IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rumsey v. Carros Group Services Inc.,* 2023 BCSC 887

Date: 20230331
Docket: S209875
Registry: Vancouver

Between:

Maria José Serrão Rumsey

Plaintiff

And

Carros Group Services Inc. dba Engel & Volkers Vancouver, Chantal Vignola, Chantal Vignola Personal Real Estate Corporation, Wendy Fuller, DPM Rental Management Ltd., Jane Doe and the Land Title and Survey Authority

Defendants

Before: The Honourable Mr. Justice Macintosh

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	C. Hartnett
Counsel for the Defendants, Carros Group Services Inc. dba Engel & Volkers Vancouver, Chantal Vignola and Chantal Vignola Personal Real Estate Corporation:	V. Critchley
Place and Date of Hearing:	Vancouver, B.C. March 31, 2023
Place and Date of Judgment:	Vancouver, B.C. March 31, 2023

[1] One group of Defendants, the Applicants, whom I will call "the Realtors", apply to be able to withdraw their deemed admissions to the facts stated in a notice to admit from the Plaintiff dated October 25, 2022. The Realtors rely on Supreme Court Civil Rule 7-7(5), which requires consent or the leave of the Court for the withdrawal. The Plaintiff refuses to consent, which brings us here on the application.

[2] The claim is unusual. The Plaintiff alleges that the unknown defendant, Jane Doe, defrauded the Plaintiff by causing the Plaintiff's strata property in North Vancouver to be conveyed away from her to two other people in March 2020. In other words, her property was taken from her without her involvement or knowledge.

[3] The Plaintiff sues the Realtors, the manager of the property, a notary to the transaction, the Land Title and Survey Authority as representing an insurer, and Jane Doe.

[4] The Realtors and other Defendants in their pleadings deny that someone other than the Plaintiff was the true vendor, and alternatively, that they were not negligent or otherwise responsible for permitting the conveyance to have proceeded as it did.

[5] The pleadings were closed in February 2021. The notice to admit was delivered on or about October 25, 2022. By then, relatively little had happened on the file. The exchange of documents was incomplete. The Realtors had not discovered the Plaintiff and the Plaintiff had not discovered the Realtors. No trial date has been set.

[6] The circumstances of the delivery of the notice to admit were out of the ordinary. Service was to be only by fax or certain other means that did not include email. Because of technical difficulties with the fax system at the office of the Realtors' lawyers, someone in the Plaintiff's lawyer's office contacted a woman in a secretarial position at the Realtors’ lawyer's office. That woman told someone at the Plaintiff's lawyer's office that they could email the notice to admit, and she received it

by email at the Realtors' lawyer's officer. She was relatively new working in the law, and did not really know what she was receiving.

[7] I pause to note that the notice to admit was voluminous. It contained 32 requested admissions and a request to admit the authenticity of certain documents. Plaintiff's counsel acknowledges today that the notice covered the entirety of the liability issues for the litigation, such that the answers the Plaintiff sought to the 32 requests or admissions would negate the need for a trial on liability.

[8] Plaintiff's counsel knew from the pleadings and email correspondence among counsel that the topics raised in the notice to admit were squarely in issue in the litigation, directly or indirectly, at least in substantial part.

[9] Returning to the chronology, the assistant at the Realtors' law firm transmitted the notice to admit, with approximately 50 pages of other documents, to the lawyer handling the Realtors' case, with a cover email, the body of which, in its entirety, said simply, "FYI".

[10] The receiving lawyer within the Realtors' law firm reviewed that volume of material on November 17. His review that day was prompted by a letter he received also that day from the Plaintiff's lawyer, writing to cancel the Plaintiff's discovery of the Realtors' discovery witness set for November 22, in light of the deemed admissions from the notice to admit, in effect negating the need for a discovery.

[11] This was a mere five days after the deadline in the rules for responding to a notice to admit.

[12] Understandably, the Realtors' counsel immediately requested a slight time extension for replying to the notice, but that was denied to him by Plaintiff's counsel, who said those were his instructions.

[13] I digress briefly to observe that a decision on that practice point should not, in my view, be the subject of client instructions, but instead be regarded as a matter within counsel's discretion.

[14] In any event, counsel for the Realtors still prepared and delivered to Plaintiff's counsel a detailed reply to the notice to admit on November 26, 2022, still only 18 days after the deadline, but that was to no avail. Plaintiff's counsel admits, as he is compelled to on these facts:

a) that the Plaintiff suffered no prejudice from the slight delay in the reply;

b) that indeed, the response of the Realtors' counsel, in an effort to remedy matters, was prompt; and

c) that this was simply a matter of inadvertence.

[15] I observe as a practical matter, to amplify the point that the Plaintiff is not prejudiced, that the deemed admissions would never bind the other Defendant groups who are entitled to litigate all issues addressed in the notice to admit without prejudice to their positions. The risk of there being findings at trial conflicting with the deemed admissions made by one defendant group is obvious.

[16] Rule 7-7(5) confers a broad discretion on me as the chambers judge in this application. Counsel for the Plaintiff rested his opposition largely on the proposition that the Realtors have not established a triable issue on the deemed admissions that they seek to withdraw. However, he acknowledged the correctness of the following legal proposition, as accepted by our Court of Appeal in *Norlympia Seafoods Ltd. v. Dale & Co.* (1982), 41 B.C.L.R. 145:

> . . . there may be circumstances in which the defendant [applicant] may not be able to show by satisfactory evidence that the fact admitted is not true but the defendant may be able to show that . . . in the interest of justice the issue between the plaintiff and the defendant ought to be resolved by a trial of that issue.

[17] That is the case here. As a practical matter, in trying to address a notice to admit that is so extensive and detailed as to embrace the whole of the liability aspect of the case, it would be a harsh and unrealistic burden to obligate an applicant on the present application to show that all the admitted facts of the deemed admission

are not true. The interests of justice in this case necessitate that the Realtors be able to withdraw the deemed admissions. I note also from *Norlympia* the following:

> It seems to me that the question whether an admission has been made inadvertently, hastily, without knowledge of the facts, or whether facts come to the attention of the court after the admission has been made are all matters to be taken into consideration in deciding whether or not the circumstances show that there is a triable issue which ought to be tried in the interests of justice.

[18] In other words, in the context of an application to withdraw admissions, the Court is not to be narrowly constrained when it is ascertaining whether there is a triable issue.

[19] The Court of Appeal also examined the withdrawal of admissions in *Sidhu v. Hothi*, 2014 BCCA 510. From paras. 11 and 25 in that case, it is apparent that whether a fact admitted is not true is simply one factor to consider in ascertaining whether there is a triable issue to be better addressed on the merits at trial than by way of admissions.

[20] Finally, in the law, I observe that Justice Cohen in *Kaler v. Scales*, 2009 BCSC 457, cited with apparent approval what Justice E.R.A. Edwards said, in part, in *Davie v. Wilson*, 2007 BCSC 1876 at para. 3:

> [3] The law with respect to the exercise of the court's discretion under Rule 31(5) respecting the withdrawal of an admission is appropriately summarized — both counsel appear to have acknowledged that this accurately reflects the law — in *British Columbia Practice*, third edition, volume 2, at page 31-8:
>
> > If an applicant can establish that the admission was made inadvertently, hastily, without knowledge of the facts or where the facts came to the attention of the court only after the admission was made, an application to withdraw the admission in the pleadings will be decided on a simple balance of prejudice and considerations of the interests of justice . . .

[21] That reasoning has some application in the case before me, although considered on a slightly different practice issue. The main cases informing today's application, in my view, would be those from the Court of Appeal cited above, *Norlympia* and *Sidhu*.

[22] In the case today, the balancing of prejudice and the interests of justice necessitate an order permitting the withdrawal of the admissions, and that is the order I make.

[23] Costs were requested in the notice of application, but costs were not spoken to. The cost award I propose is costs to the successful Applicants in any event of the cause, but not payable forthwith. If that is accepted by both sides, it will be part of today's order. If it is not accepted, I reserve the right to make that or any other costs order after hearing submissions.

[24] Those are my reasons.

[25] CNSL V. CRITCHLEY: Thank you, Justice.

[26] THE COURT: All right, anything further?

[27] CNSL C. HARTNETT: If we could speak to costs, I think it would make sense. My position is that I think costs should be in the cause, and this should link to -- effectively to liability, where these were admissions that should have been made. The prejudice only arises if the admissions were not properly -- were not proper and it somewhat links to the eventual finding of liability at trial. So my submission is that costs should be in the cause.

[28] THE COURT: Mr. Critchley?

[29] CNSL V. CRITCHLEY: Yes, Justice. Given the circumstances and in particular the time that expired between when one should have responded to the notice to admit to when they did, and given that efforts were made by myself, by prior counsel, by other counsel involved in the matter to have my friend and his client consider the law and the nature of this, in my submission, costs should be to the Applicant in any event of the cause. This application was completely unnecessary, with all due respect to my friend.

[30] THE COURT: I accept Mr. Critchley’s submission. Mr. Hartnett, I was considering some more drastic costs award against your client. However, the order

will be as I had first proposed it. The order is costs in any event of the cause, but not payable forthwith. Thank you.

"Macintosh J."