NOVA SCOTIA COURT OF APPEAL
Citation: ***Sable Mary Seismic Inc. v. Geophysical Service Inc.,***
2007 NSCA 124

Date: 20071213
Docket: CA 283048
Registry: Halifax

Between:

Sable Mary Seismic Incorporated, Abbott Contracting Limited, Windsor Sales and Rentals Limited, Matthew Kimball and Mary Claire O'Hara Kimball

Appellant

v.

Geophysical Service Incorporated

Respondent

Judge(s):	Roscoe, Saunders & Fichaud, JJ.A.
Appeal Heard:	November 30, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Roscoe & Fichaud, JJ.A. concurring
Counsel:	Derrick J. Kimball, for the appellant Colin D. Piercey, for the respondent

Reasons for judgment:

Introduction

[1] The appellants are defendants in two separate but collateral proceedings who appeal the decision and order of Justice John D. Murphy in Chambers. They had applied for an order striking out the plaintiff's pleadings on the grounds that they disclosed no reasonable cause of action; or were false, scandalous, frivolous or vexatious; or were otherwise an abuse of process of the Court pursuant to **Civil Procedure Rule** 14.25.

[2] In an unreported oral judgment Murphy, J. dismissed the application, concluding that the appellants had failed to meet the heavy burden incumbent upon a party which seeks to strike out a cause of action.

[3] The appellants say the Chambers judge erred in law and that we ought to quash his order and strike out the respondent's claim. This case directly raises the question for the first time in this court whether obtaining judgment is a precondition to seeking relief under the **Statute of Elizabeth**, 13 Eliz. c. 5 (made perpetual, 20 Eliz. c. 5§ 1, 2).

[4] For the reasons that follow I would dismiss the appeal.

Background

[5] To provide context to these proceedings I will briefly outline the material facts which I glean from the pleadings, and as described in counsels' submissions before the Chambers judge.

[6] The respondent Geophysical Service Incorporated (GSI) carries on business in the acquisition, processing and management of marine and land based seismic data, including the operation of seismic vessels in the Atlantic Canadian offshore. It is a federally incorporated company with offices located in Calgary, Alberta and Windsor, Nova Scotia.

[7] In early 1998, GSI contracted with the appellant Sable Mary Seismic Incorporated (SMSI) to provide to GSI, vessel crew, as well as vessel management and related support services including the administration of crew payroll.

[8] Throughout this relationship GSI dealt with the other defendant Mr. Matthew Kimball, said to be the directing mind, manager and owner of SMSI.

[9] The contractual relationship between these two companies entailed GSI paying SMSI prescribed monthly fees for SMSI's services, and GSI paying for the vessel crew as arranged by SMSI. The amount SMSI was entitled to charge GSI for the provision of crew is the primary dispute between the parties.

[10] SMSI invoiced GSI for amounts said to be owing and GSI paid, as billed. Invoices included separate charges for crew payroll, management fees, crew expenses and Mr. Kimball's expenses.

[11] Effective March 1, 2002, the parties changed their contractual relationship. GSI took over SMSI's responsibility to provide vessel crew for GSI's marine operations, as well as administering the crew payroll. SMSI continued to offer certain vessel management services to GSI.

[12] GSI then discovered what it says were excessive charges for its past payments to crew under the old arrangements, which were seen to be significantly higher than what GSI later paid directly to largely the same crew.

[13] This revelation prompted GSI to sue SMSI, and Mr. Kimball (as SMSI's directing mind) alleging that they had over billed GSI throughout their contractual relationship. In this suit, S.H. 190408 which I will characterise as the "main action" GSI claims, among other things, breach of contract, negligent misrepresentation and fraudulent misrepresentation arising out of the parties' contractual relationship.

[14] Several months later GSI began a "second action" in which it named as defendants, SMSI and Mr. Kimball, as well as Mr. Kimball's wife, Mary Claire O'Hara Kimball and two other businesses owned and operated by Mr. Kimball, Abbott Contracting Limited and Windsor Sales and Rentals Limited.

[15] The second action is based on the **Statute of Elizabeth**, 13 Elizabeth, c. 5, 1571, and the **Assignment and Preferences Act**, R.S.N.S. 1989, c. 25, as amended. In this suit GSI alleges that SMSI and Mr. Kimball made transfers of real and personal property to others without good consideration and with the intention to defraud, and that as a consequence any such transfers ought to be declared null and void. Later in these reasons I will refer more specifically to the operative provisions of the statement of claim in this second action which lie at the heart of the appellants' application to strike.

[16] On April 25, 2007 GSI filed a notice of trial and certificate of readiness in the main action.

[17] That same day the various appellants applied to strike the statement of claim in the second action.

[18] The motion was heard in Chambers on June 13, 2007. After considering the written and oral submissions of counsel, Murphy, J. gave a brief oral decision dismissing the appellants' application. Justice Murphy's order confirming his decision was issued on June 26, 2007, and it is from that order that this appeal is taken.

Leave

[19] This Court's leave is required to appeal an interlocutory order. Section 40 of the **Judicature Act**, R.S.N.S. 1989, c. 240 as amended provides:

> There is no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, saved by leave as provided in the Rules or by leave of the Court of Appeal.

The threshold question in granting leave on interlocutory appeals is whether the appellant has raised an arguable issue. See for example **Huntley (Litigation Guardian Of) v. Larkin** 2007 NSCA 75. The respondents do not suggest that the appellants have failed to raise an arguable issue. Leave ought to be granted.

Standard of Review

[20] As this Court has said repeatedly, we will not interfere with a discretionary order, especially an interlocutory one, unless wrong principles of law have been applied or a patent injustice would result. Persuading us to intervene carries a heavy burden. **Minkoff v. Poole**, (1991) 101 N.S.R. (2d) 143 (C.A.)

[21] The several issues raised by the appellants in Chambers and now on appeal touch different aspects of a single question: should the respondents' statement of claim in the second action be struck pursuant to **CPR** 14.25?

[22] **Civil Procedure Rule** 14.25 permits the Court to strike out a statement of claim in certain clearly defined circumstances. The **Rule** provides:

> (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph (1)(a).

[23] In bringing its application to strike the appellants relied upon subsections (a), (b), and (d). Thus, for the purposes of this appeal, nothing turns on subsection (c).

Analysis

[24] The test to be applied on an application to strike an action is well known. Assuming that the facts pleaded can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a flaw in the claim which can be properly characterized as a "radical defect"? If it is plain and obvious that the action is certain to fail because it is so fatally flawed, the court may properly strike out those portions of the claim. However, if there is a chance that the plaintiff might succeed, the case should be heard. An order to strike out a statement of claim will not be granted unless on the facts as pleaded the action is obviously unsustainable. See for example **Hunt v. Carey Canada Inc.** [1990], 2 S.C.R. 959 at 975; and **Haase v. Vladi Private Islands Ltd.**, 96 N.S.R. (2d) 323, at 325 (N.S.C.A.).

[25] In Chambers the appellants made two principal submissions. First, they said the statement of claim in the second law suit should be struck as it disclosed no cause of action and merely referenced an anticipated outcome that had not yet accrued. Second, they said the claim was false, frivolous, vexatious or otherwise an abuse of the court's process. At the hearing before us the appellants added a third principal argument. They said sufficient facts had not been pleaded nor particulars provided to sustain the action. I will now consider each of the appellants' submissions.

Cause of action had not yet accrued

[26] To deal with this submission I will begin by referring to the specific provisions of the statement of claim in the second action upon which the appellants base their complaint. The operative provisions read in part:

> 11. In the action bearing Court File S. H. No. 190408, GSI claims, among other remedies, entitlement to an equitable tracing order in respect of the wrongfully converted property which is the subject of that action. GSI says that the Defendants in the within action are or were the recipients of wrongfully converted property or the proceeds thereof in respect of which the equitable tracing order, if granted in action bearing Court File S.H. No. 190408, would apply.
>
> 12. GSI pleads that if and when it obtains a judgment as against SMSI or Mr. Kimball in the action bearing Court File S. H. No. 190408, that it should be

> granted an Order setting aside any transfers of real or personal property as referred to above, and an Order declaring such transfers null and void.
>
> 13. GSI therefore claims:
>
> (a) an Order declaring the transfers of real or personal property made in violation of the *Statute of Fraudulent Conveyances* or the *Assignments and Preferences Act* null and void and declaring they be set aside;
>
> (b) an Order that the Defendants pay to GSI amounts received by the Defendants in respect of which an equitable tracing order, if granted in action bearing Court File S. H. No. 190408, applies;
>
> (c) an Order charging in favour of GSI all wrongfully converted property and the proceeds thereof in the hands of the Defendants in respect of which an equitable tracing order, if granted in action bearing Court File S. H. No. 190408, applies, or declaring GSI to be the beneficial owner of such property and proceeds; . . .

[27] The appellants say that this claim is bound to fail because, to quote from their factum:

> . . . the entire action and basis for the action is predicated on the successful conclusion in the other action. None of the facts upon which this claim depends or could depend exist at the present time. . . . Rather, the remedy sought by the Plaintiff is contingent entirely upon the possible results of another action which has yet to be determined.

[28] In effect the appellants say that the second action cannot survive because the cause of action on which it is framed, has not yet accrued. While conceding that there has been "some progression" in the law in Nova Scotia, the appellants say it has not developed to the point where this second claim can be allowed to stand.

[29] With respect I cannot accept the appellants' submissions. At their heart lies the notion that under current law a plaintiff must either have a judgment against the debtor prior to starting proceedings to set aside the conveyance under the **Statute of Elizabeth**, or, if both remedies are sought in the same action, the court must first make a finding in favour of the creditor before considering whether to set aside a

conveyance. With respect, these propositions no longer conform to the current law.

[30] The appellants refer to the decision of Hallett, J. (as he then was) in **Bank of Montreal v. Crowell** (1980), 37 N.S.R. (2d) 292 (S.C.). After considering some of the leading jurisprudence concerning the application of the **Assignments and Preferences Act**, R.S.N.S. 1967, c. 16 and the **Statute of Elizabeth**, Justice Hallett went on to describe the material facts a plaintiff was required to prove in order to succeed with a claim under the **Statute of Elizabeth**. In doing so, Justice Hallett considered the requirement that the impugned transfer had to have the effect of delaying or defeating creditors. He observed:

> [38] . . . The plaintiff must first obtain a judgment against the debtor prior to commencement of proceedings to set aside the conveyance under the Statute of Elizabeth and must, on the application to set aside, adduce sufficient evidence to enable the court to make a finding that the conveyance had the effect of delaying or defeating the creditors.

[31] This extract from Hallett, J.'s decision in **Crowell** to which I have just referred, and upon which the appellants here rely, requires this court's consideration.

[32] With great respect, I no longer consider it necessary that before a plaintiff can seek to set aside a conveyance under the **Statute of Elizabeth**, he or she must have obtained judgment. In **Shah v. Jesudason** (1999), 177 N.S.R. (2d) 162 (N.S.C.A.) this court acknowledged that the question merited further consideration but said that it was not necessary to decide the point for the purposes of that appeal. After repeating Justice Hallett's three part test, Pugsley, J.A. wrote at ¶ 33-35:

> [33] As part of the third prerequisite, Justice Hallett added these words, at p. 304:
>
> > "The plaintiff must first obtain a judgment against the debtor prior to commencement of proceedings to set aside the conveyance under the **Statute of Elizabeth ... "**
>
> [34] Counsel for the appellant pointed out that there is a substantial amount of authority from academia, as well as courts in other provinces, stipulating that a

> person attempting to set aside an allegedly fraudulent conveyance pursuant to the **Statute of Elizabeth** need not have a judgment in hand, at the time of the impugned conveyance, nor even at the time the action is commenced, in order to be successful. (Dunlop, **Creditor - Debtor Law in Canada**, (2d), Carswell (1995) 619; **Hopkinson v. Westerman** (1919), 45 O.L.R. 208, at p. 210 (Ont. C.A.); **McGillan v. McGillan** (1947), 4 D.L.R. 456, at 458 (N.B.C.A.))
>
> [35] In my opinion, it is not necessary to decide this issue for the purposes of this appeal.

[33] Here we are obliged to face the issue squarely. I am not persuaded that Murphy, J. erred in principle or induced a patent injustice when he dismissed the appellants' motion to strike. In deciding that both proceedings could proceed he said:

> The Plaintiff chose to follow a route involving two actions proving the principal debt in one action and intending to get a judgment there. And addressing the conveyance to other parties in a second action with those parties as co-defendants along with the alleged debtor in that second action . . . in my view that's a correct procedure . . . I interpret the cases and the evolution of the law as allowing that option . . .

[34] To similar effect Goodfellow, J. in **Aliant Telecom Inc. v. 3007620 Nova Scotia Ltd.** (2001), 199 N.S.R. (2d) 182 (S.C.) observed at ¶ 19:

> In my view, it is no longer necessary or appropriate to require a Judgment in hand to impugn a transfer or conveyance. Such a requirement has an impact of adding unnecessarily to the litigation process requiring in effect two lawsuits. This provides a fraudulent debtor with a continuing opportunity to hinder the creditor's ultimate recovery. . . .

[35] The issue was also recently considered in Alberta. In **Proprietary Industries Inc. v. Workum**, 2005 ABQB 610, Kent, J. observed at ¶ 15:

> . . . With respect to the *Statute of Elizabeth*, it cannot be that simply because no process is set out in the Act, only judgment creditors may avail themselves of the provisions. Why would such a condition be required? In fact, given the risk of the property in question be transferred (sic) again beyond the reach of the creditor before the creditor obtains judgment, it makes more sense to interpret the Act broadly. . . .

[36] This view is consistent with the approach that has long been taken in other jurisdictions for the better part of a century. See for example **Hopkinson v. Westerman** (1919), 45 O.L.R. 208 at p. 210 (Ont. C.A.) and **McGillan v. McGillan**, [1947] 4 D.L.R. 456 at 458 (N.B.C.A.). In my opinion it is the approach we ought now to adopt in Nova Scotia.

[37] I think it important to reflect upon the original text in the **Statute of Elizabeth**. In Nova Scotia this wording is rarely quoted, and has been virtually supplanted by the paraphrasing from **Crowell**, supra. I will set out the relevant passage from the preamble within the **Statute of Elizabeth**:

> *An Act against Fraudulent Deeds, Gifts, Alienations, &c.*
>
> For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued. . . .
>
> (Underlining mine)

[38] In my opinion the remedy prescribed in the **Statute of Elizabeth** is not restricted to judgment creditors. In 1571 when the **Statute of Elizabeth** was first declared law makers recognized that relief from fraudulent conveyancing might extend to persons who did not hold a judgment.

[39] Before concluding my consideration of the appellants' first submission, I wish to comment upon their suggestion that at best the respondents ought to have combined their two claims in one.

[40] If I understand the appellants' arguments correctly, they appear to have conceded before the Chambers judge that the claims for relief in the main action, and in the second action might have been sustainable if combined in the same action, provided that the court would first have to find in favour of the creditor as to the merits of the debt before going on to consider whether to set aside the conveyance. Whether that is so, need not be decided here. There was no application before Justice Murphy to consolidate the action. In obiter, he anticipated the situation and wisely observed that he had not been asked to deal with it. He said:

> . . . If the Plaintiff is wrong in doing it that way or had been wrong - - and I don't find that the Plaintiff was - - then the Plaintiff could do it in one action as Mr. Kimball seems to concede could be done. Or remedies would be available short of dismissing the action. In this case I don't suggest that any remedy is required. I think the circumstances as they have developed are sufficient that no remedy is required from the Court at this time. I think it would be inappropriate to join the actions largely for the reasons that - - and perhaps I'm overstepping my bounds here because there may be a future application to join the actions, I don't know. But I'm saying my piece anyway. . . .

[41] The issue was not before the Chambers judge and so need not be considered here. I hasten to add, however, that references in other cases to "sufficiency of evidence" or "what is necessary . . to be satisfied that a valid debt exists before proceeding with the issue of setting aside a fraudulent conveyance . . . " or "adduce sufficient evidence to enable the court to make a finding that the conveyance had the effect of delaying or defeating the creditors" are of course made in the context of trials on the merits where the evidence is and must be considered by the trier before deciding whether the impugned conveyance ought to be set aside. Such an assessment of the evidence does not arise in applications to strike pleadings pursuant to **CPR** 14.25.

[42] In conclusion on this point, I would hold that a party seeking relief in setting aside a conveyance under the **Statute of Elizabeth** need not have first obtained a judgment against the debtor before commencing those proceedings.

[43] Accordingly there is no merit to the appellants' first submission that the second claim is obviously unsustainable because the "cause of action had not yet accrued."

Claim is false, frivolous, vexatious, or otherwise an abuse of the court's process

[44] Here the appellants' complaint is that the respondent's second action embarrasses the named defendants with serious claims of "fraud" and amounts to an abuse of process because it is nothing more than a plea in aid of execution, is "multifarious" and is "fundamentally flawed" as a "deviation in pleading."

[45] There is no merit to the appellants' submission. As was argued before the Chambers judge, an alternative course of action for the respondent would have been to name all of the appellants as defendants in the main action, or apply to join the two actions now. However, the respondent preferred not to name certain appellants as defendants in the main action, as they were not seen to be implicated in those claims for breach of contract, and negligent and fraudulent misrepresentation.

[46] Commencing a separate, second action, avoided dragging Mrs. Kimball, and the corporate appellants into the litigation surrounding the main action. We were advised that proceedings related to the main action have gone on for five years and involve a highly contentious and complex dispute that has occupied weeks of discovery examination and production of voluminous documents, with a three week civil jury trial now scheduled for November, 2008. These realities - both practical and substantive - were not lost on the Chambers judge who said:

> . . . If the Plaintiff is wrong in doing it that way or had been wrong - - and I don't find that the Plaintiff was - - then the Plaintiff could do it in one action as Mr. Kimball seems to concede could be done. Or remedies would be available short of dismissing the action. In this case I don't suggest that any remedy is required. I think the circumstances as they were developed are sufficient that no remedy is required from the Court at this time. I think it would be inappropriate to join the actions largely for the reasons that . . . Mr. Piercey has outlined for this being a case where it would be inappropriate, at least unnecessary to join everything in one action. . . . In my view it's not necessary to stay this proceeding. The parties have de facto held the matter in abeyance while the first case is being resolved. And I don't feel that any remedy is required from the Court. In a nutshell I don't find that there is any prejudice to the Defendants which needs to be addressed as a result of the manner in which the Plaintiff has chosen to proceed. So no - - clearly there's no - - in my view, no abuse, no unreasonable cause of action, no frivolous or vexatious action, no basis for a dismissal. . . . for those reasons but particularly for the reasons contained in the brief from the

> Respondent and the oral submissions of the Respondent the application will be dismissed. . . .

[47] Murphy, J. turned his mind to the arguments advanced by the appellants as to whether the second action was false, scandalous, frivolous or vexatious or otherwise an abuse of the court's process. He addressed all of those issues directly and concluded that the appellants had not met the heavy burden required to strike out a claim.

Insufficient Facts or Particulars

[48] In oral argument at the hearing counsel for the appellants complained that there were insufficient particulars of allegedly fraudulent transfers pleaded in the second action. They say the only specific conveyance is that which is identified in ¶ 10 of the impugned statement of claim which refers to a transfer of real property in Antigonish County from Mr. Kimball to Mrs. Kimball on October 29, 2002. But for that single conveyance the appellants say there is no other particular given to sustain any allegations against the other named defendants in the second action. They say this "void" in pleading has not been answered by the respondent, despite a formal demand for, and reply to, particulars.

[49] I need not address the merits, if any, of the appellants' last submission since the matter was not raised in Chambers before Justice Murphy. Concerns with respect to the provision of particulars of fraud; the adequacy of their disclosure; the timing thereof along the temporal spectrum of protracted litigation; and the resulting consequence, should deficiencies in proper procedure be demonstrated, are all questions that were not raised on the application in the court below and therefore need not be addressed here.

Conclusion

[50] The Chambers judge's reasons, as well as his exchanges with counsel during argument, show that he carefully considered the material issues and applied the correct legal principles in their resolution.

[51] The law with respect to the application of the **Statute of Elizabeth** has evolved, such that a party need not have a judgment in hand prior to commencing

an action and seeking the relief afforded by that statute. The Chambers judge's decision and order dismissing the application to strike out the cause of action pursuant to **CPR** 14.25 because the appellants failed to show that it was obviously unsustainable, do not reveal any error in principle or patent injustice. As Murphy, J. noted, the parties have *de facto* held the second action in abeyance while the main action is pursued.

[52] I would dismiss the appeal and direct that if the respondent is ultimately successful in this the second action, S. H. No. 203124, the respondent is entitled to its costs of this appeal in the amount of $1,000 inclusive of disbursements.

Saunders, J. A.

Concurred in:

Roscoe, J.A.

Fichaud, J.A.