CV 04149

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N:

PTARMIGAN CONSTRUCTION LTD.

Plaintiff

- and -

ALTA SURETY COMPANY and 851820 N.W.T., LTD. carrying on business as CURRY CONSTRUCTION, 851820 N.W.T. LTD. and CURRY CONSTRUCTION

Defendants

- and -

851820 N.W.T. LTD., 851820 N.W.T. LTD., carrying on business as CURRY CONSTRUCTION, CANADIAN CONCRETE PRODUCTS LTD. and GEORGE WHISSELL

Third Parties

Application pursuant to Rule 241 and Rule 242 for a pre-trial adjudication of certain specific issues. Application denied.

Heard at Yellowknife, N.W.T. on November 29, 1994.

Judgment filed: December 19, 1994.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.E. RICHARD

Counsel for the Plaintiff: J.V. Miller

Counsel for the Defendant Alta Surety Company: S.M. MacLellan

Counsel for the Third Parties: P. Belzil

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REASONS FOR JUDGMENT

1 This is an application pursuant to the Rules of Court for an order directing that certain specific issues in the within action be tried separately prior to trial.

2 The plaintiff is a construction company. In its statement of claim it alleges that it is an unpaid subcontractor of the defendant Curry Construction. It further alleges that Curry Construction was the general contractor on a highway construction project for the Government of the Northwest Territories in 1991. Finally, the plaintiff alleges that the defendant Alta Surety was Curry Construction's bonding company on this project, and the plaintiff asserts its claim against Alta Surety as an unpaid claimant under the labour and material payment bond issued by Alta Surety.

3 The within action commenced with the filing of the plaintiff's statement of claim on September 3, 1992. On December 15, 1993 Alta Surety filed its statement of defence. In that pleading Alta Surety alleges, *inter alia*, that the plaintiff's action is barred by a limitation period in the labour and material payment bond. In particular, paragraph 7 of the statement of defence reads:

> Further, and in the alternative, one of the conditions under the Labour and Material Payment Bond is that an action must be commenced against Alta Surety Company within the time period specified in the Labour and Material Payment Bond. The Plaintiff failed to commence action within the time period specified in the labour and Material Payment Bond and has no claim against the Defendant Alta Surety Company.

4 At the time of filing its statement of defence on December 15, 1993 the defendant Alta Surety also filed a third party notice, claiming indemnity from the three third parties pursuant to a certain indemnity agreement executed by the three third parties in favour of Alta Surety in 1988.

5 The plaintiff's claim herein is for goods and services provided on the highway project, as subcontractor to Curry Construction, up to July 15, 1991. During examination for discovery an officer of the plaintiff acknowledged that neither the plaintiff nor Curry Construction performed work on this contract after July 15, 1991.

6 Alta Surety points to the limitation period in its labour and material payment bond:

> "6. No suit or action shall be commenced hereunder by any claimant:
>
> ...

> (b) after the expiration of one year following the date on which the Principal [Curry Construction] ceased work on the said Contract, ..."

and alleges that as the plaintiff did not commence the within action until September 3, 1992, the action is barred as against Alta Surety.

7 Alta Surety now applies to the court for leave to have the issue of the limitation period determined as a "preliminary" question prior to trial, as that issue may well dispose of this action as against Alta Surety.

8 The other issue on which Alta Surety seeks a preliminary determination concerns the third party action and the 1988 indemnity agreement on which it is founded. The statement of defence to third party notice filed herein on behalf of the third parties merely constitutes a general denial of the allegations in the third party notice.

9 Counsel for Alta Surety conducted an examination for discovery of third party George Whissell on November 7, 1994, in his personal capacity and as an officer of the two corporate third parties. At that time Mr. Whissell acknowledged that the third parties executed the 1988 indemnity agreement and received due demand from Alta Surety under the terms of that indemnity agreement. He also acknowledged, through counsel, that the third parties were not alleging such things as *non est factum*, duress, fraud, misrepresentation, *estoppel*, etc. with respect to the 1988 indemnity agreement. In the face of these admissions and the lack of any particulars from Mr. Whissell at discovery as to the basis of the third parties' denial of liability to Alta Surety, counsel for Alta Surety moves the court to have the issue of the third parties' liability to indemnify Alta Surety determined in a summary way on affidavit evidence without the necessity of

a full-blown trial.

Pre-trial adjudications

10 These applications by Alta Surety are made pursuant to Rule 241 and Rule 242 of the Rules of Court:

> 241. Where any point of law has been raised by the pleadings, it may, by leave of the court, be set down for hearing at any time before trial; otherwise it shall be disposed of at trial.
>
> 242. (1) The court may order any question or issue arising in a proceeding whether of fact or law or partly fact and partly law to be tried before, at or after the trial and may give direction as to the manner in which the question or issue is to be stated, and may direct any pending application to be stayed until the question or issue has been determined.
>
> (2) Where it appears to the court that the decision in that question or issue separately tried substantially disposes of the proceeding or renders the trial of further issues unnecessary, it may dismiss the proceeding or make such other order or give such other judgment as it considers proper.

11 It should be noted that the court on these applications is not being requested to decide the merits of the limitation issue or the indemnity issue, but merely to determine whether it is appropriate that these issues be tried prior to final, or other than at trial.

12 Normally, all substantive issues in the pleadings are decided at trial, following the reception of evidence adduced by the litigants and tested by cross-examination by opposite parties in the presence of the trial judge.

13 Keeping in mind the object of the Rules of Court - "to secure the just,

speedy and inexpensive determination of every proceeding" (Rule 5) - it is clear that the two rules cited above give the court a discretion to permit a departure from the normal procedure, even in defended actions. It is equally obvious, however, that this discretion should be exercised sparingly and with caution.

14 In *CMHC* v. *Canative Housing Corporation* (1988), 90 A.R. 303, Roslak J set forth the guiding principles when considering the equivalent provisions of the Alberta Rules:

> a) it is only in the clearest of cases that litigants should be deprived of the normal procedural rights to have a full production and discovery before trial and to have all issues in dispute determined at trial,
>
> b) the courts do not encourage piece meal trials of actions,
>
> c) the issues sought to be determined, so as to delay discovery or inspection, must be "readily severable from the other issues to be tried",
>
> d) the Plaintiff's prospects of success should be examined, so far as it can be determined at the pleading/discovery stage, and considered carefully in the decision whether to grant or refuse the severance of the trial of issues,
>
> e) the amount of the documentation to be produced should be considered and the court must be satisfied that the cost of a long trial would be saved by granting the orders sought,
>
> f) a preliminary question should not be tried unless it is likely to end the suit or some distinct part of it and,
>
> g) the court should not attempt to determine substantial or difficult questions as preliminary issues.

15 Other case law from Alberta confirms that applications under Rules 241 and 242 should involve a two step procedure, i.e. the point of law, or the issue, can be posed for determination by a judge in a pre-trial or preliminary fashion only after leave of the

court has been obtained to do so. *Town of Spruce Grove* v. *Yellowhead Regional Library Board* (1983) 44 A.R. 408 (Alta. C.A.); *Skogs* v. *Emery Jamieson* (1986) 72 A.R. 231 (Alta. Q.B.).

The one-year limitation issue

16 It is argued on behalf of Alta Surety that as there is uncontradicted evidence under oath from the examination for discovery that Curry Construction was not on the job-site after July 15, 1991, there is no factual dispute as to the commencement of the limitation period. Consequently, it is argued, this is an appropriate case to direct a pre-trial determination of the limitation issue, as a decision favourable to Alta Surety will substantially dispose of the within litigation.

17 The plaintiff opposes the application to have the limitation issue determined prior to trial. Plaintiff's counsel advances two arguments that this is not a proper case in which to grant leave for a pre-trial adjudication of the issue.

18 Firstly, plaintiff's counsel submits that the facts related to the limitation period are (or will be) in dispute. Counsel states that if the court grants leave (step one of the two-step procedure), then at step two counsel intends to produce affidavit evidence to the effect that Curry Construction was indeed on the job-site subsequent to July 15, 1991 either directly or through subcontractors. No such affidavit evidence is before the court on the present application (step one).

19 In my respectful view, the court is unable to give consideration to this argument in the absence of the affidavit evidence alluded to. If evidence exists to show

there is more than one version of the facts, such evidence should be placed before the court. The court cannot, in a vacuum, find that the facts are in dispute. There must be before the court a basis for any such finding.

20 Therefore, on the material before the court on this application, there is no merit in the plaintiff's first argument.

21 Secondly, it is argued that a determination of the limitation period issue will not end the litigation, as submitted by Alta Surety. It is pointed out on behalf of the plaintiff that it has pleaded in its statement of claim, in the alternative, relief from forfeiture (I assume by this is meant relief from the fatal consequences of its failure to commence its action within the limitation period) pursuant to the provisions of the *Judicature Act*; and, also in the further alternative, waiver by Alta Surety of the plaintiff's non-compliance with the contractual conditions, and *estoppel*.

22 Indeed, paras 13 and 14 of the statement of claim read:

> "13. The Plaintiff states that it has complied with all statutory and contractual requirements, however, if the Plaintiff has not, the Plaintiff has acted in good faith throughout and claims relief from forfeiture.
>
> 14. Alternatively, if the Plaintiff has not complied with all statutory and contractual requirements, the Defendants by their actions and representations have waived or are *estopped* from relying on the Plaintiffs non-compliance."

23 Further, included in the prayer for relief at the conclusion of the statement of claim is a request for "a declaration that the plaintiff is entitled to relief from forfeiture".

24 It is thus argued that even if the court were to find, on a pre-trial adjudication, that the plaintiff had failed to commence its action within the one-year limitation period, that finding would not dispose of or end the litigation, as the court (the trial judge) would still be required to conduct a trial to determine the issues of relief from forfeiture, waiver and *estoppel*. I find merit in this submission.

25 In *Victoria County Board of Education* v. *Bradstock, Reicher & Partners Ltd.* (1984) 46 O.R. (2d) 674, the Ontario Divisional Court, on a similar application for a pre-trial hearing on a point of law, was considering a statutory limitation period. The statute in question prescribed a limitation period of twelve months, but also provided that the court had a discretion to relieve against the limitation period. The defendant in that lawsuit applied for an order setting down the question of the limitation period for a hearing as a preliminary question of law. In denying the application, the court stated, at p.678:

> "A party to an action does not have an absolute right to the hearing of a point of law under Rule 134 ... We think leave should not have been granted because the determination of the point of law in question would not have disposed of the action or a substantial part thereof. If it were decided on the hearing of the point of law that the plaintiff's action is statute-barred under s.28(1), one cannot conceive that any court would then peremptorily dismiss the plaintiff's action, without giving the plaintiff an opportunity to move for an extension of the limitation period under s.28(2). This might be the case many months down the road after all appeals had been exhausted from a decision favourable to the defendant as to when the cause of action arose."

26 In my view, the present case is analogous to the *Victoria County* case. A pre-trial hearing of the limitation period here would not end the matter. Relief from forfeiture, waiver and *estoppel* would still have to be litigated. As Laycraft J.A. stated

in *Town of Spruce Grove, supra*, all related issues should be resolved at one time rather than in a fragmented fashion.

27 I accordingly deny Alta's application under Rules 241 and 242 on the issue of the limitation period.

The indemnity agreement issue

28 The possibility of this issue being determined in a final manner at a pre-trial hearing pursuant to Rule 241 or 242 appears to have provoked the third parties to substantially amend their pleadings. As stated earlier, the statement of defence filed on behalf of the third parties consisted simply of a general denial of the allegations against them in the third party notice. Examinations for discovery of the third parties did not reveal any particulars of this denial of liability.

29 At the hearing of the within application on November 29, 1994, counsel for the third parties advised the court that he intended to file an amended statement of defence to the third party notice. This has now been done. The amended pleading alleges bad faith on the part of Alta Surety in its dealings with the plaintiff and Curry Construction, alleges that such conduct by Alta Surety *estops* Alta from pursuing the third parties, and alleges that such conduct by Alta constitutes a waiver of its right of

indemnity against the third parties.

30 This recent amendment virtually renders moot Alta's request for a pre-trial ruling on the 1988 indemnity agreement. The very foundation of the application (i.e. no specific response to the validity of the indemnity agreement) no longer exists. Alta Surety's application in that regard must therefore be denied.

31 In summary, the application by the defendant, Alta Surety Company, pursuant to Rules 241 and 242, as framed in its notice of motion dated October 7, 1994 is dismissed. There will be no costs to any of the parties.

J.E. Richard
J.S.C.

Yellowknife, Northwest Territories
December 19, 1994

Counsel for the Plaintiff: J.V. Miller

Counsel for the Defendant
Alta Surety Company: S.M. MacLellan

Counsel for the Third Parties: P. Belzil