IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: The Owners, Strata Plan LMS 2940 v. Squamish Whistler Express and Freight, 2007 BCSC 948

Date: 20070629
Docket: S036494
Registry: Vancouver

Between:

The Owners, Strata Plan LMS 2940

Plaintiff

And

Squamish Whistler Express and Freight a division of Quick as a Wink Courier Service Ltd., Keefer Laundry Ltd., Gary Comeau, John Owner, John Owner Ltd., John Lessor, John Lessor Ltd.

Defendants

Before: The Honourable Mr. Justice Tysoe

Reasons for Judgment

Counsel for the Plaintiff:	David A. Garner and Kevin J. McLaren
Counsel for the Defendants, Squamish Whistler Express and Freight a division of Quick as a Wink Courier Service Ltd. and Gary Comeau:	Richard B. Lindsay, Q.C. and Christine L. Stewart
Counsel for the Defendant, Keefer Laundry Ltd.:	Russell J. Bailey
Date and Place of Hearing:	June 1, 2007 Vancouver, B.C.

Introduction

[1] On December 1, 2001, a vehicle driven by the Defendant, Gary Comeau, struck a water pipe located in the parking garage of a building in Whistler, B.C., owned by the persons who are the members of the Plaintiff (the "Strata Corporation") and operated as the Delta Whistler Village Suites Hotel. The consequential flooding caused extensive damage to the building and its contents.

[2] This action was commenced on December 2, 2003, two years and one day after the incident. The Plaintiff has now made an application for a declaration that the action was brought within the applicable limitation period under the *Limitation Act*, R.S.B.C. 1996, c. 266, and the Defendants have made two separate applications to have the action dismissed as being statute barred.

Background

[3] After the flooding started, a man who identified himself as Gary Comeau came into the lobby of the hotel and said that he had been driving the truck which struck the water pipe. He gave a copy of what he said was his employer's business card to the hotel's general manager. It was the card of the general manager of Squamish Whistler Express and Freight, and it had an address and phone numbers. Mr. Comeau was then told that he could leave.

[4] The hotel's general manager contacted the Plaintiff's insurance broker and was put in touch with an adjuster. The adjuster could not travel to Whistler on that day as a result of a snow storm and he attended at the property on the next day, December 2, 2001, which was a Sunday, to begin his investigation. On December 3, the adjuster met with the building inspector for the City of Whistler to inquire whether the heights and locations of the water pipes in the hotel's parking garage complied with the City's building code. He was told that they did comply, at which

point he decided that a subrogated claim against the driver of the truck and other parties was a good possibility.

[5] Approximately a week later, the adjuster met with a representative of the Insurance Corporation of British Columbia ("ICBC"), who said that he was investigating the collision of the truck with the water pipe at the hotel. The adjuster told the ICBC representative that his client would be looking to ICBC to recover its loss. The ICBC representative did not make any commitment to accept responsibility.

[6] The adjuster then focused on the restoration of the property and quantification of the loss. He had a discussion with the ICBC representative on July 2, 2003 and advised that he was nearing the end of the adjustment in respect of the insurance claim and would like to discuss subrogation recovery from ICBC. The representative said that ICBC would likely be accepting responsibility and asked the adjuster to send him a package of information. The adjuster reached agreement with the hotel as to the final adjustment in the first week of November 2003 and then turned his attention to compiling a package to send to ICBC.

[7] The adjuster was under the mistaken impression that the limitation period for filing a lawsuit for claims arising out of property damage was two years from the date that investigation and evidence supported an action. On December 2, 2003, the adjuster decided to instruct counsel to file a writ of summons to protect the claim. This action was commenced on the same day.

Legislation

[8] Subsection 3(2) of the *Limitation Act* reads, in part, as follows:

> After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
>
> (a) ... for damages in respect of injury to person or property ...

The relevant portions of subsections (3), (4), (5) and (6) of section 6 of the *Limitation Act* read as follows:

> (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
>
> ...
>
> (b) for damage to property ...
>
> (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
>
> (5) For the purpose of subsection (4),
>
> (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
>
> (b) "facts" include
>
> (i) the existence of a duty owed to the plaintiff by the defendant, and
>
> (ii) that a breach of a duty caused injury, damage or loss to the plaintiff,
>
> (c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and
>
> (d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.
>
> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[9] Provisions of the *Strata Property Act*, S.B.C. 1998, c. 43 are also relevant to this application. Section 171 provides that a strata corporation may sue as a representative of all owners about any matter affecting the strata corporation and s. 172 provides that a strata corporation may sue on behalf of one or more owners affecting their strata lots. In each case, the suit must first be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting. The present action was brought pursuant to s. 171.

[10] Subsection 45(1) of the *Strata Property Act* provides that the strata corporation must give at least 2 weeks' written notice of an annual or special general meeting. Subsection 44(1) allows for the waiver of the holding of a special general meeting if all eligible voters waive the holding of the meeting and consent to the resolution in question, and s. 45(5) allows a vote to proceed despite lack of notice if all persons entitled to receive notice waive their right to notice.

[11] Cohen J. considered ss. 171 and 172 in *Strata Plan LMS 888 v. Coquitlam (City)*, 2003 BCSC 941, supp. reasons 2003 BCSC 1311. He held that (i) a strata corporation's right to commence a representative action does not exist outside ss. 171 and 172, (ii) a strata corporation must obtain a 3/4 vote before it commences a representative action and its right to commence such an action does not arise until the vote is obtained, and (iii) if a representative action is commenced before the vote is obtained, it is a nullity.

[12] The B.C. Legislature reacted to Cohen J.'s decision. On December 1, 2003, *Miscellaneous Statutes Amendment Act (No. 3), 2003* received third reading. Among other things, it amended the *Strata Property Act* by adding s. 173.1, which provides that the failure of a strata corporation to obtain the authorization required under s. 171 or s. 172 does not affect the capacity of the strata corporation to commence a representative action and does not invalidate a suit that is otherwise undertaken in accordance with the *Act*. Subsections (2) and (3) state that

subsection (1) applies to an action commenced before the section comes into force and that the section is retroactive to the extent necessary to give full force and effect to its provisions. Section 173.1 came into force by royal assent on December 2, 2003, which is coincidentally the same day this action was commenced.

Issues

[13] The issues requiring determination on this application are as follows:

(a) was this action commenced within the two year limitation period set out in s. 3(2) of the *Limitation Act*?

(b) was the running of time in respect of the limitation period postponed under s. 6(4) of the *Limitation Act* such that the running of time did not begin until at least December 3, 2001?

[14] Although the point was not argued by counsel for the Plaintiff, counsel for Keefer Laundry Ltd. addressed an *obiter dicta* comment in *Shah v. Governor and Co. of Adventurers of England Trading into Hudson's Bay Co. (c.o.b. Hudson's Bay Co.)*, 2007 BCSC 346 that, as a result of s. 25(4) of the *Interpretation Act*, R.S.B.C. 1996, c. 238 (which excludes the first and last days of a period in the calculation of the period), the expiry of two years after September 10, 2002 was September 11, 2004.

[15] Relying on the decisions in *Walter v. Cote* (1989), 69 O.R. (2d) 661 (H.C.J.), affirmed (1991), 1 O.R. (3d) 558 (C.A.), *Sovereign v. Wawanesa Mutual Insurance Co.*, [1999] O.J. No. 99 (QL) (Gen. Div.) and *Chiasson v. Century Insurance Company of Canada* (1978), 21 N.B.R. (2d) 192 (S.C. (App. Div.)), counsel for Keefer Laundry Ltd. submitted that even when the day of the event is excluded, a year is completed on the anniversary date of the event. Counsel for Mr. Comeau and Squamish Whistler Express and Freight submitted that s. 25(5), not s. 25(4), of the *Interpretation Act* is applicable to the calculation of limitation periods under the *Limitation Act*. As counsel for the Plaintiff did not address the issue, I do

not propose to deal with it. I will proceed on the assumption, without deciding the point, that counsel for the Defendants are correct.

Discussion

[16] Counsel for the Plaintiff primarily based his argument that the action was commenced within the limitation period on the decision in *Kitto (Guardian Ad Litem) v. Hanson* (1991), 58 B.C.L.R. (2d) 265 (C.A.). That case involved a claim under the *Family Compensation Act*, R.S.B.C. 1979, c. 120, in respect of a death which occurred on July 15, 1986. The action was commenced on October 28, 1988 by the mother of the deceased on behalf of herself and a person who may have been a child of the deceased.

[17] Subsection 3(1) of the *Family Compensation Act* provided that an action could be brought for the benefit of the spouse, parent or child of the deceased and was to be brought by and in the name of the personal representative of the deceased. Subsection 3(3) stated that if there was no personal representative of the deceased or, if there was a personal representative but no action had been brought within 6 months after the date of death, the action may be brought by and in the names of persons for whose benefit the action could have been brought if it had been brought by the personal representative.

[18] The B.C. Court of Appeal first held that, if there is a statutory impediment in the procedure for bringing an action on a substantively fully accrued statutory cause of action, the right to bring the action does not arise until the statutory impediment is removed. The Court observed that, in contrast to the predecessor legislation (which provided for the limitation period to run from "the cause of such actions"), s. 3(1) of the *Limitation Act* provides that the period for the bringing of an action runs from the "date on which the right to do so arose".

[19] The Court next considered the ambiguity in the wording of s. 3 of the *Family Compensation Act* and concluded that the right of a beneficiary to bring an action under that *Act* did not arise until six months after the date of the death of the deceased. As a result, the Court held that the limitation period of two years began to run after the passage of those six months. In reaching this conclusion, the Court noted that there will be different limitation periods for executors, for administrators and for beneficiaries.

[20] The B.C. Court of Appeal went on to consider the alternate argument that the running of time of the limitation period had been postponed under s. 6 of the *Limitation Act*. The Court concluded that, if the limitation period was two years from the date of death and if the right of a prospective beneficiary to bring an action did not arise until the six month period had elapsed following the death without a personal representative bringing an action, the prospective beneficiary would not "be able" to bring an action until the lapse of the six month period, with the result that there would be a postponement in the running of the limitation period for six months.

[21] Although *Kitto* is obviously distinguishable on the facts, its reasoning is instructive and is applicable to the circumstances of this case. However, I prefer to base my decision on the alternate argument in *Kitto* that there has been a postponement in the running of time. My reluctance to apply the reasoning on the first ground in *Kitto* stems from the difference in the statutory impediment in the two cases and my opinion that the removal of the statutory impediment in this case is more properly viewed in the context of a postponement in the running of time.

[22] The statutory impediment in *Kitto* was removed by the simple passage in time (together with inaction on the part of the personal representative in commencing an action). In contrast, the removal of the statutory impediment in the present case requires a resolution to be passed by the Strata Corporation. In my view, it could not have been intended by the Legislature in passing the *Limitation Act*

that a person with a cause of action, but facing a statutory impediment requiring the person to take some step to remove it, could avoid the commencement of the running of time of the limitation period for an indefinite period of time by failing to take the step required to remove the statutory impediment. Consequently, it is my opinion that the reasoning on the first ground in *Kitto* should be restricted to the situation where the statutory impediment is removed by the passage of time (with or without some form of inaction during the period of time).

[23] The reason why I consider the statutory impediment in this case to be more properly viewed in the context of a postponement in the running of time is because clause (b) of s. 6(4) of the *Limitation Act* states that time does not begin to run until "the person whose means of knowledge is in question *ought,* in the person's own interests and *taking the person's circumstances into account, to be able to bring an action"* (emphasis added). One of the relevant circumstances in considering when a strata corporation ought to be able to bring an action is a statutory impediment requiring it to first have a 3/4 vote authorizing the action.

[24] A strata corporation ought not "be able" to bring an action until it has a reasonable time to obtain the requisite 3/4 vote authorizing the action. What is a reasonable period of time will depend on all of the circumstances, including the number of owners, their proximity and their past practice of waiving notice to meetings. In the present case, I need not determine what would constitute a reasonable period of time because there is no doubt that it would be at least one day.

[25] As I am relying on the alternate reasoning in *Kitto*, I should address the comment of Lambert J.A. that he did not wish to rest his judgment on the alternate ground. His reason was that he considered the second condition he set out (i.e., "the right of a prospective beneficiary to bring an action did not arise until the six months period has elapsed following the death without a personal representative

bringing an action") to be inconsistent with the first condition he set out (i.e., "if ... I am wrong and the limitation period runs for two years from the date of death"). The two conditions were considered inconsistent by Lambert J.A. because they would mean that the right of action on the part of a beneficiary arose on death but the beneficiary was not able to bring an action for the first six months. This expression of inconsistency was essentially a reiteration of Lambert J.A.'s reasoning on the first ground that the limitation period did not run for two years from the date of death because the beneficiary did not have the right to bring the action until six months later.

[26] Counsel for Mr. Comeau and Squamish Whistler Express and Freight submitted that s. 173.1 should be given full retroactive effect, with the result that there never was a statutory impediment and the limitation period expired on December 1, 2003, one day before this action was commenced. In this regard, counsel relies on the following comments of the Attorney General when introducing the amendment:

> This amendment will correct an error and restore the original intent of the legislation. The new section will clarify that the requirement for strata corporations to obtain owner approval before commencing a lawsuit is an internal procedural rule for the benefit of the owners and that failure to obtain this approval does not invalidate the lawsuit. (British Columbia, *Official Report of the Debates of the Legislative Assembly (Hansard)*, Vol. 19, No. 3 (27 November 2003) at 1615 (Geoff Plant).

I disagree with this submission for two reasons.

[27] The first reason is that the intent of making s. 173.1 retroactive was to ensure that an action commenced prior to the enactment of s. 173.1 without an authorizing resolution would not be considered a nullity. The amendment was made for the benefit of strata corporations and should not be construed to their detriment. It was intended to save actions which had been commenced by strata corporations, not to make actions by strata corporations statute-barred.

[28] Counsel for the Plaintiff relied on the following passage from P.A. Côté, *The Interpretation of Legislation in Canada*, 2d ed., (Cowansville: Les Editions Yvon Blais Inc., 1991) at 115, which was cited with approval in *Razutis v. Garrett*, 1999 BCCA 410 at para. 7:

> The courts are often influenced by the consequences of different interpretations. They can determine whether the retroactive or prospective application of a statute will cause undue prejudice to individuals. There is a presumption that the legislator does not intend to be unjust. As a result, judges may refuse to apply statutes so as to produce "unjust", "unreasonable", "prejudicial", "severe", or simply "inconvenient" consequences.

I agree with counsel for the Plaintiff that an interpretation of s. 173.1 to provide the Defendants with a limitations defence would be an unjust result and contrary to the intention of the Legislature.

[29] My second reason is that even if s. 173.1 is construed retroactively to the extent of removing the statutory impediment in the present case, it does not result in the conclusion that the action is statute-barred. Section 171 was not amended by s. 173.1 and there has at all times been the requirement that a strata corporation obtain an authorizing resolution before commencing a representative action. Even though an action commenced without an authorizing resolution will no longer be a nullity due to the enactment of s. 173.1, the *Strata Property Act* still requires the resolution to be passed before the strata corporation commences a representative action.

[30] When deciding when a strata corporation ought to be able to bring an action for the purpose of s. 6(4) of the *Limitation Act*, a relevant consideration is whether the commencement of an action without obtaining an authorizing resolution would be a breach of a statute. In my view, a strata corporation ought not to be able to bring a representative action until the passage of a reasonable period of time to enable the strata corporation to obtain the authorizing resolution. In other words, even if s. 173.1 is interpreted to be as retroactive as counsel for Mr. Comeau and

Squamish Whistler Express and Freight submitted, the postponement provisions of s. 6 of the *Limitation Act* would still have been operative in the circumstances, and the two year limitation period would not have expired prior to the commencement of this action.

[31] As I have concluded that there was a postponement of the running of time with respect to the two year limitation period for at least one day on the basis of the reasoning of the alternate ground in *Kitto,* I need not address the argument made by counsel for the Plaintiff that there was a postponement of the running of time for other reasons.

Conclusion

[32] I dismiss the applications made by the Defendants, and I declare that this action has been brought within the limitation period under the *Limitation Act.* I grant costs of the Plaintiff's application to the Plaintiff in the cause.

"D. Tysoe, J."