Orser v. *Hovat*, 2002 NWTSC 18

Date: 2002 03 06
Docket: S-001-CV 2001-000120

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

REASONS FOR DECISION OF THE
HONOURABLE MR JUSTICE IRVING

BETWEEN:

NEIL ORSER HOLDINGS LTD.

Plaintiff

- and -

HOVAT CONSTRUCTION (1985) LTD.
and PETER HOVAT

Defendants

COUNSEL:

C. F. McGee
For the Plaintiff

R.A. Kasting
For the Defendants

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[1] The Defendants bring two applications:

(a) to strike out the Amended Statement of Claim as disclosing no cause of action pursuant to Rule 129(1)(a)(i).

(b) for Summary Judgment dismissing the Plaintiff's claim on the ground that the limitation period for bringing the claim had expired before the action was every brought.

[2] Counsel agree that each application must be treated differently regarding process, evidence and legal argument.

DOES THE AMENDED STATEMENT OF CLAIM DISCLOSE A CAUSE OF ACTION?

[3] Both counsel agree that the test for striking out the Amended Statement of Claim must proceed without evidence, relying solely on the pleading itself; the facts as stated in the Amended Statement of Claim must be assumed to be true, and must be read generously. The Amended Statement of Claim can only be struck if it is "plain and obvious that it discloses no cause of action". If the claim has some chance of success, the Court must permit the action to proceed.

[4] The Amended Statement of Claim is very broadly worded. The claim arises out of a debt payable on demand, which was incurred between 1980 and 1982 by Hovat Construction Ltd. to Supercorp Management Ltd. ("Supercorp") which was assigned to a bank, and then in 1984 or 1985 reassigned by the bank to the Plaintiff's predecessor, which had advanced $71,000.00 to the bank on account of the debt of Hovat Construction Ltd. to Supercorp.

[5] During 1985 or 1986, the Defendant Hovat caused the defendant company to be incorporated and transferred to it the assets and business of Hovat Construction Ltd. The Amended Statement of Claim alleges that the Defendant Hovat incorporated the defendant company and transferred to it all of its assets, opportunities and goodwill of Hovat Construction Ltd. "with the fraudulent intention to defeat creditors including the Plaintiff to whom the indebtedness of Hovat Construction Ltd. to Supercorp had been assigned."

[6] Given this complicated factual background, I do not accept that it is "plain and obvious" that the Plaintiff's claim cannot succeed. Accordingly, the Defendant's application to strike the Amended Statement of Claim is dismissed.

SHOULD THE PLAINTIFF'S CLAIM BE DISMISSED BECAUSE THE PLAINTIFF'S ACTION WAS NOT BROUGHT IN A TIMELY FASHION AS REQUIRED BY THE *LIMITATION OF ACTIONS ACT*?

[7] The issue of the missed limitation period must be dealt with by way of a summary trial, rather than an application to strike. ***Spur Aviation Ltd.* v. *Govt. of NWT, Bank of Montreal***, 2000 NWTSC 65 per Vertes, J. at para. 14.

[8] The test for Summary Judgment is that the material must clearly demonstrate that there is "no genuine issue for trial", that the action is "bound to fail", and that there is "no reasonable prospect of success". The object of the rule is to screen out claims that "cannot withstand a good hard look." Rule 176 of the *N.W.T. Rules of Court*; ***923087 N.W.T. Ltd. v. Anderson Mills Ltd.***, NWTSC, June 16, 1997, per Vertes, J. at pp. 11-14; ***Arctic Environmental Services Ltd.* v. *Northern Management & Development Ltd.***, 2000 NWTSC 53 per Schuler, J. at para. 4, 5.

[9] In a summary trial, evidence must be presented, and the judge is entitled to assume, on that issue, that the parties have presented all evidence available. ***Arctic Environmental Services Ltd.* v. *Northern Management & Development Limited*, *supra***, per Schuler, J. at para. 23.

[10] For the purpose of the Defendant's application for a Summary Judgment on the limitation defence, both counsel have agreed to regard the allegations of fact contained in the Amended Statement of Claim to be provable. The Defendants have also filed affidavits of the Defendant Peter Hovat and of Eric Sputek who had been an employee of the defendant company since 1992, and its General Manager since 1993. Where these affidavits are in conflict with factual allegations made in the Amended Statement of Claim, I must assume that the allegations of fact made in the Amended Statement of Claim are provable for the purpose of this Application.

[11] Hovat Construction Ltd. was incorporated in 1974 and carried on business in Yellowknife until sometime in 1985 or 1986 when its assets were transferred to the defendant company. Hovat Construction Ltd. was inactive thereafter and was dissolved by operation of law in 1999. The incorporation of the defendant company and the transfer to it of the business of Hovat Construction Ltd. did not become known to the Plaintiff until 1997.

[12] The Plaintiff's claim is for the $71,000.00 (plus interest) advanced by its predecessor in 1984. The Plaintiff argues that while the debt was payable on demand, payment was actually contingent on Hovat Construction Ltd. becoming sufficiently solvent so that the payment would be possible. Accordingly, the Plaintiff submits that the six year limitation period would not start running until a contingency was satisfied, i.e. Hovat Construction Ltd. had become sufficiently solvent to pay the debt to the Plaintiff.

[13] The ***Limitation of Actions Act***, R.S.N.W.T. 1988, c.L-8, as amended, provides:

"2. (1) The following actions must be commenced within and not after the following times:

. . .

(f) actions for the recovery of money, except in respect of a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other speciality or on a simple contract, express or implied, and actions for an account or for not accounting, within six years after the cause of action arose;

. . .

3. When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.

. . .

6. (1) Whenever any person who is, or would have been but for the passage of time, liable to an action for the recovery of money as a debt, or his or her agent in that behalf,

(a) conditionally or unconditionally promises his or her creditor or the agent of the creditor in writing signed by the debtor or the agent of the debtor to pay the debt,

(b) gives a written acknowledgment of the debt signed by the debtor or the agent of the debtor to his or her creditor or the agent of the creditor, or

(c) makes a part payment on account of the principal debt or interest on the principal debt, to his or her creditor or the agent of the creditor,

> an action to recover any such debt may be brought within six years after the date of the promise, acknowledgment or part payment, as the case may be, notwithstanding that the action would otherwise be barred under this Act.
>
> (2) A written acknowledgment of a debt or a part payment on account of the principal debt or interest on the principal debt has full effect whether or not a promise to pay can be implied from that and whether or not it is accompanied by a refusal to pay."

[14] The Plaintiff commenced this action on August 1, 2001. No earlier or other proceedings were taken by it to recover the $71,000.00 debt of Hovat Construction Ltd.

WAS THE DEBT OF HOVAT CONSTRUCTION LTD. A DEMAND LOAN, OR A CONTINGENT LOAN?

[15] In his written submissions, counsel for the Plaintiff stated "the cause of action may be said to have arisen in 1982 when the last of the advances on the operating line of credit was alleged to have been drawn."

[16] Paragraph 7 of the Amended Statement of Claim states in part:

> "Between 1980 and 1982, Hovat Construction had an operating line of credit from Supercorp (the "loan"), the balance of which was payable on demand with interest calculated at the prime lending rate plus 1%."

[17] In giving the unanimous opinion of the Court in ***Barry v. Page***, [1989] B.C.J. No. 1285, Wallace, J.A. stated:

> "NATURE OF THE LOAN:
> The characterization of the loan as either a contingent loan or a demand loan determines whether or not the action is statute barred under the Limitation Act. It is well established that the cause of action accrues, and the Statute of Limitation runs, from the earliest time at which repayment can be required (Chitty on Contract - 25th Ed. (1983) - Vol. I - pgra. 1843, 1024). For a demand loan, the Statute of Limitations runs as of the date of the advancement of the funds, and not from the date of the demand. No demand is necessary in order for the cause of action to arise: Barclay v. Bank

> of Montreal (1988), 28 B.C.L.R. (2d) 376 (S.C.); Henback v. Sprague, [1933] 3 D.L.R. 647 (Man. C.A.)."

[18] Therefore I conclude that the $71,000.00 advance was payable on demand and the six year limitation period would have commenced in 1982; however, paragraph 12 of the Amended Statement of Claim also asserts:

> "On or about December 3, 1985, Hovat as President of Hovat Construction gave written acknowledgement of the indebtedness of Hovat Construction to P & A and Frame and Perkins Limited."

[19] Such an acknowledgement would itself restart the time running under s. 6(1)(b) of the ***Limitation of Actions Act*** so that the Plaintiff's claim would become statute-barred as of December 3, 1991.

DOES SECTION 3 OF THE LIMITATION OF ACTIONS ACT IN ANY WAY ASSIST THE PLAINTIFF?

[20] The Plaintiff alternatively submits that s. 3 of the ***Limitation of Actions Act*** delays the commencement of the six year limitation period until 1997, because until then the cause of action had been concealed by the fraud of the Defendant Hovat, thus the cause of action should be deemed to have arisen when the fraud was discovered.

[21] The cause of action was the $21,000.00 debt owing by Hovat Construction Ltd. which was well known to the Plaintiff. The six year limitation period had already commenced to run before the defendant company took over the business of Hovat Construction Ltd. in 1996. There can be no doubt that the Plaintiff's predecessor knew of the cause of action, as did Mr. Neil Orser who managed the business of the predecessor company, as well as that of the Plaintiff.

[22] If the Plaintiff was unaware of the incorporation of the Defendant, and the transfer of the assets and business of Hovat Construction Ltd., then one would have expected a claim to have been advanced against Hovat Construction Ltd. on or before December 3, 1991; other remedies, such as tracing of assets, etc., would have been available to the Plaintiff to obtain recovery from the Defendants.

[23] The important factor here is that the plaintiff company took no steps whatever within the six year limitation period (up to December 3, 1991) to effect recovery of its claim. Instead, the Amended Statement of Claim in issue was not issued until August 1, 2001, approximately nine years later.

[24] There were, indeed, discussions between the Defendant Hovat and Mr. Orser about the debt over the years. In his affidavit of August 31, 2001, the Defendant Hovat states:

> "10. At various times over the course of the past many years, Neil Orser has approached me to ask me to contribute to his losses or the losses of Petersen & Auger Ltd. flowing from this failed venture. I have never agreed to pay, and have never acknowledged such a debt. Hovat Construction (1985) Ltd. has never acknowledged such a debt."

[25] In these circumstances, s. 3 of the ***Limitation of Actions Act*** is not available to the Plaintiff to suspend the limitation period until 1997 when it learned that the defendant company had acquired the assets and business of Hovat Construction Ltd. in 1996.

DOES SECTION 6(1)(b) OF THE *LIMITATION OF ACTIONS ACT* ASSIST THE PLAINTIFF?

[26] Paragraph 15 of the Amended Statement of Claim alleges:

> "... During the period between approximately 1992 and 1995, Hovat entered into an arrangement with Piro to enable Piro to write off the outstanding indebtedness of Hovat Construction to Frame & Perkins Limited for income tax purposes and thereby acknowledged the indebtedness on his own behalf and on behalf of Hovat Construction and Hovat 1985. Orser learned of this arrangement and acknowledgement in or around July of 1998."

[27] There is no information on what is meant by Hovat "entering into an arrangement with Piro." Nor is there any suggestion of a **written** acknowledgement of the debt by the Defendants to any agent for the Plaintiff.

[28] Paragraph 11 of the Amended Statement of Claim alleges that Piro (for Frame & Perkins Ltd.) and Orser (for Petersen & Auger) each advanced $71,000.00 to Supercorp for payment to the bank for Hovat Construction Ltd. as part of the overall settlement in 1984. In return, each received an assignment of one-half of the debt ($71,000.00 = 50% of $142,000.00 - the debt). This resulted in two debts owed by Hovat Construction Ltd., one to Piro's company, and one to Orser's company.

[29] I am not persuaded that there is any evidence or allegation in the Amended Statement of Claim that there was any acknowledgement of the debt by the Defendants, whether in writing or

not, of the Plaintiff's claim, or that Piro was the agent of the Plaintiff to receive any such acknowledgement.

[30] In the case of ***Boatwright v. Boatwright*** (1873), L.R. 17 Eq. 71 at pp. 73-74, Sir George Jessel, M.R. stated:

> "It is attempted to get rid of the operation of the statute by various ingenious arguments; and I must say that where a debt is clearly admitted, and where this statute is used, as it is in this case, not with a view of protecting persons from a claim of which they doubt the truth and honesty, but for a purpose for which it was not intended, namely, to defeat an honest claim which is not brought forward within six years, the Court is anxious to listen to any fair ground which may bring the case of the creditor within some or one of the exceptions which have been established to the stringent provisions of the statute. For that reason I have looked into the authorities to see if I could discover any ground on which I could give relief to the plaintiff, but I have not been able to find any."

[31] I have looked into the authorities and the facts of the case to see if I could discover any ground on which I could grant relief to the Plaintiff, but I have not been able to find any. In my view, the claim has no reasonable prospect of success. Accordingly, I direct that the claim of the Plaintiff be dismissed without costs on the ground that the ***Limitation of Actions Act*** is applicable and the action cannot succeed as having been brought beyond the six year limitation period.

APPLICATION HEARD on NOVEMBER 8, 2001

REASONS FILED at YELLOWKNIFE, NORTHWEST TERRITORIES
this 6th day of MARCH, 2002

H. L. Irving

IRVING, J.
DEPUTY JUDGE

S -001-CV2001-000120 A.D. 2002

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