CV 06574

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ARCTIC OUTPOST CAMPS LTD.

Plaintiff

- and -

THE GOVERNMENT OF CANADA as represented by the Minister of Indian and Northern Affairs

Defendant

Application to strike out Statement of Claim and for security for costs. Allowed in part.

Heard at Yellowknife on August 13 & 16, 1996

Judgment filed: August 23, 1996

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Plaintiff: Gerard K. Phillips

Counsel for the Defendant: Alan R. Regel

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REASONS FOR JUDGMENT

1 In Reasons for Judgment filed August 16, 1996, I dismissed the Plaintiff's application for an interlocutory injunction. I will now deal with the Defendant's application for an order striking out the Statement of Claim or, alternatively, security for costs.

I will not repeat all of the factual background, but refer only to what is relevant for purposes of this decision.

Application for an order striking out the Statement of Claim

2 The Defendant applies to strike the Statement of Claim on two grounds: (i) that the action has been brought outside the applicable limitation period and (ii) that the Defendant, in removing and disposing of the chattels, is acting lawfully pursuant to the Territorial Lands Regulations, C.R.C., c. 1525 (the "Regulations").

3 In the Notice of Motion filed on its behalf, the Defendant asks for an order "Striking out the Statement of Claim on the basis that it discloses no cause for *(sic)* action, or is otherwise an abuse of the Court process pursuant to Rule 129 of the Rules of Court.

4 The Defendant's application is therefore based on subsections (1)(a)(i) and (1)(a)(iv) of Rule 129, which reads as follows:

> 129. (1) The Court may, at any stage of a proceeding, order that
>
> (a) any pleading in the action be struck out or amended, on the ground that
> (i) it discloses no cause of action or defence, as the case may be,
> (ii) It is scandalous, frivolous or vexatious,
> (iii) it may prejudice, embarrass or delay the fair trial of the action, or
> (iv) it is otherwise an abuse of the process of the Court; and
> (b) the action be stayed or dismissed or judgment be entered accordingly.
>
> (2) No evidence is admissible on an application under subrule (1)(a)(i).
>
> (3) This rule applies with such modifications as the circumstances require to an originating notice and a petition.

(1) No cause of action disclosed.

5 Dealing first with whether the Statement of Claim discloses a cause of action, I note that Rule 129(2) provides that no evidence is admissible on an application under subrule (1)(a)(i). Accordingly, all I can look at is the Statement of Claim itself to determine whether a cause of action is disclosed. For that purpose, I must assume that all the facts alleged in the Statement of Claim are true: *Kiewit Management Ltd. v. Northwest Territories (Commissioner)*, [1992] N.W.T.R. 70 (S.C.); *Hearn Stratton Construction Ltd. v. Northwest Territories (Commissioner)*, [1992] N.W.T.R. 107 (S.C.).

6 As Richard J. said in *Hearn Stratton* of what was then Rule 124A(1)(a), which was the same as Rule 129(1)(a)(i):

> Relief under R. 124A(1)(a) is granted sparingly and only in the clearest of cases. The test to be applied is whether it is plain and obvious that the action will not succeed at trial: see *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1, 33 N.R. 304, *Canada (Attorney General) v. Operation Dismantle Inc.*, [1985] 1 S.C.R. 441, (sub nom. *Operation Dismantle Inc. v. R.)* 12 Admin. L.R. 16, 13 C.R.R. 287, 18 D.L.R. (4th) 481, 59 N.R. 1, and *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, (sub nom. *Hunt v. T&N pic*) 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321. Put another way, is the plaintiff's case simply unarguable, or does it have a chance, even a small chance, of success?

7 The Statement of Claim, filed August 7, 1996, states the following:

- in 1971 the Plaintiff was granted lease #2149 by the Defendant for a twenty year term with a renewal provision
- at some time thereafter the Plaintiff was granted leases #2944 and #2985, each for a twenty year term with renewal provisions
- in 1977, the leases were assigned to 100868 Outfitters Ltd. ("100868"); the Plaintiff held a debenture over the assets of 100868, including the leases
- in January of 1984, leases #2944 and #2985 were purportedly terminated by the Department of Indian and Northern Affairs ("DIAND") without notice to the Plaintiff
- 100868 defaulted under the debenture and as a result a receiver was appointed in June 1
- in April, 1986, DIAND purported to terminate lease #2149 without notice to the Plaintiff or the receiver
- in June, 1986, an order was issued in the Court of Queen's Bench of Alberta vesting the assets of 100868, including its interest in the leases and the assets and equipment located thereon, in the name of the Plaintiff.

Those are the allegations of fact in the Statement of Claim that are relevant for purposes of this aspect of the application. The Plaintiff claims an order requiring the Government of Canada to

reinstate or renew the said leases, damages for breach of contract and damages for conversion by the Defendant of the Plaintiff's chattels. While the Statement of Claim is very vague in many respects, I will consider on this application only those issues raised by the Defendant.

8 The claim for damages for breach of contract appears to be based on the allegation that the leases were wrongfully terminated. The only factual allegations which appear in the Statement of Claim which might be relevant to wrongful termination are the allegations of lack of notice. The Statement of Claim does not say on what basis it is alleged that notice ought to have been given to the Plaintiff, who was not the holder of the leases at the time of termination. I suppose that with respect to the allegation of lack of notice to the receiver, it is at least arguable that notice ought to have been given to the receiver and that because it was not, termination of lease #2149 was not lawful and the order made in the Court of Queen's Bench of Alberta was effective to vest the interest in that lease in the Plaintiff.

9 Counsel for the Defendant argues that this action has not been brought in time. He says that either section 2(1)(j) or section 18 of the *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8 is applicable. Section 2(1)(j) provides that an action not specifically provided for in the Act or any other Act must be commenced within six years after the cause of action arose. Section 18 provides as follows:

> 18. No person shall take proceedings to recover any land except
> (a) within 10 years after the time at which the right to do so first accrued to the person through whom he or she claims;
> or
> (b) if the right did not accrue to such a predecessor, then within 10 years after the time at which the right first accrued to the person taking the proceedings.

The definition of "land" in section 1 of the Act includes a leasehold estate or interest in same.

10 Counsel for the Defendant submits that under either section relied on, the limitation period has expired because the leases were cancelled in January of 1984 and April of 1986.

11 Counsel for the Plaintiff submits, however, that the limitation period may run from when the Plaintiff received notice of the cancellation. The discoverability rule may therefore apply. The Statement of Claim does not say when the Plaintiff became aware that the leases had been cancelled. On the basis of what is alleged in the Statement of Claim, I cannot say that it is beyond any doubt that the action has been commenced outside the applicable limitation period.

12 There is a further problem with the limitation period argument. In Stevenson and Cote, *Civil Procedure Guide 1996*, (Edmonton: Juriliber, 1996) at page 555, there is a notation as to cases both for and against the proposition that one can strike out a Statement of Claim on the basis of expiry of a limitation period. There appears to be some doubt as to whether an application under Rule 129 is an appropriate way to deal with the allegation that a limitation period bars the action (which is, after all, a defence to be pleaded). See, for example, *Pile Base Contractors 1987 Ltd. v. Pasichnyk* (1993), 109 D.L.R. (4th) 339 (Alta. C.A.). I am not satisfied in this case that it is an appropriate basis upon which to strike the Statement of Claim.

13 The second basis upon which the Defendant asks that the Statement of Claim be struck is that the Plaintiff can have no cause of action for conversion because the Defendant in

disposing of the assets in question is acting lawfully in accordance with the Regulations.

14 Again, this issue must be decided with reference only to the Statement of Claim. If the leases were wrongfully terminated, as alleged in the Statement of Claim, then it may be that the Regulations do not provide a defence to a claim of conversion. Counsel for the Defendant says that the Defendant is acting pursuant to section 13 of the Regulations, subsections (1) and (2) of which read as follows:

> 13. (1) When a lease is cancelled or expires and there are no arrears of rent or taxes, the lessee may, within three months thereof, remove any buildings or other structures owned by him that may be on the lands or the portion thereof withdrawn from the lease.
>
> (2) Where a lessee described in subsection (1) does not remove his buildings or other structures within three months of the expiration or cancellation of a lease, a land agent for the area in which the lands leased are located shall make an appraisal of the buildings or other structures that have been left on the lands by the lessee and the Superintendent may direct the sale of the same by public auction.

15 The Statement of Claim alleges that the Plaintiff was not given notice of the termination of the leases. If that is true, and I must assume for purposes of this application that it is, it is not clear when the three month period referred to in subsections (1) and (2) would have commenced.

16 The case is not so clear as to enable me to say that the Plaintiff has no cause of action for conversion. I note that the Defendant's argument, i.e., that its actions are lawful, is really a defence to be pleaded.

(2) Abuse of Process

17 The Plaintiff relies on the same grounds as referred to above in asking that the Statement of Claim be struck as an abuse of the process of the Court. As I understand it, the Defendant is essentially saying that the proceedings brought by the Plaintiff are an abuse of the Court's process because the Plaintiff has no cause of action. Since I have denied the application to have the Statement of Claim struck out as disclosing no cause of action, it follows that I deny the application based on abuse of process.

Security for costs

18 The Defendant asks for an order that the Plaintiff post security for costs. Rules 632 and 633(1) provide as follows with respect to the Court's discretion to order security for costs:

> 632. (1) An application for security for costs may be made at any time after service of the originating document and shall be supported by an affidavit of the defendant, or an agent of the defendant who can speak positively as to the facts, alleging that there is a good defence to the proceeding on the merits and specifying the nature of the defence.
>
> (2) An application for security for costs shall be made on notice to the plaintiff and every other defendant who has appeared on the record of the proceeding.
>
> 633. (1) The Court, on the application of a defendant in a proceeding, may make such order for security for costs as it considers just where it appears that
> (a) the plaintiff is ordinarily resident outside the Territories;
> (b) the plaintiff has another proceeding for the same relief pending;
> (c) the plaintiff has failed to pay costs as ordered in the same or another proceeding;
> (d) the plaintiff brings the proceeding on behalf of a class or an association, or is a nominal plaintiff, and there is good reason to believe that the plaintiff has insufficient assets in the Territories to pay costs;
> (e) there is good reason to believe that the proceeding is frivolous or vexatious and that the plaintiff has insufficient assets in the Territories to pay costs; or
> (f) a statute entitles the defendant to security for costs.

19 On behalf of the Defendant it is argued that security for costs should be ordered because the Plaintiff is a non-resident corporation, which is not in good standing with respect to the filing of annual returns at Legal Registries, the Plaintiff does not carry on business in the Northwest Territories and for a long time has not shown an interest in the leased property in question and the only asset the Plaintiff appears to have is the fishing lodge, which is being disposed of by the Defendant.

20 The Defendant's affidavit material does not respond to any of the above except that the affidavit of its president, Mr. Hackman, indicates that over the years he has invested time, money and effort into building and maintaining the lodge. From his own affidavit, however, it does not appear that the Plaintiff has operated the lodge since 1977, nor that the Plaintiff has done anything to pursue its claims to the lodge property in the last seven years.

21 As the Plaintiff is a non-resident corporation, Rule 633(1)(a) clearly provides a basis upon which the Court may order security for costs.

22 It is clear that even where the Rules give the Court the power to grant security for costs, in the end it remains a matter of judicial discretion: *Drywall Services Grand Centre Ltd. v. PCL Constructors Northern Inc.*, [1991] N.W.T.R. 210 (S.C.).

23 The only one of the affidavits filed on behalf of the Defendant which addresses the issue of security for costs is the affidavit of Annette McRobert. (I pause here to note that her affidavit and the Notice of Motion filed with it, as well as all documents filed subsequent thereto have named a different Defendant from what is shown on the Statement of Claim. This unilateral

change to the style of cause does not comply with the Rules of Court).

24 No objection was taken to Ms. McRobert's affidavit. Although it does not set out specifically the matters required by Rule 632(1), it does in effect allege a good defence on the merits and provide details as to the nature of the defence. I will accept it as such and assume, although the affidavit does not say so, that Ms. McRobert makes the affidavit as the agent of the Defendant in her capacity as Manager, Land Administration, Department of Indian Affairs and Northern Development, Northwest Territories Region.

25 I also note that there is no evidence that the Plaintiff has any assets located outside the Northwest Territories, so that if the Defendant is successful in this case and recovers costs, there would not appear to be any realistic option of attempting to enforce a judgment for costs elsewhere.

26 This is not a case where the Plaintiff has pleaded impecuniosity as a basis upon which the Court should decline to exercise its discretion as was the case in *Holly Homes v. Euchner*, [1986] N.W.T.R. 289 (S.C.).

27 The Plaintiff's case, as I said in my decision on the application for an interlocutory injunction, appears to be a weak one. And nothing has been presented which meets the case put forward by the Defendant for security for costs.

28 Counsel for the Defendant did not suggest any figure or terms for the security, nor was a draft bill of costs presented, as was done in *Drywall Services*.

29 I will grant the Defendant's application for security for costs. However, in order to set the terms of that security, I direct that counsel for the Defendant submit a draft bill of costs setting out clearly the amounts referable to the following stages of the action:

a) up to and including examinations for discovery;

b) up to commencement of trial;

c) for the trial itself.

30 The draft bill of costs is to be submitted to the court and a copy provided to counsel for the Plaintiff within 30 days of the date of issuance of these Reasons for Judgment. If either counsel wishes to make submissions about the draft bill of costs they may do so by arranging a date for the matter to be spoken to within a further 30 days after that. In the absence of any submissions, I will issue a decision setting the terms of the security for costs.

31 This action is stayed until the terms of the order for security for costs have been set by this Court.

V.A.Schuler

J.S.C.

Yellowknife, Northwest Territories

August 23, 1996

Counsel for the Plaintiff: Gerard K. Phillips

Counsel for the Defendant: Alan R. Regel