

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chau v. Crawford*,
2015 BCSC 1756

Date: 20150930
Docket: M131123
Registry: Vancouver

Between:

Tai Chi Chau

Plaintiff

And

Michael David Crawford

Defendant

And

**The Owners, Strata Plan LMS 3869,
ABC Property Management Company Ltd.,
ABC Company Ltd. and John Doe**

Third Parties

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:

D.F. Corrin
(Not appearing for this hearing)

Counsel for the Defendant:

E.C. Watson

Counsel for the Third Party, The Owners,
Strata Plan LMS 3869:

R.P. Dueckman

Place and Date of Hearing:

Vancouver, B.C.
March 5, 2015

Place and Date of Judgment:

Vancouver, B.C.
September 30, 2015

I. INTRODUCTION

[1] The Owners, Strata Plan LMS 3869 (the “Strata Corporation”) is a strata corporation. The Strata Corporation is a third party in these proceedings.

[2] The Strata Corporation seek that the third party proceedings be stayed pending the issuance of a certificate under s. 257 of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

[3] The defendant opposes the application. The plaintiff takes no position respecting the application.

[4] For the reasons that follow, the stay the Strata Corporation seeks is granted.

II. PLEADINGS

[5] The plaintiff, a construction labourer, has sued the defendant claiming that he sustained serious personal injury as a result of a collision caused by the defendant.

[6] The plaintiff has pleaded that on or about April 13, 2011, he was standing on a ladder power washing a townhouse complex (the Strata Corporation’s strata property) when a car driven by the defendant ran over and pulled or struck the plaintiff’s power washing equipment causing the plaintiff to fall from the ladder and sustain injury.

[7] The defendant denies all of the plaintiff’s key pleaded facts, including that a collision occurred. In further answer the defendant has pleaded:

2. In answer to the whole of the notice of civil claim, the defendant says that if an incident occurred at the time and place as set out in paragraph 4 of the notice of civil claim, which is not admitted but specifically denied, and if as a result thereof the plaintiff sustained any injury, loss, damage, or expense which is not admitted but specifically denied, the defendant says that the Collision occurred without negligence on the part of the defendant, and occurred solely as a result of, or was contributed to, by the negligence of the plaintiff, the plaintiff’s employer, Strata Plan LMS 3869 (the “Strata Corp.”) and/or the management company employed by the Strata Corp. The defendant is under no liability to the plaintiff whatsoever.
3. Particulars of the negligence of the plaintiff include, but are not limited to:

- (a) Failing to take reasonable or proper or any precautions to avoid the incident;
 - (b) Failing to take any or, in the alternative, any proper care for his own safety;
 - (c) Operating and erecting the power washing equipment on a roadway when he knew or ought to have known it would be unsafe to do so;
 - (d) Running the hose of the power washer across a roadway without protecting the hose from passing vehicles;
 - (e) Failing to operate the power washer as recommended by the manufacturer and as set out in the operating instructions of same;
 - (f) Failing to wear protective and/or a safety harness to protect himself from injury should he lose balance or fall from the ladder;
 - (g) Failing to ensure the ladder was properly installed and secured as recommended by the manufacturer and as set out in the operating instructions of same;
 - (h) Failing to report to his supervisor or employer the absence of or defect in any protective equipment, device or clothing, or the existence of any other hazard, that he considered likely to endanger him or any other person pursuant to s. 116 of the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (i) Failing to take reasonable care to protect his health and safety and the health and safety of other persons who may be affected by his acts or omissions at work pursuant to s. 116 of the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (j) Failing to carry out his work in accordance with established safe work procedures as required by the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto; and,
 - (k) Failing to ensure that his ability to work without risk to his safety was not impaired by alcohol, drugs or other causes pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto.
4. Particulars of the negligence of the plaintiff's employer include, but are not limited to:
- (a) Failing to ensure the health and safety of all workers working for the employer pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (b) Failing to provide and maintain in good condition protective equipment, devices and clothing as required by regulation pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (c) Failing to ensure that the protective equipment, devices and clothing provided and maintained by the employer were being used by the

- workers pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
- (d) Failing to provide the worker the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the health and safety of other workers at the workplace pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (e) Failing to take that care that in all the circumstances that is reasonable to see that a person on the premises would be reasonably safe in using the premises pursuant to the *Occupiers Liability Act*, R.S.B.C. 1996, c.337 and amendments and regulations thereto.
5. Particulars of the negligence of the Strata Corp. and/or the management company retained by the Strata Corp. include, but are not limited to:
- (a) Failing to ensure the health and safety of all workers working for the Strata Corp. and/or the management company retained by the Strata Corp. pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (b) Failing to provide and maintain in good condition protective equipment, devices and clothing as required by regulation pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (c) Failing to ensure that the protective equipment, devices and clothing provided and maintained by the Strata Corp. and/or the management company retained by the Strata Corp. are being used by the workers pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (d) Failing to provide the worker the information, instruction, training and supervision necessary to ensure the health and safety of those workers in carrying out their work and to ensure the health and safety of other workers at the workplace pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto;
 - (e) Failing to give to the Strata Corp. and/or the management company retained by the Strata Corp. or prime contractor at the workplace the information known to the Strata Corp. and/or the management company retained by the Strata Corp. that is necessary to identify and eliminate or control hazards to the health or safety of persons at the workplace, namely, the location of a safe water outlet which the plaintiff could have hooked up his power washer to, pursuant to the *Workers' Compensation Act*, R.S.B.C. 1996, c.492, and amendments and regulations thereto; and,
 - (f) Failing to take that care that in all the circumstances that is reasonable to see that a person on the premises would be reasonably safe in using the premises pursuant to the *Occupiers Liability Act*, R.S.B.C. 1996, c.337 and amendments and regulations thereto.

[8] Consistent with his further answer in his response to the plaintiff's notice of civil claim, the defendant has claimed against the third parties, including the Strata Corporation.

[9] The defendant in his third party notice incorporates the facts set forth in his response to the plaintiff's notice of civil claim. The defendant in the third party notice also pleads:

6. The third party, ABC Property Management Company Ltd., is a property management company unknown to the Claiming Party and retained by and providing property management services for The Owners, Strata Plan LMS 3869.
7. The third party, ABC Company Ltd., is a company unknown to the Claiming Party which was, at all material times, retained by one or both of The Owners, Strata Plan LMS 3869 and/or ABC Property Management Company Ltd. to undertake maintenance of the subject strata plan and which employed the plaintiff to carry out certain services at the townhouse complex as described in Part 1, paragraph 4 of the Notice of Civil Claim.
8. The third party, John Doe, is an individual unknown to the Claiming Party, who was, at all material times, retained by one or both of The Owners, Strata Plan LMS 3869 and/or ABC Property Management Company Ltd. to undertake maintenance of the subject strata plan and which employed the plaintiff to carry out certain services at the townhouse complex as described in Part 1, paragraph 4 of the Notice of Civil Claim.

[10] The defendant in the third party notice pleads that he relies on the *Workers Compensation Act*, the *Negligence Act*, R.S.B.C. 1996, c. 333, and the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337.

III. STATUTORY PROVISIONS

[11] For the application at bar, the key statutory provisions are found in the *Workers Compensation Act* and read:

2 (1) This Part applies to all employers, as employers, and all workers in British Columbia except employers or workers exempted by order of the Board.

...

10 (1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker,

dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the Breach of duty arose out of and in the course of employment within the scope of this Part. ...

(7) If, in an action brought by a worker or dependant of a worker or by the Board, it is found that the injury, disablement or death, as the case may be, was due partly to a breach of duty of care of one or more employers or workers under this Part, no damages, contributions or indemnity are recoverable for the portion of the loss or damage caused by the negligence of that employer or worker; but the portion of the loss or damage caused by that negligence must be determined although the employer or worker is not a party to the action.

...

254 The appeal tribunal [the Workers' Compensation Appeal Tribunal "WCAT"] has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following: ...

(c) all matters that the appeal tribunal is requested to determine under section 257;

...

257 (1) Where an action is commenced based on ...

(b) a personal injury, or ...

the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.

(2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether

(a) a person was, at the time the cause of action arose, a worker,

(b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,

(c) an employer or the employer's servant or agent was, at the time the cause of action arose, employed by another employer, or

(d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.

(3) This Part, except section 253 (4), applies to proceedings under this section as if the proceedings were an appeal under this Part.

IV. THE STRATA CORPORATION'S POSITION

[12] The Strata Corporation's argument is that the claim against them by the defendant should be stayed pending a certificate issued under s. 257 of the *Workers Compensation Act* which will help determine many matters relevant to the litigation (e.g. whether the plaintiff was a worker; whether the claimed injury arose in the course of employment).

[13] With a stay pending the issuance of the s. 257 certificate, the Strata Corporation argues that the litigation will proceed more efficiently and without creating unnecessary costs.

V. THE DEFENDANT'S POSITION

[14] The defendant makes various arguments. First, the defendant says that the pleadings reflect aspects that are not covered by the *Workers Compensation Act*. The defendant directed the Court's attention to the pleadings related to the *Occupiers Liability Act*. In a similar vein, the defendant argued that the bar to proceedings in s. 10 of the *Workers Compensation Act* applies only to "employers, as employers".

[15] Second, the defendant says there was no evidence as to what the plaintiff's activities were at the time of the accident. In particular, there was no evidence that the plaintiff was being paid or the contractual relationship he had, if any.

[16] Third, the defendant argued that examinations for discovery at this time would not be a waste of resources because the WCAT would be able to use the discovery transcripts (the defendant wishes that a s. 257 certificate be sought after discoveries) and in any event, the defendant could bring a motion asking to depose a representative of the Strata Corporation and to seek document production.

[17] Fourth, the defendant argued that in all likelihood the WCAT would not investigate matters. In this regard, the defendant referred the Court to a WCAT booklet entitled "Legal Act Guide, Section 257 Certificate" in which it is stated at p. 6:

WHAT MUST I PROVIDE TO WCAT TO OBTAIN A SECTION 257 CERTIFICATE?

In addition to the application documents and information that you give to us, you will need to make submissions that clearly identify the issues, set out the factual background, and provide all the evidence and argument necessary for WCAT to consider the issues.

Although we have the right to seek additional evidence, please do not assume that we will investigate further. Ensure that you provide us with all relevant evidence.

[18] Fifth, the defendant says that any prejudice occasioned to the Strata Corporation could be addressed by an award of costs.

VI. ANALYSIS

[19] *Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46 provides guidance in the present case. In *Dominion Cannery*, the plaintiff's employees claimed to have suffered typhoid fever attributable to well water that served the domestic needs of the plaintiffs as dwellers in a tenement of the defendant employer. Both the Supreme Court of Ontario and the Appellate Division held that the plaintiffs had not been injured "by accident" within the meaning of the Ontario workers' compensation legislation. The Ontario legislation shares common legislative purposes with the *Workers Compensation Act*.

[20] The defendant employer appealed to the Supreme Court of Canada on the grounds that the plaintiff's claim was statute-barred because of the exclusive jurisdiction granted to the Workmen's Compensation Board by the *Workmen's Compensation Act*, R.S.O. 1914, c. 25. In considering the jurisdiction of the Supreme Court of Ontario relative to the Ontario Workmen's Compensation Board, Justice Anglin, *per majority*, stated at p. 61:

It seems to be quite clear that the question of the plaintiffs' right to bring and maintain this action "arises under" Part I and also that it is

a matter or thing in respect to which power, authority or discretion is conferred on the Board.

In my opinion by giving to the board

exclusive jurisdiction to examine into, hear and determine

all such matters and questions the legislature intended to oust and did oust the jurisdiction of the ordinary courts to entertain them, and required that they should be examined into, heard and determined solely by the board.

In reaching this conclusion I have not forgotten that the jurisdiction of superior courts is not taken away unless by express language in, or necessary inference from, a statute. *Balfour v. Malcolm* [[1842] 8 Cl. & F. 485 at 500]; *Oram v. Brearey* [[1877] 2 Ex. D. 346 at 348]. I find here a positive and clear enactment that the jurisdiction of the board shall be “exclusive” -- and nothing to warrant a refusal to give to that word its full effect.

The purpose of the legislature apparently was to secure uniformity in the determination of what classes of cases fall within the operation of the [Workmen’s] Compensation Act by having a single tribunal deal with that question, and also to ensure that no workman injured in the course of his employment should find himself in the position of having been denied damages by the courts because he was, in their opinion, entitled to compensation under the Act, and refused compensation by the board because he was, in its view, not so entitled.

[21] With respect to issuing a stay, Anglin J., also *per* majority, stated at p. 63:

Under the amended statute, in my opinion, whenever this question arises as a substantial issue in the course of an action the proper course to take is to stay proceedings in the action until it has been adjudicated upon by the board. *Simpson v. Crowle* [[1921] 3 K.B. 243] at pages 250, 255. In view of the provisions of s. 20 the workman-plaintiff will be well advised in every case where there is any conceivable ground for contending that his claim falls within the Act to seek the determination of the board at the earliest possible date. [Emphasis added]

[22] The granting of a stay or an adjournment is a matter within the Court’s discretion and depends on the circumstances of each case: *Hommel v. Cooke et al.*, 2005 BCSC 658 at para. 32. However, when issues are raised under the *Workers Compensation Act* that are within the exclusive jurisdiction of WCAT, the usual course taken by the Court has been to stay or adjourn the proceedings to allow WCAT to render a determination: *Clack v. Duffus* (1995), 5 B.C.L.R. (3d) 120 (S.C.); *Davidson v. Kokanee Park Marine Ltd.*, 2001 BCSC 263 at para. 4; *Hazell v. Toews*, [1997] B.C.J. No. 2495 (S.C.) at para. 20; *Hommel*. This course is consistent with *Dominion Cannery*, as discussed above.

[23] The defendant objects to the granting of a stay at this point in the proceedings. The defendant argues that only some of the issues in this matter are related to the *Workers Compensation Act*, and that there is no evidence yet as to the

plaintiff's activities at the time of the accident. The defendant wishes the examinations for discovery to proceed. On these points, absent exceptional circumstances, the reasoning of Justice Clancy in *Hazell* at para. 20 applies:

[20] I conclude that the authorities binding on me and to which I am obliged to give deference make it clear that, at any stage of the proceedings, the issue may be raised and if that is done on any conceivable grounds, the proper course is to stay the action and refer the matter to the Board for a determination. ...

[24] In *Dominion Cannery*, the *Workmen's Compensation Act*, while allowing (after its amendment) "any party" to apply to the Workmen's Compensation Board for a determination, did not, like s. 257(1) of the *Workers Compensation Act*, contemplate specifically the court making such request. In my view, the fact that the court may request a s. 257 determination shows the Legislature's intent that the court should ensure matters within WCAT's jurisdiction are addressed by WCAT before unnecessary or duplicative steps are taken in court. Judicial resources are also conserved: see *Hommel* at para. 46.

[25] To put matters in colloquial terms, the underlying legislative goal in giving the court the power to request a s. 257 determination by WCAT is to avoid having "two cooks in the kitchen". WCAT has the expertise to deal with workers' compensation matters, has access to records which may be relevant to its determinations, and has the statutory authority to investigate matters and to conduct hearings: see Part 4, Division 3 of the *Workers Compensation Act*.

[26] I have noted defendant counsel's argument that WCAT's policy is not to investigate matters. With respect, I do not read WCAT's policy to be so firm. WCAT simply advises parties not to assume that it will initiate its own investigation in every case. WCAT has broad statutory powers, including, as noted, the power to investigate. Where a worker has been seriously injured, I expect that WCAT would use its powers to have before it all relevant information. WCAT has a broad mandate and has been granted exclusive jurisdiction to fulfill its mandate. WCAT should be able to proceed as it determines is proper in the circumstances of a particular case.

[27] If a stay were not granted, I am concerned that as information was discovered by a particular party, it would be sent to WCAT after it had already begun considering matters, causing its deliberations to become disjointed. Ongoing discovery obligations arising in the course of the court proceedings give rise to this concern.

[28] Answers to such questions as whether the plaintiff was a worker working at the time of the accident and if so, who his employer was, underlie many aspects of the litigation as currently framed by the pleadings. The Court therefore views that greater overall efficiency and conservation of resources will be achieved with a stay.

[29] The Court is also of the view that the possible prejudice to the Strata Corporation of needing to address matters that may prove superfluous could not be fully addressed by an award of costs.

VII. CONCLUSION

[30] The Court orders that proceedings as against the Strata Corporation be stayed pending the issuance of the relevant certificate(s) under s. 257 of the *Workers Compensation Act*.

[31] Costs will be in the cause.

“Funt J.”