

CANADA / JUDGMENT

Balmoral Holdings Ltd. v. Rogers Communications Inc.

2021 BCSC 2330

COURT

Supreme Court of British Columbia

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2021 BCSC 2330 Balmoral Holdings Inc. v. Rogers Communications Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Balmoral Holdings Inc. v. Rogers Communications Inc.,

2021 BCSC 2330

Date: 20211130

Docket: S193072

Registry: Vancouver

Between:

Balmoral Holdings Inc.

Plaintiff

And

Rogers Communications Inc.

Defendant

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

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K.K. Strong

Place and Date of Hearing:

Vancouver, B.C.

October 29, 2021

Place and Date of Judgment:

Vancouver, B.C.

November 30, 2021

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Overview

- [1] This is an application for summary trial. The plaintiff, Balmoral Holdings Inc. (Balmoral), seeks damages, or alternatively restitution, from the defendant, Rogers Communications Inc. (Rogers). Balmoral seeks to recover amounts of rent payable between 1997 and 2016 under a lease agreement between the parties (the "Lease"). Balmoral argues Rogers breached its contract by failing to pay utilities and property taxes that were due under the Lease. In the alternative, Balmoral argues I should find unjust enrichment for Rogers' failure to pay these amounts of rent.
- [2] Rogers admits that it failed to pay the utilities and property taxes required under the Lease, but argues that Balmoral's claim for these fees is statute barred with the exception of a narrow 72-day window for which damages may be payable. The amount of damages is less than \$1,000.
- [3] The Lease between the parties was signed in 1997. It was not until after the Lease was assigned to a third-party purchaser that Balmoral became aware that a check meter, which was to measure Roger's electrical consumption, had never been installed. The plaintiff commenced this action on March 21, 2019.
- [4] For the following reasons, I find that the claim is statute barred with the exception of the narrow 72-day window. I decline to find unjust enrichment.

Background Facts

- [5] In 1997, Rogers agreed to lease space from Balmoral in a property located in Coquitlam, BC (the "Property"). Rogers leased approximately 246 square feet of ground floor interior space and rooftop space to operate its telecommunications business. Under the Lease, Rogers was responsible for paying its share of the utilities and property taxes. To determine its proportionate share of utilities, Rogers agreed to install a meter to measure its electrical consumption.
- [6] The Lease states at para. 6: "UTILITIES required for the operation of the telecommunications facilities shall be the sole responsibility of Tenant, and electrical consumption shall be determined by " Although "direct invoice from local utility, if available" was an option, the parties indicated "check meter, installed by Tenant".
- [7] With respect to property taxes, the Lease states: "Realty taxes attributed to the premises shall be payable by the Tenant."

- [8] Rogers admits that its contractors mistakenly failed to install a check meter when constructing the telecommunications facilities at the Property. A meter base was installed in the electrical room, but the meter was not.
- [9] According to Mr. Garth Jones, Project Manager at Rogers, the meter base that was installed in the electrical room was a large metal box onto which the meter was to be placed. The building's electrical room is located on the second floor. Throughout the term of the Lease, Balmoral had unrestricted access to the electrical room. Conversely, Rogers had to seek permission to enter the electrical room.
- [10] Balmoral received invoices from BC Hydro and property tax assessments from the City of Coquitlam (the "City"). It paid these invoices and did not seek reimbursement from Rogers.
- [11] The Lease was for an initial period of five years. Rogers exercised its option to renew the Lease several times over the years. This extended the term, but did not otherwise alter the Lease.
- [12] Balmoral sold the Property and assigned the Lease to a third-party purchaser on January 15, 2016. In October 2018, the purchaser advised Balmoral that the check meter had never been installed. Shortly thereafter, Balmoral realized that Rogers had not paid its proportion of utilities and property taxes throughout the terms of the Lease. It then sought, unsuccessfully, to collect the outstanding amounts from Rogers.

Is the Matter Appropriate for Summary Trial?

- [13] The parties agree that this matter is suitable for determination by summary trial.
- [14] There is only one area in which there is any dispute on the facts: whether the meter base that Rogers installed was easily visible in the electrical room. There were initially two other areas of factual dispute, whether Rogers had access to the electrical room and the time at which Balmoral assigned the Lease to a third party, but these were conceded by Balmoral during the hearing.
- [15] In terms of the one remaining factual dispute, the meter base was in the electrical room, which did not form part of Rogers' leased premises. Rogers tendered affidavit evidence that the meter base was easily visible upon entering the electrical room. While Mr. Orr, director, shareholder, and property manager for Balmoral, admitted he could enter the electrical room as he pleased, Mr. Orr did not agree the meter base was easily visible. There was no evidence that Mr. Orr ever actually saw the meter base.
- [16] In my view, the parties remaining factual disagreement is not central to the resolution of this dispute. The precise visibility of the meter base is not a material fact because, as I will explain, I am not persuaded that there is a direct link between the lack of a meter and the non-demand for payment.

- [17] Since there are no material facts in dispute, this matter is suitable for summary disposition based on the factors listed in the leading decisions of the Court of Appeal: *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.) and *Gichuru v. Pallai*, 2013 BCCA 60.
- [18] In the interests of proportionality and efficiency, I will address and resolve this dispute through the process of a summary trial.

Breach of Contract

- [19] The plaintiff's claim spans the time between May 1, 1997 and January 15, 2016, when the Lease was assigned.
- [20] At the time that Rogers constructed their telecommunications facilities on the Property, Rogers' contractors failed to install a meter into the meter base. Under the Lease, Rogers was required to do so. Rogers was also responsible for paying its proportion of the electrical utilities and property taxes. Rogers did not do so.
- [21] I agree with Rogers that para. 6 of the Lease ruled out Rogers establishing a direct billing relationship with BC Hydro. That box was not selected. Instead, "check meter, installed by Tenant" was selected.
- [22] By failing to comply with the terms of the Lease, Rogers clearly breached their contract. However, the primary issue before me is whether Balmoral is entitled to recovery based on the breach of contract, or whether the Limitation Act, R.S.B.C. 1996, c. 266 [Former Limitation Act] or the Limitation Act, S.B.C. 2012, c. 13 [Current Limitation Act] prevents recovery.

Is the Claim Statute Barred?

Parties' Positions

- [23] Rogers argues that Balmoral's claim for property taxes and utilities is statute barred with the exception of a narrow 72-day window from March 21, 2013 to June 1, 2013.
- [24] Rogers submits that its failure to pay its share of property taxes and utilities to Balmoral between May 1, 1997, and June 1, 2013, the date the Current Limitation Act came into force, is a "pre-existing claim" under the transition provisions in s. 30(1) of the Current Limitation Act:

30(1) In this section:

"effective date" means the day on which this section comes into force;

()

"pre-existing claim" means a claim

(a) that is based on an act or omission that took place before the effective date, and

(b) with respect to which no court proceeding has been commenced before the effective date.

[25] Rogers argues that under s. 3(5) of the Former Limitation Act, a six-year limitation period applied to the plaintiff's claim. As such, Rogers submits that the plaintiff's claim between May 1, 1997 and June 1, 2007 is statute barred pursuant to s. 30(2) of the Current Limitation Act:

(2) A court proceeding must not be commenced with respect to a pre-existing claim if

(a) a former limitation period applied to that claim before the effective date, and

(b) that former limitation period expired before the effective date.

[26] Rogers further argues that the plaintiff's claim between June 2, 2007 and March 21, 2013 is statute barred pursuant to s. 30(3) of the Current Limitation Act:

(3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.

[27] Rogers admits that the period of time between March 21, 2013 and June 1, 2013 is not statute barred because the six-year limitation period applied and had not elapsed by the time of filing the original notice of civil claim in 2019. However, Rogers contends that the plaintiff's claim between June 2, 2013 and January 15, 2016 is statute barred pursuant to the basic two-year limitation period in s. 6 of the Current Limitation Act.

[28] Balmoral argues that its claim is not barred by either the Current Limitation Act or the Former Limitation Act. Balmoral submits that the limitation period did not begin to run until Rogers' failure to pay was discovered. Balmoral submits that there is no limitation period issue because it was entitled to make a demand for payment in December 2018 when it discovered the meter was not installed. Balmoral submits that its claim is a pre-existing claim under s. 30(1) of the Current Limitation Act. It was not discovered before June 1, 2013, pursuant to s. 30(4) of the Current Limitation Act. As a result, the limitation period only began to run from the date of its demand. Balmoral contends that it had two years from its demand in 2018 to bring an action against Rogers.

Legal Principles

[29] In *Borek v. Dr. Derek Stirling Hopkins*, 2020 BCSC 304, Justice Marzari helpfully explained why limitation periods apply despite the underlying claim otherwise being valid:

- [14] I approach this summary trial mindful that "almost all applications of limitation statute will seem harsh. But their finality should not obscure their value. They bring needed stability to society by enabling potential defendants to plan their affairs in a safe assumption that stale claims cannot be raised against them. They minimize the risk that evidence relevant to the claim will be lost. In addition, they are an incentive for the plaintiffs not to 'sleep on their rights'" as was stated at para. 8 of Novak.
- [15] Similarly, I recognize the important and continued balancing function of Limitation Acts and limitation periods noted at para. 66 of that decision, and relied upon by Ms. Borek, that these acts "seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances."
- [30] I come back to the application of the Former Limitation Act and the Current Limitation Act at the end of these reasons.

Discovery of Roger's Failure to Pay

Parties' Positions re Discoverability

- [31] Balmoral contends that from 1997 to 2016 it was unaware of Rogers' failure to install the meter and to pay the associated fees. Balmoral argues it only became aware of the meter issue in October 2018 when the new property owner advised it that the meter had not been installed. Balmoral argues it relied on the term in the Lease that Rogers would install the meter.
- [32] In making this argument, Balmoral relies on s. 8 of the Current Limitation Act:
- 8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
- (a) that injury, loss or damage had occurred;
 - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
 - (c) that the act or omission was that of the person against whom the claim is or may be made;
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
- [33] Rogers argues that Balmoral discovered its claim, or should have discovered its claim, upon its first payment to the City of Coquitlam and BC Hydro. Rogers submits that the Lease assumes these amounts were payable as soon as the plaintiff became liable to BC Hydro or the City. The only manner in which these Lease provisions were workable is if Balmoral notified Rogers of its share of property tax or hydro payments promptly after it received tax notices from the City or hydro bills from BC Hydro. As such, Rogers submits that its failure

to install the meter is not material to the discoverability of Balmoral's claim.

Legal Principles

- [34] It has long been established that a plaintiff is required to exercise reasonable diligence and cannot sleep on its rights. The recent decision in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para. 3 holds that a cause of action arises when a plaintiff has constructive knowledge of the material facts upon which a plausible inference of liability on the defendant's part can be drawn.
- [35] In *Grant Thornton LLP*, Justice Moldaver articulated the rationale for the discoverability rule and stated that the rule has its origins in equity. The rule seeks to "balance the three rationales for imposing limitations periods -- the guarantee of repose, the desire to foreclose claims based on stale evidence and the expectation that a plaintiff will start a claim in a timely manner with the need to avoid the injustice of precluding a claim before the plaintiff even has knowledge of its existence ": at para. 29.
- [36] In *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289, La Forest J. summarized the law's expectation that plaintiffs act diligently:
- [24] Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. This rationale again finds expression in several cases of some antiquity. For example in *Cholmondeley v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

The statute is founded upon the wisest policy and is consonant to the municipal law of every country. It stands upon the general principle of public utility. Interest reipublicæ ut sit finis litium, is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question.

It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right... [Emphasis added.]

Analysis

- [37] The key question I must determine is whether Balmoral knew or reasonably ought to have known each of the facts listed in s. 8 of the Current Limitation Act each time it became liable to the City and BC Hydro for the payment of utilities and property taxes.

[38] Mr. Orr, the property manager, gave evidence that Balmoral did not learn that Rogers had failed to install the check meter until October 2018 when the new owner brought the meter issue to Balmoral's attention. Balmoral then reviewed its records and the Lease and demanded payment from Rogers.

[39] Balmoral is an experienced commercial entity. Mr. Orr was aware, or should have been aware, of the Lease and its terms well before he discovered the meter had not been installed. During his examination for discovery, Mr. Orr made the following admissions:

430 Q Would you agree with me that it was open to you at any time during the term of the lease to review the lease terms?

A Absolutely.

431 Q And you would also agree that at any time during the term of the lease you could enter your electrical room as you pleased?

A Absolutely.

432 Q And at any time you could have spoken to your accounts payable team about the amounts that Rogers was paying; that's correct?

A Yes, I could have.

433 Q And you also agree that you could have looked at the property tax notices and your BC Hydro bills; that's correct?

A Yes, I could have, yeah.

434 Q And you could have looked at the amount of money that you were paying to the City of Coquitlam and to BC Hydro at any time; is that correct?

A Yes, I could have.

435 Q And you needed no more information from Rogers to make those inquiries; that's right?

A I needed no more information from Rogers?

436 Q To make those inquiries of your accounts - -

A I could have made the inquiries, yeah. I could have made the inquiries, yeah.

437 Q And you agree that you never did this?

A I agree that I never did it.

[40] Mr. Orr did not take any steps to enforce the Lease. He knew that the way in which other tenants pay amounts of additional rent depended on the terms of their lease. Mr. Orr also had experience preparing and submitting schedules of payments to tenants for amounts of additional rent, including property taxes and utilities.

- [41] I accept that Mr. Orr never knew where the meter base was installed and he did not recognize it as a meter base. However, the meter's non-installation does not justify Balmoral's lack of inquiry into whether the terms of the Lease were being followed. Also, the non-installation of the check meter was unrelated to Balmoral's failure to collect property taxes from Rogers.
- [42] Mr. Orr agreed he knew Rogers was required to pay property taxes and utilities under the Lease. Mr. Orr deposed that Rogers should have had systems in place to ensure it would fulfill its obligations under the Lease. However, there is no evidence before me that even if the meter had been installed, Mr. Orr, or anyone at Balmoral, would have checked it and invoiced Rogers.
- [43] Mr. Orr admitted that he could have reviewed the terms of the Lease at any time. He could have, at any time, made inquiries into how much Balmoral was paying. Mr. Orr agreed that at any time he could have spoken to his accounts payable team about the amounts Rogers was paying, looked at the property tax notices and BC Hydro bills, and looked at the amounts Balmoral was paying to the City and BC Hydro. Despite these admissions, Balmoral failed to issue a single invoice to Rogers for its share of property taxes and utilities until 2018.
- [44] Based on these facts, it is clear that Balmoral did not exercise due diligence in collecting this part of its rent. I find that Balmoral ought to have known that Rogers was not paying rent as required under the Lease. Balmoral should have become aware the first time Balmoral became liable for property taxes and utilities payments. Balmoral's claim was discoverable from the inception of the Lease, or shortly thereafter.
- [45] What changed in October 2018 was Balmoral's realization that Rogers had failed to install a check meter. However, the missing meter does not change the fact that:
- (a) Balmoral alone received notice of the amounts owing to the City of Coquitlam and to BC Hydro;
 - (b) Balmoral knew or should have known Rogers' obligations under the Lease;
 - (c) Balmoral knew or should have known Rogers was paying only the base rental amount each month;
 - (d) Balmoral was an experienced commercial landlord;
 - (e) Mr. Orr was experienced at preparing and submitting schedules of payments to tenants; and
 - (f) Mr. Orr knew that Balmoral's other tenants paid amounts of additional rent depending on the terms of their particular lease.

[46] A reasonable person in the plaintiff's position, exercising reasonable diligence, would have discovered its claim the first time Balmoral paid amounts to the City and BC Hydro after May 1, 1997. Reviewing its own records is an exercise that is well within the scope of Balmoral's obligation to exercise diligence.

[47] In my view, discovery of the failure to install a meter in the meter base has little bearing on the fact that Balmoral, at any time, could have invoiced Rogers for its share of property taxes and utilities expenses.

Demand Obligation

Parties' Positions

[48] Balmoral relies on s. 14 of the Current Limitation Act to argue that once it discovered the non-payment a demand obligation arose:

A claim for a demand obligation is discovered on the first day that there is a failure to perform the obligation after a demand for the performance has been made.

[49] Pursuant to s. 14 of the Current Limitation Act, Balmoral argues that the limitation period only began to run when Rogers failed to pay following Balmoral's demand.

[50] Rogers argues the Lease did not provide a date or method for payment. Therefore it was due on demand, but within a reasonable period of time.

Legal Principles

[51] In *Leatherman v. 0969708 B.C. Ltd.*, 2018 BCCA 33, the Court stated that the mere insertion of the term "payable on demand" did not render a mortgage a "demand obligation": at para. 44. However, in the context of the particular mortgage before the Court, the language was consistent with a demand obligation

[52] In *Bulley v. Weatherford Canada Partnership*, 2016 BCSC 1955, the lease explicitly made payments of additional rent payable upon demand:

[8] As this case involves the provisions of the Lease, I set out the provisions under scrutiny. The Lease provides, *inter alia*, as follows:

14.8 Any amount payable by the Tenant under this paragraph 14 shall be deemed to be rent and shall be collectible and be paid as additional rent within thirty (30) days after demand by the Landlord. The Landlord may estimate for any calendar year or fiscal year of the Landlord the amount payable by the Tenant and the Tenant shall upon demand pay to the Landlord on the 1st day of each month, one-twelfth (1/12th) of the Landlord's estimate. The Landlord shall then account to the Tenant for such amounts within two (2) months after the end of such calendar or fiscal year.

[Emphasis added.]

- [53] Justice Maisonville relied on this lease provision in dismissing the defendant's limitations defence. She found that a demand for payment in 2014 for rent between 2012 and 2014 was not barred by the statutory limitation period. The payment was due 30 days after the demand was sent.
- [54] *Robichaud Estate et al. v. Plourde et al.*, [2000] N.B.J. No. 367, 230 N.B.R. (2d) 141 (Q.B.) [Plourde] considered the meaning of "shall be payable" in an agreement that did not refer to a particular time period. The court concluded that the amounts were immediately payable.
- [55] Lastly, in *St. Joseph (Township) v. Rowe*, 2015 ONCA 128, the lease, which commenced in 2005, provided that the tenant "shall be responsible to pay any and all realty taxes and assessments applicable to the leased premises". The municipality did not provide the landlord with property assessment notices for the property until 2007, several years after the commencement of the lease. One month after receiving the notices, the Township sent the tenant tax notices for the period of 2005 to 2007. At para. 10, the Court held that the Township issued the tax notices to the tenant as soon as it was in a position to do so and permitted recovery of the arrears.

Analysis

- [56] In October 2018, the Property's new owners advised Mr. Orr that no check meter had been installed. Mr. Orr gave evidence that this is when he realized that Rogers had not paid their portion of the Property's utilities and property taxes. At that point, Balmoral demanded payment from Rogers for the utilities and taxes incurred between May 1997 and January 2016. When the outstanding amounts were not paid, Balmoral commenced this action on March 21, 2019.
- [57] The Lease did not specify a manner or date for payment. While there was no time is of the essence clause, payment was due within a reasonable period after the demand was received: 524991 B.C. Ltd. v. Frank Wells, 2001 BCSC 50 [Wells] at para. 22. Wells holds that the court may determine what is a reasonable period in which to demand payment. While Bulley suggests that the payment was due upon demand, the demand must have been made in a timely manner.
- [58] The amounts payable by Rogers for property taxes were payable when Balmoral became liable to the City of Coquitlam for the property taxes or shortly thereafter. Rogers' liability for utilities expenses similarly accrued when Balmoral became liable to BC Hydro for energy expenses for the Property. Although the Lease is not explicit, a reasonable interpretation is that the amounts owing were payable when Balmoral became liable to BC Hydro and the City, or soon thereafter: *Plourde*. It is not reasonable that they would become payable years later.
- [59] Balmoral took no steps to issue notices to Rogers throughout the term of the Lease. Its demand in 2018 was stale: *M.(K.)*.

Mistake

Parties' Positions

- [60] Balmoral argues that both parties were operating under a mistake of fact, not identified by the parties, that the meter had been installed. Balmoral argues the limitation acts do not apply because the non-payment was based on a mistake of fact and it was entitled to demand payment in December 2018 when the mistake was discovered.
- [61] Rogers argues that the non-installation of the meter by Rogers is not a mistake capable of supporting Balmoral's reliance on the doctrine of mistake.

Legal Principles

- [62] The law regarding a mistake of fact permits recovery where money is paid to another party under the influence of a mistake.
- [63] In *International Longshore & Warehouse Union Local 502 v. Ford*, 2016 BCCA 226 [International Longshore] at para. 26, the Court held that where there is a mistake of fact by both parties, a demand may be required. Once the demand is made, the plaintiff has a right of recovery.
- [64] In *Stortheoaks v. Mobil Oil Canada, Ltd.*, [1976] 2 S.C.R. 147 at 156 and 157, 55 D.L.R. (3d) 1, the Court adopted the reasoning in *Kelly v. Solari* (1841), 9 M. & W. 54, 152 E.R. 24 regarding the necessary requirements to ground a claim of mistake:

I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Bayley J. in the case of *Milnes v. Duncan*, (1827) 6 B. and C. 671; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact." Rolfe B. said: "With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it.

[Emphasis added.]

[65] Further, in *Chimo Structures Ltd. v. Canadian Pacific Ltd.* (1977), 78 D.L.R. (3d) 210, 1977 CanLII 1698 (B.C.S.C.) [Chimo] the defendant paid an amount to the plaintiff without exercising its right of set-off. The court found that it could not ground a claim of mistake:

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Counsel for the plaintiff argues that a payment under mistake of fact when the payor is not liable to pay the money must be distinguished from a payment made under a mistake of fact when the payor is liable. In the first instance the payor can recover money so paid but in the second instance the payor has no right to recover payment. He submits that because the defendant made the payment to the plaintiff to discharge a debt which was truly owing to the plaintiff, the defendant cannot recover the money so paid. Plaintiffs counsel relies upon a statement in *Corpus Juris*, 48 C.J. 764, para. 319, and the cases cited in support of that statement, and in particular a decision of Justice Cardozo of the Court of Appeal of New York, *Carnegie Trust Co. v. First National Bank of City of New York* (1915), 107 N.E. 693. He also relies upon *Re Fallon* (1925), 7 C.B.R. 223, and *Archangel Saw Mills Co. v. Baring Bros. & Co.* (1921), 91 L.J.Ch. 325.

[Page 212] In both the *Carnegie Trust* case and *Re Fallon* the plaintiff attempted to recover money paid in ignorance of the fact that a setoff was available and such recovery was denied. It is clear from my reading of the judgment in those cases that recovery was not permitted because the payor had made payment of a just debt which existed at the time.

[Page 213] The cases of *Weld-Blundell et al. v. Synott*, and *Mobil Oil Canada Ltd. v. Rural Municipality of Storthoaks*, *supra* (and [affirmed] 55 D.L.R. (3d) 1, [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591 (S.C.C.)), are concerned with cases where the plaintiff has succeeded in recovering for a payment made in discharge of a debt which did not in fact exist. In *Weld-Blundell* recovery was allowed for an overpayment and in *Storthoaks v. Mobil Oil* recovery of payments of royalties made in ignorance of the surrender of certain leases was also permitted.

That situation is different from the type of mistake which does not involve the existence of the debt but rather some circumstance which would have caused the payor not to pay off the debt had he known of the circumstance.

[Page 214] In the present case the mistake of fact was as to the existence of the right of set-off. This mistake of fact did not alter the defendant's liability for the debt it owed to the plaintiff but rather related to a wholly separate debt and was a circumstance which, had the defendant been alert to the matter at the time, might have prompted him to not make the payment of the debt which he owed the plaintiff.

[Page 215] I accordingly answer the question of law in the negative and say that the mistake of fact made by the defendant in the case at bar does not entitle the defendant to repayment from the plaintiff of the sum of \$17,324.

[Emphasis added.]

Analysis re Mistake

- [66] Balmoral received and paid all property taxes and utilities bills for the Property, but never invoiced Rogers. Balmoral argues it made the payments because of an error that was not identified by either party. Specifically, the error was that neither party was aware the meter had not been installed.
- [67] In my view, there are two problems with Balmoral's mistake of fact argument.
- [68] First, a mistake of fact is one in which money is paid to another under the influence of mistake. The only fact Balmoral alleges to potentially ground its claim of mistake is that it was unaware that Rogers had failed to install the check meter.
- [69] The implication of this argument is that, had the meter been installed, Balmoral would have alerted Rogers to pay its portion of the invoices. However, the evidence before me is that the meter base was installed in the second-floor electrical room. Balmoral had access to the electrical room throughout the Lease term and Rogers did not.
- [70] The other implication is that, had the meter been installed, Mr. Orr would have seen the meter in the electrical room. However, based on Mr. Orr's evidence, this implication is merely speculative.
- [71] Balmoral made the payments at issue to discharge its liability to the City and to BC Hydro. There is no evidence before me that Balmoral made these payments with reference to whether a check meter was installed. Furthermore, while the check meter would have assisted Balmoral in determining Rogers' proportionate share of BC Hydro expenses, the check meter had no relevance to the payment of property taxes. Consequently, in my view, the authorities on mistake of fact are of limited assistance in this case.
- [72] Mr. Orr agreed that at no time was he mistaken about the fact that Balmoral was paying property taxes and utilities. He also agreed that Balmoral's accounts payable team kept track of the payments Rogers made to Balmoral and that he could have spoken with the clerk at any time about those amounts. In Mr. Orr's examination for discovery, he agreed that Balmoral required no information from any third party in order to discover its claim from 1997 onward.
- [73] There is only a tenuous causal connection between the meter mistake and Balmoral's decision to pay the utilities without contribution from Rogers. There is no connection between the lack of meter and Balmoral's decision to pay the property taxes without contribution from Rogers. The non-installation of the meter is not a mistake of fact capable of supporting Balmoral's reliance on the doctrine of mistake.

- [74] Second, no money was paid by Balmoral to Rogers; the money was paid to a third party. Yet the cases which Balmoral relies upon all involved situations where the mistaken payments were made directly to the other party. In all three decisions relied upon by the plaintiff, the payments were made by the party claiming mistake to the other party from whom they sought to recover. In *Edgewater Casino Inc. (Re): Utilities Issue*, 2007 BCSC 1829, Storthoaks, and *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2017 BCCA 307, the money was paid directly to the other party.
- [75] Balmoral paid amounts to the City and BC Hydro, not to Rogers. The fact that Balmoral did not make payments to Rogers also distinguishes this case from the facts in *Chimo*. To establish mistake, the payments must have been made directly to the other party.
- [76] Balmoral did not know that Rogers failed to install a meter in the meter base in the electrical room. Nevertheless, the lack of a meter did not alter Balmoral's liability to the City and BC Hydro. Balmoral made payments to BC Hydro and the City because it was just to do so: *Chimo* at 211. Its mistake was not demanding payment from Rogers as it was expected to do under the Lease.
- [77] In summary, there must be a causal connection between the mistake and the decision to pay the money. In this case, the mistake was that Rogers never installed the meter. However, I am not persuaded that the missing meter was an important determinant in Balmoral's failure to seek payment. There is no evidence that if Rogers had installed the meter, Balmoral would not have made payments to the City and BC Hydro or would have made inquiries of Rogers.
- [78] In this case, there is no direct connection between the missing meter and Balmoral's decision to pay full invoices from BC Hydro and the City. As Balmoral had a direct billing relationship with BC Hydro, it was the only party who was on notice to check for a meter reading to determine the proportion of utilities for which Rogers was liable.
- [79] There is no basis to apply the doctrine of mistake. Balmoral's failure to collect amounts owing to it under the Lease is not a mistake of fact, and it cannot avoid the operation of the limitation period. Balmoral simply failed to collect amounts owing to it by Rogers between 1997 and 2016.

Negligent Misrepresentation

- [80] The plaintiff's claim for negligent misrepresentation rests on representations it alleges were made prior to the Lease and during Lease negotiations. However, in argument, Balmoral conceded there was no misrepresentation.

Unjust Enrichment

- [81] Balmoral argues that Rogers was unjustly enriched. It relied on the representation that Rogers would install the meter and that Rogers was handling its own construction: International Longshoreman. It relied on that representation to its detriment.
- [82] For the reasons already articulated, I find there is no evidence of reliance. In any event, I find the claim is statute barred.
- [83] I dismiss the unjust enrichment argument.

Damages

- [84] The plaintiff has adduced evidence regarding the 72-day period that is not statute barred. The property taxes payable between March 21, 2013 and June 1, 2013 is 5% of the total property taxes payable (\$65,613.28) for that 72-day period (72/365), which amounts to \$647.14. Balmoral's general ledger indicates it paid \$6,501.35 to BC Hydro between March 21, 2013 and June 1, 2013. Assuming that Rogers consumed an amount of energy proportionate to the total amount of space it occupied at the Property (5%), its total liability for utilities expenses is \$325.07, for a total quantum of damages of \$972.21.
- [85] During the other time periods, Rogers argues there were significant deficiencies in the evidentiary support for much of the plaintiffs' damages claim. I need not address this argument, given my decision.

Conclusion

- [86] I am persuaded that the unpaid property taxes and utilities were discoverable from the time Balmoral first began making utilities and property tax payments for the Property or shortly thereafter. The affidavit evidence establishes that Balmoral's claim against Rogers ought to have been discovered the first time Balmoral became liable to the City and BC Hydro for property taxes and utilities for the Property after May 1, 1997.
- [87] Balmoral's claim for damages, whether characterized as a breach of contract or unjust enrichment, are dismissed as being statute barred. Section 30(4) and s. 14 of the Current Limitation Act do not apply because Balmoral should have discovered its mistake long before December 2018. The Lease indicated that Rogers was not paying BC Hydro directly for utilities. Further, Balmoral's payments to BC Hydro and the City were not triggered by the meter, but rather by invoices from these third parties. Rogers was not in a position to know when these payments were due or in what amounts. Balmoral failed to exercise due diligence in collecting these payments from Rogers.
- [88] The exception is a 72-day period between March 21, 2013, six years prior to filing the notice of civil claim, and June 1, 2013, when the Current Limitation Act came into force. Balmoral's records establish \$972.21 in damages.

Disposition

[89] Balmoral's claim should be dismissed as statute barred with the exception of the 72-day period between March 21, 2013 and June 1, 2013.

[90] Balmoral is entitled to \$972.21 in damages.

"D. MacDonald J."

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