COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ari v. Insurance Corporation of British Columbia,* 2019 BCCA 183

Date: 20190528
Docket: CA45000

Between:

Ufuk Ari

Appellant
(Plaintiff)

And

Insurance Corporation of British Columbia

Respondent
(Defendant)

Order sealing exhibits to an affidavit, as well as copies of an indictment and reasons for sentence in two related criminal matters, to be accessible only to counsel of record or by further order of a Justice.

Restriction on publication: No person shall publish information regarding the identity of any potential class members (except those who have commenced proceedings in the Supreme Court of British Columbia), license plate numbers, driver's license numbers, vehicle descriptions, vehicle identification numbers, or addresses of potential class members insofar as they may connect them with this action or the facts surrounding it.

Before: The Honourable Madam Justice Bennett
The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated December 1, 2017 (*Ari v. Insurance Corporation of British Columbia*, 2017 BCSC 2212, Vancouver Docket S-123976).

Counsel for the Appellant:	G.J. Collette
Counsel for the Respondent:	R.R. Hira, Q.C. J.K. Bienvenu
Place and Date of Hearing:	Vancouver, British Columbia March 15, 2019
Place and Date of Judgment:	Vancouver, British Columbia May 28, 2019

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Dickson

Summary:

Mr. Ari is the representative plaintiff in a class action brought against the Insurance Corporation of British Columbia ("ICBC") for the statutory tort of violation of privacy. An employee of ICBC had accessed the information of 78 ICBC customers and provided it to a criminal organization. After the breach, ICBC, among other laudable conduct, cooperated with police and enhanced its security protocols. The chambers judge certified the class proceeding but declined to include other residents at the premises of the primary plaintiffs in the class or to certify the issue of punitive damages. Mr. Ari appeals. Held: Appeal allowed. It is not plain and obvious that the statute is not broad enough to extend to the other residents, and ICBC's subsequent laudable conduct does not necessarily insulate it from an award of punitive damages.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] The Insurance Corporation of British Columbia ("ICBC") retains an enormous collection of personal and private information about British Columbians. This class action case arises as a result of a privacy breach by an employee of ICBC. The chambers judge certified a class proceeding against ICBC, but excluded a particular group of individuals from the class and refused to certify the appropriateness and amount of punitive damages as a common issue. Mr. Ari, the representative plaintiff, appeals the certification order on those two grounds. I would allow the appeal on both issues.

Background

[2] A former employee of ICBC, Ms. Candy Elaine Rheaume, for no business purpose, accessed personal information of 78 ICBC customers ("Primary Plaintiffs") who had been at or near the Justice Institute of British Columbia in New Westminster. The personal information included names, addresses, driver's license numbers, vehicle descriptions and identification numbers, license plate numbers, and claims histories. Ms. Rheaume then provided the information to an acquaintance involved in the drug trade. She received $25.00 per name provided. She was charged with, and pleaded guilty to, fraudulently obtaining a computer service pursuant to s. 342.1 of the *Criminal Code* and received a suspended sentence with nine months probation.

[3] The illegally obtained information was used to target 13 of the Primary Plaintiffs ("Attack Victims") with vandalism, arson and shootings between April 2011 and January 2012 ("Attacks"). Two people have been found criminally responsible for their involvement in the Attacks. The attackers thought they were targeting police officers solely because the vehicles were parked at or near the Justice Institute.

[4] Mr. Ari's central allegation is that ICBC is vicariously liable for the wrongful acts of Ms. Rheaume. She is not named as a defendant. In *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468, this Court confirmed the chambers judge's ruling that a vicarious liability claim was not bound to fail.

[5] The Primary Plaintiffs claim general and pecuniary damages for the statutory tort of violation of privacy pursuant to s. 1(1) of the *Privacy Act*, R.S.B.C. 1996, c. 373, expenses for alternate accommodation,

security or additional security and moving expenses, and loss of past and future income. In addition to these damages, the Attack Victims claim damages for property damage caused by the Attacks.

[6] Mr. Ari sought to include in the proposed class family members and other residents at the premises of the Primary Plaintiffs ("Other Residents"). Mr. Ari also sought to include a common issue of punitive damages against ICBC.

Chambers Judgment (2017 BCSC 2212)

[7] The chambers judge granted the plaintiff's application for certification with two exceptions: (1) she found that the pleadings did not disclose a cause of action for the Other Residents; and (2) she declined to certify the issue of punitive damages against ICBC as a common issue.

[8] The chambers judge found that the pleadings disclosed a cause of action for the Primary Plaintiffs. ICBC had already applied to strike the vicarious liability claim, in which the application was dismissed and upheld on appeal: *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308, aff'd 2015 BCCA 468. That issue was therefore *res judicata*.

[9] She concluded that two narrower issues were not *res judicata*: whether the Other Residents had a cause of action; and whether the Attack Victims' property damage claims were proper *Privacy Act* claims.

[10] The chambers judge held that the Other Residents did not have a cause of action under the *Privacy Act* because Ms. Rheaume had not wilfully violated their privacy as required by s. 1(1). She reasoned that Ms. Rheaume had not identified the Other Residents and did not know that they resided at the premises of the Primary Plaintiffs, and that therefore, Ms. Rheaume's breach of the Primary Plaintiffs' privacy did not touch the Other Residents' personhood in a manner sufficient to come within the ambit of the statutory tort for violation of privacy under the *Privacy Act*. As a result, the chambers judge found that the Other Residents' privacy rights were not engaged and had not been violated, and held that the pleadings did not disclose a cause of action for the Other Residents under s. 4(1)(a) of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50.

[11] On whether the property damage claims were properly *Privacy Act* claims, the chambers judge found that it was not plain and obvious that the claims could not proceed. She reasoned that the Attacks were not necessarily an unforeseeable intervening act that severed the chain of causation between Ms. Rheaume's breach of privacy and the Attacks that would absolve her of liability for them. Without deciding the merits, she reasoned that this could, potentially, have been reasonably foreseeable. As a result, she found that the pleadings disclosed a cause of action for the Attack Victims' property damage claims.

[12] The chambers judge further held that there was an identifiable class of two or more persons. She found that it was appropriate to designate the Attack Victims as a subclass, since the property damage claims were common to them, but not to those Primary Plaintiffs who were not Attack Victims.

[13] Finally, the chambers judge refused to certify the issue of whether ICBC's conduct justified an award of punitive damages against it. She noted that ICBC had assisted the police with its investigation, performed

its own internal investigations, terminated Ms. Rheaume's employment, took various measures to ensure enhanced security, and compensated the Attack Victims for all property damage related to their vehicles. As a result, she found that there was no evidence of misconduct on the part of ICBC, and that the plaintiff did not establish "some basis in fact" to ground a claim for punitive damages.

[14] To this point there has been no discovery, so the personal identification of the Other Residents is not available.

[15] In summary, the chambers judge certified the action as a class action, but defined the class as follows:

> The 78 individuals who have been identified by ICBC as having had their personal information accessed for non-business purposes by Ms. Rheaume.

[16] She also identified the subclass as follows:

> There will be a sub-class of the 13 individuals [out of the 78] who have been identified by ICBC as having had their personal information accessed for non-business purposes by Ms. Rheaume, and whose premises received property damage caused by the third party Attacks.

[17] Having defined the class, the chambers judge certified the following common issues (at Schedule "A"):

> (i) Whether the Employee breached the Members' privacy pursuant to the *Privacy Act* … when she accessed Class Members' personal information wilfully and without a claim of right from the ICBC data bases.
>
> (ii) Whether the Members are entitled to general damages based on the Employee's breach of the *Privacy Act*.
>
> (iii) Whether the Members are entitled to pecuniary damages for losses suffered and expenses incurred due to the Employee's breach of the *Privacy Act*.
>
> (iv) Whether ICBC is vicariously liable for the general damages and pecuniary damages caused by the Employee's breaches of the *Privacy Act*.

[18] In addition, she certified the following common issues of the subclass (at Schedule "A"):

> (i) Whether the attacks were unforeseeable intervening acts such that Ms. Rheaume is not liable for the property damage the Subclass Members suffered as a result of the Attacks.
>
> (ii) If the Attacks were foreseeable, whether the Subclass Members were entitled to damages.

[19] Mr. Ari raises two grounds of appeal:

> (a) Whether the chambers judge erred in concluding that the pleadings do not disclose a cause of action for the Other Residents under s. 4(1)(a) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50; and
>
> (b) Whether the chambers judge erred in refusing to certify the issue of punitive damages against ICBC as a common issue.

Discussion

Standard of Review

[20] The parties agree that the standard of review for both issues is correctness: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at paras. 37–38.

Cause of Action for the Other Residents

[21] The chambers judge concluded that the Other Residents' privacy rights were not engaged and had not been violated because Ms. Rheaume did not identify any of them. She concluded that therefore no cause of action was disclosed under s. 4(1)(a) of the *Class Proceedings Act*.

[22] Section 1 of the *Privacy Act* reads as follows:

> Violation of privacy actionable
>
> 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[23] The chambers judge concluded that because Ms. Rheaume did not access the names of the Other Residents, she did not violate their privacy. She assumed that none of the Other Residents were identified by Ms. Rheaume. In my view, she applied too strict a test at this early stage of the certification proceedings.

[24] A class action cannot be struck unless it is plain and obvious that no claim exists: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. The factual basis for the breach of privacy of the Other Residents can arise in a number of circumstances. For example, they may be named as co-owners of the vehicle or as principal drivers. Some of those individuals may well have been identified by Ms. Rheaume. The chambers judge acknowledged that it was reasonably foreseeable that other people may live in the premises with the Primary Plaintiffs. Ms. Rheaume gave the private information to a criminal organization. The targets of the criminal organization were individuals and their families who attended at the Justice Institute, who were not necessarily the registered owners of the vehicles. It is arguable that anyone living at the address where the vehicle was registered had a reasonable expectation that their address would not be provided to a criminal organization.

[25] Other factual scenarios can be envisioned. The legislation says that there must be a wilful breach of privacy of another. It is arguable that the wilfulness aspect defines the action amounting to the breach of privacy, not necessarily the so-called target of the breach. For example, if surveillance by A is intended to breach the privacy of B, and in fact breaches the privacy of C, in my view, it cannot be said that it is plain and obvious that C has no cause of action simply because C was not the intended target or was unknown to A.

[26] In my view, the chambers judge applied the test of privacy too narrowly. There are few cases that

consider the scope of privacy under this *Act*. The onus at this stage is not high—it is only to show that it is not plain and obvious that a cause of action exists, and to provide some basis in fact to support the certification order. In my opinion, Mr. Ari has met that standard.

Punitive Damages

[27] The chambers judge concluded that there was no reprehensible conduct by ICBC and that there was no basis in fact that ICBC's conduct justified an award of punitive damages.

[28] In coming to this conclusion, she found:

> [102] I agree that there is no evidence of misconduct on the part of ICBC here. On the contrary, there is evidence that upon being made aware of potential wrongdoing, ICBC assisted the police with its investigation and performed its own internal investigation; and upon discovering Ms. Rheaume's wrongful conduct, ICBC terminated Mr. Rheaume's employment. In addition, ICBC undertook various measures to ensure enhanced security, and fully compensated the 13 victims of property damage (the Subclass Members) for all motor vehicle insurance claims, including deductible payments. On this basis, I accept the defendant's submission hat the plaintiff has failed to establish there is "some basis in fact" that ICBC's conduct justifies an award of punitive damages.

[29] Punitive damages may be awarded when misconduct "represents a marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at para. 36. Punitive damages may be certified as a common issue in appropriate cases. *Rumley v. British Columbia,* 2001 SCC 69 at para. 34.

[30] Rather than consider the past history of breaches of privacy by ICBC employees—the evidence supported that at least 7 employees have been terminated by ICBC between 2008 and 2011 for privacy breaches—the chambers judge considered the steps taken since the breach in this case was discovered. While laudable on ICBC's part, subsequent conduct is not the sole basis upon which punitive damages are determined. The chambers judge should have accepted as true the allegation that ICBC has a history of employees breaching private information. Instead, she judged the case on the merits on the evidence before her. That was an incorrect approach.

[31] In my view, the chambers judge erred when she refused to certify punitive damages. There was a basis in fact for the claim based on the information relating to the history of privacy breaches by employees.

[32] Before us, ICBC asked that if we overturn the failure to certify the issues, we return the case to the chambers judge for the analysis on preferability. This was the approach this Court took in *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 151.

[33] With respect to the punitive damages issue, the chambers judge continued the analysis and concluded that had she not decided that there was no basis in fact for a claim for punitive damages, it would be an appropriate case for certification.

[34] The chambers judge carefully analyzed the preferability of the issues she did certify. In respect of the Other Residents, her analysis is equally applicable. The common issues that were certified apply equally to

the Other Residents. Some of the Other Residents will fall into the subclass.

[35] A judge has a great deal of discretion to change things to fit the circumstances as a class proceeding progresses. At this point, there having been no discovery, it is my view that the additional classes and common issues are preferable for a class proceeding. I would not refer that issue back to the chambers judge for further consideration as a result of allowing this appeal.

[36] I would allow the appeal, include the Other Residents as members of the class, and certify the punitive damages issue as a common issue. I would leave the tasks of identifying the broader class and framing the common issue for the chambers judge.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Madam Justice Dickson"