IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lam v. University of British Columbia,* 2013 BCSC 2142

Date: 20131107
Docket: S035269
Registry: Vancouver

Between:

Howard Lam

Plaintiff

And

University of British Columbia

Defendant

And

Arpel Industries Ltd., carrying on business as Arpel Security Systems, Arpel Security Systems Ltd., Arpel Security and Monitoring Ltd., Enerand Holdings Ltd., carrying on business as Caltech Tech Services, Peter Moore, carrying on business as Moore Security Systems, Thermo Forma Inc., Vancouver Coastal Health Authority operating as Vancouver General Hospital and UBC Hospital, Mallinckrodt, Inc. and Sanyo Electric Co., Ltd.

Third Parties

- and -

Docket: S137452
Registry: Vancouver

Re: In the Matter of the B.C. Women's Centre for Reproductive Health

Children's & Women's Health Centre of British Columbia Branch, an agency and branch society of Provincial Health Services Authority

Petitioner

Before: The Honourable Mr. Justice Butler

Oral Reasons for Judgment

In Chambers

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Counsel for the Applicant/Petitioner Children's & Women's Health Centre of British Columbia:	James Goulden Anne Amos-Stewart
Counsel for the Respondent/Plaintiff Howard Lam:	Arthur M. Grant Peter E. Norell
Counsel for the Respondent/Defendant University of British Columbia:	Dylana R. Bloor
Place and Date of Hearing:	Vancouver, B.C. October 15, 2013
Place and Date of Judgment:	Vancouver, B.C. November 7, 2013

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[1] **THE COURT:** The Children's & Women's Health Centre of British Columbia Branch, which is an agency of the Provincial Health Services Authority ("the Applicant") applied on October 15, 2013 for an order permitting it to destroy and dispose of sperm specimens it is storing for class members in the class proceeding *Howard Lam v. University of British Columbia* ("the Class Action"). The sperm specimens are stored at the Applicant's fertility clinic at the BC Women's Centre for Reproductive Health ("the Fertility Clinic").

[2] At the same time, the Applicant sought a similar order in the proceeding commenced by way of petition *Re: In the Matter of the BC Women's Centre for Reproductive Health*, Vancouver Registry No. S137452 (the "Petition"). In the Petition, the Applicant seeks an order permitting it to destroy and dispose of all other unclaimed embryos and sperm specimens stored at the Fertility Clinic.

[3] At the hearing of the application in the Class Action, the plaintiff took the position the Applicant did not have standing to bring the application, and that in any event, the order should not be granted as it required findings to be made which would negatively impact the rights of the plaintiff and class members in the Class Action. The defendant UBC did not take any position on the application. At the hearing of the Petition, Mr. Grant who is counsel for the plaintiff in the Class Action, although not representing a party in that proceeding, made submissions as a friend of the court opposing the granting of the order sought. Mr. Grant submitted that the order should not be granted without proper notice to the individuals who stored the specimens and argued the order sought could impair the rights of class members in the Class Action.

[4] Mr. Grant further submitted there was no need for either order sought by the Applicant because it can proceed to destroy the specimens without court order if it wishes to do so. Rather than seeking an advance order permitting it to destroy the specimens, he argued that the Applicant should simply proceed to do that. Whether or not it had the right to do so could be litigated if and when the individuals brought an action against them.

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[5] At the hearing on October 15, 2013, I indicated I was prepared to grant the order sought in the Class Action provided that the order fully preserved the rights of the class members to pursue their claims in that proceeding. I invited counsel to discuss wording that would effectively ensure that the Class Action members' rights were not impaired in any way.

[6] I also concluded the Applicant did have standing to bring the application. I indicated I was of the view that there should be one further attempt to notify class members who may not have received notice of the possible destruction of the sperm specimens. The Applicant proposed a form of advertisement to accomplish that.

[7] With regard to the order in the Petition, I indicated I was prepared to grant the order provided the Applicant made one further attempt to notify individuals who had stored sperm or embryo specimens, of the proposed destruction of the specimens by way of a broadly distributed advertisement. I also indicated there ought to be one further hearing following the advertisement before the order for destruction would be made. I also indicated I would provide reasons for my decision, and these are my reasons.

Background

[8] I need not describe the circumstances giving rise to the Class Action, as those have been set out in detail in the decisions issued by this Court and by the Court of Appeal. The sperm specimens of the class members that remain in storage in the Fertility Clinic were placed in storage prior to the failure of the freezer which took place on May 24, 2002. UBC was an operator of the Andrology Lab where the sperm specimens, which are the subject of the Class Action, remained in storage until September 3, 2010. At that time the sperm specimens were transferred to the Fertility Clinic operated by the Applicant.

[9] In addition to the sperm specimens stored for the class members, the Applicant stored other sperm and embryo specimens at the Fertility Clinic. Those

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specimens were either received from the Andrology or Gamete Labs on September 3, 2010, or were received directly from clients after that date.

[10] On March 12, 2012, the Fertility Clinic stopped accepting new specimens for storage. In July 2012, following a review of its operations and resources, the Applicant decided to close the Fertility Clinic. On November 30, 2012, the Fertility Clinic ceased its operations.

[11] While the Fertility Clinic has ceased operations, it has continued to store unclaimed sperm and embryo specimens. The Applicant has gone through an extensive process in an attempt to contact all individuals who have stored their specimens at the Fertility Clinic. Some have asked that their specimens be transferred to other storage facilities and some have asked that they be destroyed. However, many have not responded, and the Applicant has been unable to contact some of the individuals. The continued storage of the remaining specimens is costly. The Applicant incurs daily costs of approximately $1,900 to store these specimens. I understand that neither the clients of the Fertility Clinic nor the class members are paying for the storage and that the Applicant has no other source of funding to cover the costs. Accordingly, it brought the applications.

[12] As I have already indicated, the Applicant has gone through an extensive process in an attempt to contact all individuals who had specimens in storage at the Fertility Clinic. This includes class members and other individuals ("clients").

[13] As of November 30, 2012, the Fertility Clinic continued to store samples for approximately 415 class members and 847 clients. The extensive efforts taken to advise of the closure of the Fertility Clinic and obtain instructions from the individuals have been detailed in the affidavit material provided to the Court. I will summarize those efforts briefly as there is no issue regarding the steps that have been taken. I do stress that both the Applicant and counsel for the plaintiff and UBC in the Class Action are to be commended for the extensive work they have undertaken in an effort to obtain instructions.

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[14] In late 2012 or early 2013, counsel for the plaintiff in the Class Action sent a letter to all class members advising them of the closure of the Fertility Clinic and requesting instructions as to whether they wished to have their specimens destroyed or transferred to another facility. An election form was enclosed. Where election forms were returned, they were provided to the Applicant which resulted in the transfer of specimens for only two class members and the destruction of specimens of 30 class members. Approximately half of the Class Action letters were returned as undeliverable. UBC retained a skip tracer in an attempt to locate those class members. Counsel for the plaintiff followed up with additional correspondence in August 2013 for approximately 30 class members who indicated they wished to transfer specimens but had not completed the necessary steps to effect the transfer. I understand there were also attempts to contact class members by telephone.

[15] For the clients of the Fertility Clinic who are not class members, the Applicant sent letters in July 2012 advising of the pending closure of the Fertility Clinic and requesting written notice by way of an enclosed instruction form as to whether they wished their specimens transferred or destroyed. The Applicant received responses from approximately 34% of the clients and acted in accordance with the instructions received. Since July 2012, the Applicant has attempted to contact each of the clients by telephone. Where it received directions over the telephone to destroy specimens, the Applicant followed up with a subsequent letter to confirm the verbal instructions.

[16] In March 2013, the Applicant obtained the last known addresses for most of the clients as contained in the Medical Services Plan database. Starting in April 2013, the Applicant utilized the MSP addresses and information from its own database to send different forms of registered letters to all clients from which it had not obtained directions. Where the letters were returned undelivered, the Applicant attempted to determine what the problem was with the address and re-sent the letter to any alternate address that it had for the clients.

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[17] Where the Applicant obtained instructions to transfer specimens to another facility but the client did not complete all necessary steps to effect that transfer – for example completing the forms for the receiving clinic, paying the fees of the receiving clinic, or completing bloodwork required by the receiving clinic – it sent a subsequent letter confirming the instructions to transfer and providing further information on the steps required to complete the transfer. Where clients provided instructions to destroy specimens, the Applicant sent a confirming letter noting that it would dispose of the specimens by a particular date unless the client notified it of a revocation of instructions.

[18] In summary, over the last year and a half, considerable effort and expense has been expended to attempt to contact the owners of the specimens in order to obtain instructions.

Storage Agreements

[19] The Applicant does not rely on the terms of the storage agreements that may have been entered into by the clients and the class members when they first deposited specimens for storage. I note, however, that the defendant in the Class Action and the Applicant indicate that some form of agreement was entered into when specimens were placed in storage. The agreements which are alleged in the Class Action and the agreements which the Applicant says were used subsequent to 2002, contain provisions which may have permitted the Andrology Lab and may permit the Applicant to destroy samples in certain circumstances. Those circumstances include the death of a client and the failure to pay storage fees. Those agreements may also give the Andrology Lab or the Applicant a right to give notice of termination of the agreement. In my view, these provisions are relevant simply to indicate that the Applicant may have a contractual right to destroy the specimens either by giving notice or in some cases even without giving notice, to the class members or clients. This is a factor that I can take into account in assessing the reasonableness of the steps taken by the Applicant.

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[20] Finally, I should note that the Applicant says there may be additional specimens in its storage facilities which cannot be identified. These may include specimens belonging to class members. The Applicant has no means of obtaining instructions to destroy or effect a transfer of these specimens. It seeks an order permitting it to destroy those as well.

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Order in the Class Action

[21] As I have already indicated, I have concluded the Applicant has standing to bring this application. The application is brought pursuant to Rule 10-3(1) which provides:

> (1) If:
>
> (a) a person (in this rule called the "applicant.")
>
> (i) is sued or expects to be sued in respect of property in the person's possession or under the person's control ...
>
> … , and
>
> (b) the applicant claims no beneficial interest in the property,
>
> the applicant may apply to the court for interpleader relief.

[22] Subsection (9) of that Rule provides in part:

> (9) On the hearing of an application for interpleader relief, the court may
>
> ...
>
> (h) declare that the liability of the applicant with respect to the property or the proceeds is extinguished, and
>
> (i) make any other order the court considers will further the object of these Supreme Court Civil Rules

[23] The plaintiff says that the Applicant has not been sued and cannot say that it expects to be sued in respect of property in its possession or control.

[24] The plaintiff also notes that the interpleader rule has been used in the past to allow an individual holding property to call rival claimants to that property to court to determine how the rights to the property might be settled. The object of interpleader proceedings has been to protect a person who has standing in the position of a stakeholder. The plaintiff argues that it is an extension of the rule to apply it to the

circumstances of this case where there are no rival claimants to the sperm specimens and the Applicant is not a stakeholder in the traditional sense.

[25] The plaintiff relied on a statement of these principles in *Kosmenko v. Mason and Hosie Ltd.*, [1955] 3 D.L.R. 256 (Sask. Q.B.), which was approved of by this Court in *Interpro Contractors Limited v. Village of Fort Nelson*, [1976] 6 W.W.R. 481 (B.C.S.C.).

[26] I agree that the circumstances here are unusual and that the application of the interpleader rule to these circumstances is somewhat novel. However, subsequent to the decision in *Interpro Contractors*, the interpleader rule was modified and expanded. It now applies to "property in the person's possession or control". The precondition for an application under the rule is not as limited as suggested by the plaintiff and the definition of property is not narrowed in any way. There is no question that sperm and embryo specimens are personal property: *C.C. v. A.W.*, 2005 ABQB 290; and *J.C.M. v. A.N.A.*, 2012 BCSC 584.

[27] I conclude that the Applicant falls within the scope of the current rule. It is in possession of the specimens which are property and it claims no beneficial interest in them. It is thus in the position of the stakeholder who does not know to whom to deliver the property. The Applicant is holding the property in circumstances which can be described as an involuntary bailment. It wishes to dispose of the property for reasons of commercial necessity, and if it did so, it faces the possibility of suit by one or some of the class members. It could also be added as a third or fourth party to the proceedings by the defendant or one of the third parties. In other words, the Applicant satisfies the conditions of Rule 10-3(1).

[28] The current form of the Rule gives the court powers that go far beyond the payment of funds into court in the face of competing claims. Rule 10-3(9) specifically gives the court the broad power to make an order which will further the objects of these *Rules*. Of course the object of the *Rules* as provided in Rule 1-3(1)

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is "to secure the just, speedy and inexpensive determination of every proceeding on its merits."

[29] I conclude that the order sought by the Applicant would facilitate the just, speedy and inexpensive determination of this issue in the proceeding. The sperm specimens in question have been stored for many years using specialized facilities at considerable cost. Initially, the allegation by the defendant that the specimens were not damaged posed an impediment to the possible destruction of the sperm. I am advised that the defendant has now formally admitted damage to the sperm specimens and today I have approved the form of amendment which has been developed in the last six weeks. In that regard the form which I have approved and the order that will be granted is the final form that was delivered by UBC to the plaintiff.

[30] There is, accordingly, no need for preservation of the samples for a litigation purpose so long as the terms of the order do not impair the rights of the class members to pursue the claims made in the Class Action. The class members may, of course, have personal reasons for wanting to preserve the specimens and have a right to do that. However, they have been given that opportunity.

[31] I understand from the material before the Court that the Applicant is not being compensated for storage of the specimens. Accordingly, leaving aside any contractual rights to disposal of the specimens, it is in the position of a bailee with an involuntary bailment. Its duty in this situation is to take reasonable care in the circumstances. Before disposing of property it must show a commercial necessity dictating disposal: *Duet Marketing Corp. v. Spetifore and S. Spetifore & Sons Limited* (1986), 69 B.C.L.R. 368 (S.C.). In addition, the bailee must have acted prudently and *bona fide* in the interests of the owner and for all practical purposes must have been unable to communicate with the owner.

[32] Here the Applicant has acted prudently and *bona fide* in the interests of the owners. It has shown a commercial necessity for disposal of the specimens and has

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taken reasonable steps to protect the interests of the owners by storing the specimens for a lengthy period of time without reward. It has also taken great efforts to communicate with the owners.

[33] In summary, there is no reason to refuse to make the order sought by the Applicant in the terms that I have now approved. In that regard I note that by granting this order I have not made any findings of fact which will bind the parties or the court in the Class Action proceeding. The granting of the order in its current form preserves the rights of the class members to advance all other claims in the Class Action without impairment. In addition, the terms include a provision for an advertisement in the form that I have approved. This provides one final opportunity for class members to receive notice of the impending destruction of the samples. The sperm specimens may be destroyed after December 24, 2013 without further application to this Court. Of course, if the Applicant receives instructions from a class member seeking to transfer a specimen and the required steps to do so are completed, the Applicant will follow the instructions.

Order in the Petition

[34] An unusual feature of the order sought in this proceeding is that the Applicant has not named any of the clients as respondents to the Petition. The possibility that sperm or embryo specimens could be destroyed without the knowledge of the individual who deposited the specimens for storage is a serious consideration in relation to the order sought. However, I have concluded that the process which has been followed to date in attempting to contact the clients and the process which would be put in place as a result of this order effectively gives all clients the same possibility of preserving their specimens as they would have if they had been named in the Petition and served with the supporting materials.

[35] I have concluded that the order can be granted because of the substantial efforts undertaken by the Applicant to provide specific notice to each of the clients. In attempting to contact the clients they have utilized the best contact information

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available. They have followed up by utilizing alternate contact information and have attempted telephone contacts.

[36] The one thing that has not been attempted is some form of substitutional service. The order I am making will provide for publication of an advertisement which gives notice to the clients of the Fertility Clinic that they must immediately instruct the Fertility Clinic as to whether they wish their specimens to be transferred or destroyed. The advertisement also advises the clients that if they have not completed the steps to effect a transfer of their samples by December 24, 2013, the Applicant will apply for a final order permitting destruction of the samples. The date for the further application will be included in the notice. The order granted will effectively give the individuals the same kind of notice they would have received from an order for substitutional service.

[37] I conclude the granting of the order in these terms without naming the respondents or ordering substitutional service on those who have not been directly contacted is in accord with the object of the *Rules*. The order will provide appropriate relief to the Applicant and will provide adequate notice of the potential destruction of the sperm and embryo specimens to the clients of the Fertility Clinic.

[38] I note that the clients do not have a right to continued preservation of their specimens. They do have a right to be notified so they have an opportunity to transfer those specimens if they so wish. The order allows these proceedings to be concluded justly without further delay and at reasonable cost. Their right has been respected by the process undertaken by the Applicant and by the terms of this order. While it would have been possible to name all 847 clients as respondents to the Petition, that would have been awkward, expensive, and impractical.

[39] In making this order, I rely on Rule 1-3(2) which provides that the object of the Rules is "to secure the just, speedy and inexpensive determination of every proceeding on its merits." That includes, so far as is practicable, conducting the

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proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute, and the complexity of the proceeding.

[40] The final comment I wish to make is that I have approved the form of what is now paragraph 4 in the two orders. Those paragraphs have been changed slightly from the original form in a way that satisfies UBC's concerns about the destruction of the Class Action specimens and does not impair the rights of the Class Action members in any way.

[41] That concludes my reasons.

"Butler J."

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