Court File No. SC-05-24969-00

SUPERIOR COURT OF JUSTICE
SMALL CLAIMS COURT

B E T W E E N:

DRUMMOND, SUSAN G.

Plaintiff

v.

ROGERS WIRELESS INC.

Defendant

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R E A S O N S F O R J U D G M E N T

By MADAME JUSTICE P. THOMSON
on February 22, 2007, at Toronto, Ontario

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Thursday, February 22, 2007

R E A S O N S F O R J U D G M E N T

THOMSON, J. (Orally): The chronology of what happened here is a very important part of the story, which is why I have written it on the board there.

The plaintiff went in May of 2005 to Israel, her personal cell having been left at home. Shortly after she came back, she received a message from Rogers asking her to call them. That was the 26th of August. From Rogers' point of view, at that point, they knew that there was $12,000 worth of telephone calls on an account that had never been near that high, and that this $12,000 was above the threshold, such that it got flagged by the computer. Once flagged by the computer, it was checked over by a human being and Accounts Receivable was informed, hence the phone call on the 26th.

On the 27th, Accounts Receivable speaks to the plaintiff. She tells them that this must refer to a lost phone. She realizes at that point that she doesn't have the phone, wants to cancel. The plaintiff says she is not going to pay, obviously, because she takes the position

that she didn't make the calls. She is referred to Customer Relations. Customer Relations and the plaintiff have several conversations on this day. The important thing, from my point of my view, is that they are told that she lost the phone in May, that she's not responsible for the phone calls.

Rogers say she is responsible and the phone is blocked. They tell the plaintiff to go to the police, which advice the plaintiff follows. Mr. Gefen calls Customer Service shortly after at 1:00, and he is referred to the Fraud department/Loss Prevention. The Fraud department leaves a message at the home phone.

Customer Service again is in conversation with the plaintiff. The plaintiff's own correspondence in Exhibit 6 details the names and the numbers and the exact times of those conversations. For the purposes of my judgment, I am not going into detail.

Plaintiff, at this point, says they are not her telephone calls, she is not responsible. She is transferred to a manager at 1:39. At 2:34, management has had their debate with the plaintiff about the responsibility and the provisions of the contract, and matters are not resolved. And I'm not sure, but there's a phone call either from the plaintiff or from Mr. Gefen, still on the 27th, at 3:12, inquiring

about unbilled charges on 5-7-8-0. This is the first time that 5-7-8-0 comes up.

On the 28th, Rogers' Fraud department investigates and comes to a conclusion that there is no fraud, as they define it, and the issue is closed. From their point of view, she owes the money. That's at 12:28 in the afternoon that they come to that conclusion and communicate it to the plaintiff. The plaintiff writes a letter to Fraud, not Customer Relations, and delivers it. That's Exhibit 9. Exhibit 9 talks about the theft of her cell phone.

At any rate, the idea of the phone being lost in May clearly was an error on the plaintiff's part that is corrected as soon as they realize that what happened in May was a 'lost and found' situation. There was nothing on the bill received in June about telephone calls to Pakistan. At that point, they realize that they must be talking about something that's happened in July. I can understand that kind of error being made. The plaintiff is a pretty excitable person, and her mind often runs much too quickly.

At any rate, that is corrected right away. On the 28th, Fraud makes its investigation, makes its decision that there's nothing that they're going to do. The plaintiff delivers her letter

to Fraud, and the matter is sent back to Accounts Receivable.

The 28th of August is a Sunday. So, the defendants have moved over the weekend, the 26th being the Friday. Everyone has been moving quickly over the weekend and a lot has happened. The 29th is a Monday, and as far as my notes show, nothing happens. The 30th, anywhere in any of the exhibits I've looked, I find nothing.

On Wednesday the 31st, the matter is back in Accounts Receivable by this time. A text message is sent for the plaintiff to call, and some sort of special instructions are added to the account. We do not know what those special instructions were because they have been deleted. It appears that the special instructions put up on the 31st were the second set of special instructions, the first set being put up on the 26th. And again, we do not know what they were. But we do know that on the 27th, Ms. Drummond's phone is blocked.

So, on the 31st, a message is sent out and there's no reply. The 1st of September, which is the Thursday before the long weekend, I have no record of anything happening. On Friday the 2nd, 5-7-8-0 is blocked. Now, we know that it is Noah's phone. Rogers knows at that point, from the letter of the 28th, that the plaintiff is concerned about her second phone.

The first indication that is given to Rogers that the son is involved is orally, which as we will see as we go through this decision, doesn't mean much. It is not until the letter of the 3rd of September that there is written mention of Noah's phone and the need for her to be in communication with her son. The focus still, as of the 3rd and throughout the 2nd, the 3rd being the Saturday of a long weekend, is access to the plaintiff's phone.

That draft claim, which was not issued, again focuses on the absence of one phone. There is reference at paragraph 9 of that draft that, "I might find that in Noah's moment of urgencies, Rogers had suspended service, as Rogers, through its representatives, have now threatened to do repeatedly." That's the first indication the plaintiff makes about the use of the second phone. By that time, of course, it is too late. The phone has already been blocked. The plaintiff does not discover this until after the Labour Day weekend, which takes us to Tuesday the 6th.

On the 3rd, there are detailed notes in Exhibit 4 about Accounts Receivable and Customer Relations talking about the plaintiff's concerns. The plaintiff had called on the 2nd, a Saturday, about an invoice and a new phone, and I believe this is the day that she goes to

the police. A police report was duly sought and duly filed, as could be expected.

I have a question mark as to when on Saturday the 9th the letter at Tab G was delivered. There are phone calls also set out in Exhibit 4.

During the Labour Day weekend, on Sunday the 4th, the plaintiff buys a new phone at a Rogers video store, gets her phone unblocked and calls Customer Service twice. The notes are in Exhibit 4. Nothing happens on Labour Day Monday. On the Tuesday, the plaintiff is not dealing by telephone but rather is in the stores dealing with customer service people in the stores, as shown in Exhibit 4. Various things are faxed to her, and so on.

They wouldn't know until the 6th about this, in terms of any true corporate knowledge, because the letter is delivered in the afternoon of the Saturday of a long weekend. It is five pages long, extremely detailed, and somewhat repetitive. By the time they receive that letter of September the 3rd and someone can act on it, Rogers has also received, on September the 5th, a letter that says, "Please be advised that the attached Form 7A, Plaintiff's Claim, has been sent by courier to Small Claims Court, Superior Court of Justice," so on and so forth. "Small Claims will give this claim a file number and a copy will be sent back to me. Once I

receive the claim with the Small Claims Court file number, I will courier a copy of this Notice of Claim to the Legal department, as per the instructions in Article 34 of Rogers standard form contract." (No reference to the Rules of Court, which don't provide for service by courier. That's another issue.)

On the 7th, which is the Wednesday after the long weekend, Accounts Receivable is told by the Legal department to put a hold on any collections. That is the day that the plaintiff discovers Noah's phone is not working. She is assured by Rogers, I'm not sure whether it was personally or by the phone, that this has nothing to do with her dispute relating to her lost phone. She follows the advice that it has nothing to do with that, and goes the next day to have the phone fixed.

Well, it turns out it needs a new SIM card, and lo and behold, the store doesn't have the SIM card. She doesn't get a SIM card until the next day, that is the 9th. That is the day that she writes Ms. Tsetsakos at the Legal department, setting out in great detail the chronology of things up to that point and saying very clearly that it is on the 9th of September that she discovers that her son's phone is blocked and has been since the 2nd. Of course, Exhibit 4 and the correspondence, as well as the pleadings, show what goes on after that.

The block is lifted on the 12th, the 9th being a Friday and the 12th being a Monday. There is absolutely no evidence at all that the plaintiff was advised that the block had been lifted. The plaintiff, for legitimate family reasons, gets around to buying a new phone with a new service for Noah on the 14th. From the 15th on, Noah thankfully conquers the T.T.C. and Ms. Drummond and Mr. Gefen feel safe because cell phones are in place. Most importantly, Noah feels safe.

A Statement of Claim was issued on the 19th of September. Lots of things went on after the Statement of Claim was issued. I indicated to both parties that unless they related directly to this action I was not interested and, as far as I'm concerned, all of the stuff I heard had nothing to do with this claim, which is for damages for the blocking of Noah's phone.

The very simple issue is, was the defendant entitled to block the second phone on the 2nd, and also, were they entitled to keep that block on until the 12th? My answers to both of those questions is no.

By the 2nd, when the block is put on the second phone, there is clearly a joinder of issue between the plaintiff and Rogers with respect to her obligations, as well as theirs, under the contract concerning the $12,000 worth of

unauthorized calls. That debate continues to this day, I presume, it certainly was raised incessantly during the trial.

The contract is what apparently justified the blocking of the second phone. Each telephone number has a specific contract, so we have two contracts. That may or may not make a difference because Article 28 of the contract, entitled 'Suspension/Termination', says,

"We may cancel or suspend any or all of your services without notifying you if", and then there's a list and that's the second paragraph. The third paragraph says,

"If we suspend or cancel your service, 1) You must still pay any amount you owe to us; and, 2) We may also suspend or cancel without notice your service under any other agreement or account that you may have with us."

So, there appears to be some justification there for blocking the second phone because of the operation of the contract. Rogers says, "We were entitled to block the second phone because the plaintiff had made it clear that she refused to be held responsible for the $12,000 worth of calls put to Pakistan. And therefore, she was, if you will, in anticipatory breach of Article 18." Article 18 says,

"Please immediately notify us if your device or SIM card is lost, stolen or destroyed."

Rogers knew it before she did.

"You will need to replace your device or SIM card," and we know that that's at a cost, "and you will be responsible to pay us for all charges up to the time you notify us. Should you not replace your device you will be required to pay us for any applicable early cancellation fees as outlined below."
That's an anticipatory breach. Before an anticipatory breach, they are not entitled to block the phone.

Secondly, Rogers argues that under Article 19, second paragraph, the plaintiff was in breach of the contract. Under the heading of 'Deposit', we have a clause that I would hope in any revisions has been made into its own heading:

"If you incur significant long distance charges we may require an interim payment before your normal billing date. In this case, we will consider your payment past due three days after the due date or three days after we demand payment, whichever is later. If, after we notify you, the risk of loss to us substantially increases or we believe you have no intention of paying the amount you owe, we can request immediate payment of your entire account."

Well, I don't think Rogers fulfilled their side of the bargain here in many ways. First of all, there was never a requirement for an interim payment. The consistent discussion concerned

paying the full account. Secondly, even if any of those conversations could be interpreted as being a requirement for an interim payment, it was never done in writing. This is a contract in writing. A simple text message would have done. But the text messages were all, "Please contact us."

Now, once they have asked for an interim payment, Rogers may consider the payment overdue three days after the due date, which would have been the 13th of September, or three days after they demand payment, which would have been earlier than that, whichever is later.

Now, the next part of this is,

"If after we notify you, the risk of loss to us substantially increases...."

Well, the evidence is that the calls had stopped on August 16th. The plaintiff had not lost her professorship. She had, in fact, bought a new phone and re-instituted her own phone on the same day that Noah's phone was blocked. Their belief that she had no intention of paying the amount she owed is all based on oral conversations and a legitimate debate that was going on with respect to the responsibility for those calls in law, for customer service reasons, for reasons of avoiding publicity, for a million reasons, every one of which, I promise you, Ms. Drummond has figured out. It is only then that they can request immediate payment of

the entire account and they never did that in writing again, never. So, Article 19 does not help the defendant.

Following along in my logic, which by necessity is direct, the Court is then faced with the issue of Article 25, called 'Limits On Rogers Liability Generally'. This section reads,

"Except for emergency services on a mandatory basis, we will not be liable to you or anyone else for any damages or any other loss, however caused, resulting directly or indirectly in connection with the terms and conditions herein and the service or equipment, including roaming calls." (Noah didn't sue, which is interesting. And I understand why, but that, anyway, includes Noah.)

I don't know, maybe Rogers has got the unhappy circumstance of having a Judge that's old enough to have learned grammar, but that clause doesn't make any sense to me. The grammar of it doesn't make any sense to me and I don't know how a term or condition can do anything to cause damage. Does it hit you? A term or condition doesn't *do* anything. It doesn't talk about the operation of it. I mean, there's something missing here. "In connection with...." What does that mean? "Resulting indirectly or directly in connection with the service, in connection with the equipment."

Well here, the loss was 'in connection', to use the words of the defendant, to improperly taking action pursuant to terms of the contract that they had no right to do. I don't see how the exclusionary clause can apply. And I don't mean to make light of the work that has been done by counsel, or of the debate between Justices Dickson and Wilson in the *Hunter* case, as most recently dealt with in *Fraser Jewelers*, although I'm not so sure that's a consumer case.

A lot of time was spent on fundamental breach of contract, whatever that may mean. Certainly there was a breach of contract. The phone was blocked, and all numbers but 9-1-1 could not be used, prior to Article 19 being able to be relied on. It's sort of like, "I have the last piece of your crossword puzzle figured out but I'm not going to give it to you because you haven't been nice to me. You're challenging my authority and you're fighting me back."

So if I were to push, I like the approach taken in *Fraser Jewelry*, and also by Madame Justice Himmel, in *Solway v. Davis Moving,* 57 O.R. 3rd, 245, other parts of which were overturned, most of which was upheld and complimented by the Supreme Court of Canada in 2003. She refers to Professor Friedman. We don't get any Professor Friedman cited here. We've got Waddams and we've got McCamus.

Then we go back. Why didn't they take it off until the 12th? You know, there is really no answer to that. And there is no answer because we do not know. I firmly believe and find that the reason we do not know is because we do not see the special instructions that have been deleted as of September the 12th.

Labour Day weekend or not, people are around, we know that from this. Saturday the 3rd, the next day, they know. The 4th, they unblock her other phone. Miscommunication? That is not for the consumer to bear the brunt of a large corporation not knowing what each hand is doing. The plaintiff is even calling on the 4th and they do not tell her. I've already talked about the 5th and the 6th. We go through all of this before the block is lifted on the 12th.

Like Justice Himmel, it appears to me that when one looks at all the factors that were listed by the plaintiff, in terms of when has there been a fundamental breach such as to make a clause not apply, the important one here is that we have a consumer and a business. It doesn't even matter the size of the business. This is not a business doing business with another business.

But in considering this contract and whether the plaintiff is bound by its terms, I've also looked at the unusually small print and the fact that it is a standard contract. I do not agree

with the plaintiff that it is filled with legalese. It is a pretty well drafted, plain language contract, but you do need a magnifying glass to read it and you can't change any of the terms.

None of this is to be taken as any kind of reinforcement of the plaintiff's approach that, "I don't read standard form contracts because there's always a way to get out of unenforceable clauses". And as far as I'm concerned, the plaintiff is taken to have read the contract and to have understood it. If she didn't, she should have. I am certainly not forgiving her for not reading it or giving her any brownie points for not reading it, or taking anything away from Rogers. You didn't read it at your own risk, ma'am, which may become relevant with respect to costs.

Then we come to what are the damages. The plaintiff is entitled to the cost of the new phone, $234.60. The evidence is unclear as to what days Noah was driven to school twice a day. I appreciate that this was a very upsetting thing for the plaintiff to recount. The letter to Margaret on September the 9th says clearly that Noah was driven to school on the 7th. The evidence indicates that he was also driven to school on the 8th and the 9th. And as far as I am concerned, the damages for the driving stop there. The plaintiff could have mitigated by

buying a new phone or by arranging with a bonded company to take him. 45 minutes back and forth twice a day equals 180 minutes a day, times 3 is 540, divided by 60 is 9 hours. The plaintiff argues that she should be reimbursed at $350 an hour. With all respect to her value, which is probably greater than that, her professorial hourly rate is $68 according to the pay stubs, and $68 times 9 hours is $612.00.

The plaintiff claims compensatory damages for the time spent arguing her point with respect to the stolen phone and the unauthorized phone calls.

COURT REPORTER'S NOTE: Cell phone rings from the body of the courtroom.

THE COURT: I wish I could think of something funny to say but I can't.

You know, part of what I'm thinking is that until a court says that she didn't owe that money, one never knows. People write off accounts, or compromise accounts, or negotiate accounts, for a lot of reasons. Right or wrong doesn't enter into it. Right or wrong comes into it once you get into a court, and there is no defendant's claim here, no counterclaim. I'm not prepared to recognize as a legitimate head of compensatory damages the time spent by the plaintiff with respect to her debate concerning

her stolen phone. Nor am I prepared to consider compensatory damages because of the time spent concerning a lost or stolen phone, plus concerning the blocking of Noah's phone and the issues that that created, or her lost fee for the class action. I simply do not have any corroborative evidence, or certainly, sufficient evidence to say that but for this, Ms. Drummond would be getting more than 20 percent of 20 percent of $66 million *if* the action is certified and *if* the action is successful. There are so many 'ifs' in there as to make it pretty clear to me that this is not a proper claim for damages.

There certainly is reference in the pleadings to mental stress, physical stress, but no argument was made on that and I have no evidence other than some from the plaintiff about how upsetting this all was. Well, some of that upset is related to the behavior of Rogers, some of it is related to the plaintiff's own personality, and some of it is related to the fact that the plaintiff has a special child.

We now come to punitive damages. This, when all is said and done, comes down to whether I think their behavior was egregious and immoral. There are judges that are paid a great deal more money than I, and have a great deal more time than I, that will debate this until the cows come home, and law professors too, who will try and

articulate what punitive damages are. I have read *Whiten* with care, and I have also considered my own experiences in this Court over 26 years in terms of awarding punitive damages, which I have done. There is apparently some idea that we do not have jurisdiction to do that, given that there is some weird argument that it is an equitable remedy and we do not have the power to give equitable remedies, which I think is not right. I do have the power to award punitive damages.

Rogers has not been nice. The blocking of the phone caused huge stress on the family. The blocking is done by Accounts Receivable after it has been to the Loss Prevention department and come back to Receivables, and they had sent out an S.M.S. It is certainly not nice that it is done on the Friday of the long weekend, and done before a written demand for payment, or before any deadline.

Then we come to, well, did they maliciously keep a block on that phone? I can promise you if I had any hint at all that this was maliciously done, I would be certainly inclined and would give punitive damages. I find, on the evidence I have before me, both oral and in writing, that keeping the block on until the 12th and refraining from notification to the plaintiff of both the block and the removal was malicious.

Accounts Receivable puts the block on at 16:54, a few minutes before 5:00, on the 2nd. On the 3rd, there's a conversation with Accounts Receivable and the plaintiff is focusing on the payment of her balance. On the 3rd, the dealings are with Customer Service; one call to Accounts Receivable requesting information on price plans, transferred to Customer Service, back again, Customer Service, Customer Service. Accounts Receivable does not deal with her directly on the 6th, it is the stores who do. It is on the 9th that she realizes that there's a block because that's when she goes to get the SIM card, they put the new SIM card in and it doesn't work.

The block has been on one week with no notice to the plaintiff. Well, the 9th is a Friday and nothing happens on the weekend. We know that Legal is involved at this point, and my bet is that Legal doesn't work on the weekend but I wouldn't know. It is unblocked on the afternoon of the 12th. We know that the letter to Ms. Tsetsakos in the Legal department was delivered on Friday, September 9th.

Well, I have no reason why it wasn't taken off on the Friday. Nothing happens. Perhaps Margaret doesn't receive her letter, because on the Sunday another email is sent, and it is not responded to. On the Monday, the plaintiff sends yet another email, "Hi Margaret, I haven't

heard from you yet." That email is sent at 1:28 and the block is taken off at 3:30. So, success was made but kept a secret.

At 9:52 p.m. on the 12th, Margaret is written to. This is at night, saying, "I'm going to have to drive my kid to school tomorrow." This doesn't indicate to me that there's been a conversation with Margaret. I don't think the evidence indicates there was, either.

So the block is lifted at 3:30 in the afternoon. As of 10:00 that night, Ms. Drummond does not know. September the 14th is when Ms. Drummond finds out the block is lifted. At any rate, that's the day she gets a new phone and tells them, "I have today purchased a new cell phone for my son so he can start taking the subway, as originally planned, this Friday." Now, the 14th was a Wednesday, so maybe he didn't go to school on Thursdays. There was some vagueness in the plaintiff's evidence with respect to dates and times and how often he went to school and whether it was every day. The plaintiff certainly uses the upper case a lot in some places and it turned out not to be quite accurate when evidence was given in Court.

So, was this malicious? I should look at the context, and the context is the debate over the stolen phone and the charges on that, which debate we know resulted in changes of policy,

changes in practice, in an apology, and so on. And it's in the context of, as Mr. Gefen so eloquently put it, Rogers being concerned about fraud against Rogers, not fraud against its customers. That is clearly what the contract purports to do.

Another part of the context is that on the 5th, which is a holiday Monday, a draft claim was sent to the defendant, which was allegedly to be issued but wasn't. This is the kind of tactic that collection agencies use. There is some reference in the evidence that, from that point on, all real communication, if I can put it that way, was to be between the plaintiff and the Legal department.

So, it comes down to Margaret. Margaret lifted the block on the 12th, not earlier. The 12th was not the earliest that she could do it. For reasons only known to her, it was not done until the evening of the 12th.

For reasons only known to Margaret in the Legal department, the plaintiff was not informed that the block had been placed, or that it had been lifted. Had the block been lifted, she would not have had to drive Noah on at least the 14th, or even earlier. I do not know if the 13th was a school day or not, since it appears that the 15th might not have been. But she certainly would not have had to drive him on the 14th.

The new phone might not have been purchased, or could have been returned.

Margaret, or her principals, were the only persons that could, at that point, communicate the lifting of the block to the plaintiff. I did not hear from Margaret, which surprised me. And now I know why. I can read the absence of a witness against a defendant and I will do so.

I will award punitive damages of $2,000. If Noah had been a plaintiff, the damages would have been higher. There will be judgment for $2,848.68. Given the offer to settle from the defendant, among other things, the plaintiff will not be awarded costs.

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CERTIFICATE OF TRANSCRIPT
Evidence Act, Subsection 5(2)

I, Dan Lockwood, certify that this document is a true and accurate transcript of the recording of Drummond v. Rogers Wireless Inc., in Toronto Small Claims Court 303, held at 47 Sheppard Avenue East, taken from Recording No. 82/07 to 83/07, on February 22, 2007, which has been certified in Form 1.

March 26/07
Date

Dan Lockwood,
Court Reporter

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THIS IS TO CERTIFY THAT THIS DOCUMENT IS A TRUE AND ACCURATE TRANSCRIPTION FROM RECORDINGS MADE HEREIN, TO THE BEST OF MY SKILL AND ABILITY, AND AS EDITED BY JUSTICE P. THOMSON.

Dan Lockwood - Court Reporter - March 22, 2007