ms. Simpson would not have agreed to the removal of her name from the contract. In addition, there is no evidence before me suggesting that the sellers would have willingly agreed to amend the contract of sale by deleting Ms. Simpson's name as one of the purchasers. Where a seller has two buyers capable of being sued if they renege on a contract, why would a seller willingly agree to release either of them from the contract?

[26] It follows, that Mr. Armstrong's alleged failure to advise Mr. Pirie that he could withdraw from the contract did not create a cause of action in Mr. Pirie's favour.

JUDGMENT

[27] Mr. Armstrong did not commit any breach of contract, act of negligence or breach of a fiduciary duty. Therefore, the plaintiff's action is dismissed. Costs to the defendants on Scale 3.

"J.C. Bouck, J."
The Honourable Mr. Justice J.C. Bouck