1997 **138591C**

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Brett v. Anthony & Boulton, 1998 NSSC 76

BETWEEN:

BRUCE R. BRETT

PLAINTIFF

- and -

ANTHONY & BOULTON and JAMES N. HORWICH

DEFENDANTS

DECISION

HEARD: **at Halifax, Nova Scotia before The Honourable Justice Walter R.E. Goodfellow in Chambers on July 8, 1998**

DECISION: **July 13, 1998**

COUNSEL: **Ian Blue, Q.C. & Blair H. Mitchell**
Solicitor for the Plaintiff

H.E. Wrathall, Q.C. & Stephen Kingston
Solicitors for the Defendants

GOODFELLOW, J.

1. BACKGROUND

Brett commenced this action May 30, 1997, alleging Negligence as regards to the preparation of the 1988 Empire Financial Statements, and that he relied upon them in executing a guarantee to the Bank of Montreal. The allegations of negligence relating to the 1988 Empire Financial Statements relate to an account receivable of $69,248.00 from Milestone Properties Ltd. A $100,000.00 payment received by Empire from a numbered company and failure to specifically note related party transactions. All parties agree that a six year limitation period applies, and disagree as to when the limitation period commences and further, if it commences at an early date, whether the limitations defense should be struck.

Brett's application is actually to strike paragraph 5 of the defense, pursuant to Rule 14.25 and in the alternative, an Order under 3(2) The Limitations of Actions Act, disallowing the defense. The defendants oppose both applications and apply in the final alternative for an Order for Security for Costs, pursuant C.P.R. 42.01(1).

2. ISSUE (1)

Discoverability

Both parties agree that the test is set out in **Central Trust Company v. Rafuse and Cordon,** (1986) 75 N.S.R. 2(d) 109 at page 149:

> "I am thus of the view that the judgment of the majority in **Kamloops** laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that the rule should be following and applied to the appellant's cause of action in tort against the respondents under the **Nova Scotia Statute of Limitations** R.S.N.S. 1967, c. 168. ..."

Brett gave evidence acknowledging the Empire Financial Statements were released January 5, 1989 and while he has no recollection of what transpired, he does not overcome Horwich's evidence that Brett, Brett's partner Taylor and himself met to review the draft financial statements in December 1988, which included a review of the accounts receivable. Brett takes the position he was entitled to rely upon Horwich in his capacity as a fiduciary, however the evidence satisfies me that Brett's lack of recollection stems not from the fact that the accounts receivable from Milestone Properties Ltd. was brought to his attention, that he ought to have acted upon such notice, but chose not to out of trust in his then friend and partner, Taylor. The $100,000.00 payment from Empire to a numbered company, as indicated in paragraph 9 of Horwich's Affidavit, was discussed by Bruce Brett and James Taylor at the meeting to review the draft statements, in December 1988. He goes on to say that they discussed how the job went, whether it was over and whether Empire got paid and that James Taylor reminded Bruce Brett that an additional $100,000.00 was being paid to Empire by the numbered company. A letter was written by James E. Melvin, C.A., an employee of the Brett companies, which is dated April 12, 1990. This letter was not actually received by Horwich until August 1991, when it was hand

delivered by Robert Teale, C.A., and Richard Miller, the former in-house solicitor for Granbury Developments Limited, another of Bruce Brett's companies. Mr. Brett's response is once again, that he has no recollection. I do not question his credibility in that regard, but conclude that when the matter was brought to his attention, he consciously declined acting upon it, not for lack of adequate notice, but because of his loyalty to Taylor.

Brett was aware of the related party transactions, virtually from the outset.

It is clear, therefore, that the time for limitation purposes began at a point where the action commenced by Brett, is out of time.

3. SECTION 3-2 - LIMITATIONS ACT

In this regard, I have carefully followed the steps reviewed in **Smith v. Clayton et al,** (1994) 133 N.S.R. 2(d), 157 and without quoting chapter and verse of the evidence, I point out that there is no evidence of specific prejudice, in that there are no material witnesses that have died, become incompacitated, or otherwise available, nor is there any indication that any records have been lost or destroyed. Clearly the delay pushes the matter close to the absolute limit for the exercise of discretion contained in Section 3(6). I agree with the forceful argument of Mr. Kingston, to the extent that limitations should not be disallowed lightly, and for every whim or on a basis that would render the statute

meaningless. I am bound to apply the direction given in our Interpretation Act and as I said, to review carefully the provisions of the Limitations of Action Act, as I did in **Smith v. Clayton et al**, above. The delay in this matter is substantial, however, it is not a case of a party sitting on her/his right of action, whereby the intended defendants are unaware of the strong possibility of such action and do not direct their attention in any way, to that possibility so that they are lulled into a false sense of security, which shaken at the last minute, would be confronted with the difficulties of recollection, determining the record, etc. This matter did not lie dormant. Anthony and Bolton were a third party to Brett's action, in relation to the Bank of Montreal, which was resolved and while the third party action against Anthony and Bolton was discontinued, Brett refused to agree to a dismissal. Brett, in March 1993, filed a complaint with the Institute of Chartered Accountants of Nova Scotia, which Mr. Wrathall described in a letter to the Institute of March 31, 1993, as the issues raised in the legal action for which Anthony and Bolton were a third party. The complaint ran its course. The report, which is in evidence, was released June 14, 1995, which undoubtedly, gave encouragement to Brett to pursue this action. Brett's resources, by this time, were severely strained, due to the guarantee given to the Bank of Montreal and in his evidence, he attempted to arrange a solicitor to take this matter on, on a contingency fee basis, and at least with that particular solicitor, no such arrangement was concluded and it was not until May 30, 1997, that the present action was commenced.

Overall, applying those provisions of Section 3(2) that are relevant, I conclude limitations defense should be struck.

The Trial Justice will be able to address any problems with respect to evidence, weight to be given to evidence, etc. that might arise as a result of Brett's delay. Pre-judgment interest might be adjusted because of the delay. **Thomas-Canning v. Juteau,** (1993) 122 N.S.R. 2(d) 23.

4. SECURITY FOR COSTS

The defendants seek Security for Costs, based upon a certificate registered in favour of Her Majesty, certifying an amount of $753,015.63 plus interest, compounded daily under the Income Tax Act, from the 14th of June 1995, and not marked satisfied or released. I agree with Mr. Mitchell that C.P.R. 42.01(1)(d) deals with a situation where there is an order outstanding for costs, and presumably the rationale for focusing on costs is that party has ignored the courts exercise of its discretion in ordering costs. I agree with Mr. Kingston that C.P.R. 42.01(1)(1) is not limited to the subsections, however, generally speaking, the impecuniosity of a party should not deny a party, its entitlement to be heard in court unless there are circumstances warranting such a prohibition. Here Brett advances the view that the judgment for income tax is related to the state of his finances, due to the requirement of addressing the guarantee to the Bank of Montreal, which he says he would not have executed, but for the alleged misconduct of Horwich. In the circumstances, I am satisfied that this is not a situation where a posting of security for costs is appropriate.

5. COSTS

Counsel are entitled to be heard on costs, however, given the extensive delay and in particular, the delay from the receipt of encouragement by way of the Institute's report on Horwich. It was quite appropriate for the defendants to maintain the positions they advanced and my preliminary view is that while successful, Brett should be denied costs.

J.