

CANADA / JUDGMENT

Bellamy v. Ward

2011 BCSC 551

COURT

Supreme Court of British Columbia

DECIDED

29 April 2011

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2011 BCSC 551 Bellamy v. Ward IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Bellamy v. Ward, 2011 BCSC 551 Date: 20110429 Docket: S101057 Registry: Vancouver Between: Nicola Jean Bellamy - Executor of the Estate of Alison Mary Waycott Gabriel, Susannah Jessica Rum - Executor of the Estate of Alison Mary Waycott Gabriel and Simon Henry Gabriel Plaintiffs And Ian James Ward, Catherine Ward (also known as Cathy Ward) and Signet Holdings Inc. Defendants Before: The Honourable Madam Justice Loryl Russell Reasons for Judgment Counsel for the Plaintiffs: R. J. Baylis Appearing on His Own Behalf: I. J. Ward Place and Date of Trial: Vancouver, B.C. March 21 and 22, 2011 Place and Date of Judgment: Vancouver, B.C. April 29, 2011

- [1] The plaintiffs Nicola Bellamy and Susannah Rum are the executors of the Estate of Alison Gabriel (the "Estate"). The plaintiff Simon Gabriel is Ms. Gabriel's former husband.
- [2] In the Notice of Civil Claim, the plaintiffs allege that Ms. Gabriel and Mr. Gabriel loaned the defendant Ian Ward a total of \$13,855 between January 1991 and May 1994 and that Ms. Gabriel loaned Mr. Ward a further \$15,500 in 1999. In affidavit evidence, they acknowledge that Mr. Ward repaid Ms. Gabriel \$5,092.10 between April 2000 and January 2001 and therefore say that Mr. Ward owes a joint debt to Mr. Gabriel and the Estate of \$13,855 and owes a further \$10,407.90 to the Estate. They claim interest on the monies owing and costs.
- [3] The claims against Catherine Ward and Signet Holdings Inc. were dismissed by order of Mr. Justice Cole dated September 23, 2010. On plaintiff's motion, I granted an order to amend the style of cause to delete Catherine Ward and Signet Holdings Inc.
- [4] Mr. Ward is therefore the only defendant.
- [5] Mr. Gabriel swore four affidavits in support of this action. In his evidence, he says that he understood the sums he and his former wife advanced were for Mr. Ward's personal use and to assist with his family's expenses. On one occasion he advanced Mr. Ward \$8,000 to assist him to obtain a business franchise.
- [6] The plaintiffs say that numerous demands for payment have been made and that Mr. Ward has acknowledged the debts as recently as June 19, 2009 and made promises to pay as recently as October 20, 2008.

- [7] Mr. Ward takes various positions on the nature of the advances. He admits that the Gabriels and Ms. Gabriel advanced him funds, but he denies anything beyond a "moral obligation" to repay them. He says first, that the monies were advanced for the benefit of Signet Holdings Inc. and not for his personal use. He points to two cheques made payable to Signet, one by the Gabriels and one by Ms. Gabriel, to support this claim and appears to say that all of the advances were for the company's benefit.
- [8] Mr. Ward's second argument is that the monies were advanced as an investment. He says that repayment was contingent "upon the positive outcomes of certain events, which unfortunately did not come to fruition" and that the monies were advanced as a combination of "speculative investment or in the reciprocity for earlier favours to the Gabriel family".
- [9] Mr. Ward's third position is that if there ever was an obligation to repay, it is statute-barred by the provisions of the Limitation Act, R.S.B.C. 1996, c. 266.
- [10] In any event, Mr. Ward says there were no terms requiring repayment and no discussion of interest.

Issues

[11] The issues are:

- a) What is the total amount of the advances?
 - b) Has the defendant demonstrated that the monies advanced by the Gabriels and/or by Ms. Gabriel were a gift and not a loan?
 - c) If the monies were a loan, what were the terms of the loan agreement?
 - d) Does the Limitation Act apply to bar the plaintiffs' claim?
 - e) If successful, are the plaintiffs entitled to their costs?
1. What is the total amount of the advances?

[12] The following amounts are disputed for various reasons:

- (a) Gabriels' claimed January 31, 1991 advance of \$500;
- (b) Gabriels' claimed October 9, 1991 advance of \$1,000;
- (c) Gabriels' claimed May 1994 advance of \$655; and
- (d) The Estate's claimed October 7, 1999 advance of \$3,000.

[13] There is no documentation supporting the \$500. The cheques for \$1,000 and \$3,000 were written to Signet Holdings Inc. and not to Mr. Ward. Mr. Ward does not recall the cash advance of \$655.

- [14] I accept Mr. Gabriel's evidence that he and his former wife advanced Mr. Ward \$500 on January 31, 1991 and \$655 in May 1994. I also accept his evidence that all funds were advanced for Mr. Ward's personal use. I do not accept that because the \$1,000 cheque was payable to Signet Holdings Inc. it was intended by either party as a loan to that company.
- [15] I also do not accept that Ms. Gabriel's 1999 advance of \$3,000 was intended to be a loan to Signet. In addition, as the defendant properly admitted, Signet was struck from the register of companies in 1997. Therefore Ms. Gabriel's advance could only have been to Mr. Ward personally.
- [16] In the result I find that the Gabriels advanced Mr. Ward \$13,855 and that Ms. Gabriel advanced Mr. Ward a further \$15,500. Mr. Ward repaid Ms. Gabriel a total of \$5,092.10.
2. Were the advances loans or gifts?
- [17] I have no difficulty finding that the advances to Mr. Ward, both by the Gabriels jointly and by Ms. Gabriel individually, were loans.
- [18] In ascertaining whether the advances were loans or gifts, I must look at the surrounding circumstances. Once I am satisfied that the plaintiffs advanced monies to the defendant, the onus is on the defendant to demonstrate that the advances were a gift: see *Shaath v. Zarifa*, (29 June 2005), Doc. 04-CV-026948SR, 2005 CarswellOnt 3123 (Ont. S.C.J.) (cited to CarswellOnt) at para. 30.
- [19] Mr. Ward has not satisfied me that the parties intended that the advances were gifts. In *Robinson v. Robinson Estate*, 2006 BCSC 663, the plaintiff Sleight sought to recover \$15,000 he allegedly loaned to his girlfriend's ex-husband. The Court said the following about the debt claim at paras. 61-62:
- [61] Mr. Sleight characterized his delivery of a cheque for \$15,000 through Ms. Robinson to Mr. Robinson as a loan based on a gentlemen's agreement that he would be paid in due course by Mr. Robinson together with the interest that Mr. Sleight said he became obligated for by taking an advance on the line of credit in order to provide the \$15,000 to Mr. Robinson... A great part of the difficulty that Mr. Sleight now finds himself in is that there is no note on his cheque to indicate that it was a loan, there is nothing in the records of Mr. Robinson or Mr. Sleight to indicate that it was a loan and, if so, what the terms of repayment were to be. Nor, for that matter, did Mr. Sleight ever make a demand for payment on Mr. Robinson or his estate (other than by commencing this action)
- [62] Whatever the difficulties with the evidence with respect to this claim, however, I am satisfied, on a balance of probabilities, that Mr. Sleight did in fact make a loan to Mr. Robinson for the sum of \$15,000 [Emphasis added.]

- [20] Unlike in Robinson, in the present case, there exists documentary evidence supporting the plaintiffs' claim that the advances were loans; there is ample correspondence between Mr. Ward and Mr. Gabriel and the Estate going back several years, including demands for payment, promises to pay and negotiations respecting payment terms. Mr. Ward did not point me to any reference in this correspondence which persuades me that the monies were gifts.
- [21] In his affidavits, Mr. Gabriel swears the advances were loans. In e-mails between the parties between 2004 and 2010 the defendant himself uses the words "repayment", "loan" and "principal" in respect of the monies. This evidence leads me to conclude that the parties always intended that the advances would be repaid.
- [22] Mr. Ward claims that his arrangements with Ms. Gabriel were on different terms than were those between him and the Gabriels as a couple. He says that only he and Ms. Gabriel knew what those terms were.
- [23] I have before me an e-mail written by Ms. Gabriel and sent to the defendant on May 2, 2000. If accepted for the truth of its contents, this e-mail is hearsay. However I find it admissible as it is reliable and necessary.
- [24] In light of the surrounding circumstances, I find the e-mail reliable. The contents of the e-mail accord with the parties' subsequent communications. The e-mail is also necessary evidence because Ms. Gabriel died ten years ago. She is therefore not able to give direct evidence and the defendant says that she is the only other person who knew the terms of their agreement.
- [25] I therefore find Ms. Gabriel's e-mail admissible for the purpose of establishing her understanding of the terms of her agreement with Mr. Ward.
- [26] I find Ms. Gabriel expected to be repaid the money she advanced Mr. Ward in 1999. In the e-mail to Mr. Ward Ms. Gabriel says "both you and I believed that the money between us would have been settled a good while ago" and "if things have eased at all could you let me have some money back". It defies common sense that this reference in 2000 refers only to money Mr. Ward borrowed from the Gabriels as a couple between 1991 and 1994 when she had loaned him additional money as recently as 1999.
- [27] Mr. Dives argues that I cannot use the correspondence between the parties to ascertain whether a debt is owing because documents evidencing settlement negotiations cannot be used to establish the existence of the debt. He cites *DeBathe et al v. T.A. Steadman Holdings Inc. et al*, 2001 BCSC 1817 in support.
- [28] It is not the fact that there were negotiations to settle the matter which leads me to conclude there is an underlying debt. I am satisfied that the claimed monies were advanced; absent evidence which persuades me on a balance of probabilities that the advances were gifts, the debt is established.

- [29] I have used the correspondence to determine whether I can find that the parties intended the advances to be gifts. The defendant adduced little else from which I could make the finding I must make for his position to be tenable. His own evidence is that Ms. Gabriel did not want to and could not afford to put her money at risk.
- [30] I find that Mr. Ward's friends loaned him money to help him through difficult financial times, in Ms. Gabriel's case at great hardship to herself, and all parties expected the money to be repaid.
3. What were the terms of the loan agreements?
- [31] The onus is on the plaintiff to prove the terms of the loan: see Shaath at para. 30. In this case, the relevant terms are the nature of the loans, the parties to the loans, and whether the loans accrued interest. The Nature of the Loans
- [32] A loan repayable when the debtor "is able to pay" is a contingent loan: see Poulin v. Poulin, (20 April 2006), Doc. 04-CV-027296, 2006 CarswellOnt 2341 (Ont. S.C.J.) and Forest Industrial Relations Ltd. v. Weyerhaeuser Co., 2009 BCSC 733.
- [33] If the happening of the contingency does not occur within a reasonable time, a contingent loan becomes payable. In Forest Industrial Relations Ltd. the Court said:
- [67] Even if, as by the plaintiff's position, the loans are contingent, and not demand, loans, the non-occurrence of the contingency does not relieve the plaintiff from the implied obligation to repay the loans within a reasonable period of time
- [68] Nearly five years have passed since the defendants made the advances, and the plaintiff offers no evidence to explain why it has not taken steps to raise the revenue to repay them.
- [34] In Berry v. Page (1989), 60 D.L.R. (4th) 289, 38 B.C.L.R. (2d) 244 (C.A.), the plaintiff loaned his stepdaughter \$30,000 with repayment contingent on the sale of the family home. Seven years after the loan was issued, the home had yet to be sold and the plaintiff started an action to recover the loan. The Court found that repayment became due after the passing of "a reasonable time". Wallace J.A. said at 292: In my view, the trial judge was correct to view the loan as one where the parties agreed it would be repaid at a future time determined by reference to a contingent event -- i.e., the sale of the Gabriola property, and -- because the happening of the event was solely within the control of the debtor -- should the event not occur, repayment of the debt would become due upon the expiration of a reasonable time. It is clear from the evidence that it was the intent of the parties that Ms. Page's obligation to repay the loan was an absolute one. The sale of the Gabriola property was designated as the event which fixed the time of repayment solely to accommodate Ms. Page, since she then would be in receipt of moneys with which to repay the loan. Ms. Page's failure to sell the property within the time originally contemplated by the parties could not negate the implied obligation of Ms. Page to repay the loan within a reasonable period should the sale for any reason not take place.

- [35] The plaintiffs have demonstrated, on a balance of probabilities, that these were contingent loans to be repaid when Mr. Ward was able or within a reasonable time.
- [36] The Gabriels advanced almost \$14,000 over three years. There is no evidence before me that when the May 1994 advance was made, the Gabriels had asked for repayment of earlier advances. In fact, their willingness to continue to loan Mr. Ward money indicates that they did not yet expect repayment. Mr. Gabriel's evidence is that the November 1993 loan was to assist Mr. Ward to purchase a business franchise. The parties could not have expected that Mr. Ward would be able to repay the loan quickly when they believed he was starting a new business. Therefore on the evidence before me I find that a reasonable time for repayment was ten years from the date the funds were advanced.
- [37] It is more difficult to ascertain the reasonable period for Mr. Ward's repayment of Ms. Gabriel's loans. It is clear from Ms. Gabriel's e-mail to Mr. Ward in 2000 that repayment was contingent on Mr. Ward's ability to repay. However given Ms. Gabriel's precarious financial position, I cannot find that the parties contemplated a loan period of up to ten years. I find a reasonable time for repayment was five years from the date the funds were advanced.
- Parties to the Loans
- [38] This issue has already been addressed above.
- [39] I accept Mr. Gabriel's evidence that he advanced the funds to Mr. Ward in a personal capacity. I do not accept that the Gabriels or Ms. Gabriel intended to invest with Signet Holdings Inc. or that Ms. Gabriel intended to invest in NuShape.
- [40] I am therefore satisfied that Mr. Ward is a party to each loan agreement. Interest
- [41] In argument before me the plaintiffs claimed that interest was payable on the loans. In a letter to the Court dated March 23, 2011 Mr. Baylis appears to change the plaintiffs' position by saying that he is not claiming contractual interest but instead claiming court-ordered interest. I cannot accept what I view as a change in the argument at this late date.
- [42] I am satisfied that the agreement between the Gabriels and Mr. Ward required that he pay interest. There are references to this by both Mr. Gabriel and Mr. Ward in the correspondence and at several times Mr. Ward refers to the amounts advanced to him as "the principal". In an e-mail dated September 16, 2007, Mr. Ward refers to the "loan" and writes "...while I intend to repay the principal I feel there is a strong case to claim offset on any claim for interest."
- [43] No claim to offset interest was advanced before me. This evidence stands as an admission that the parties agreed that the loan was accruing interest.

- [44] The only evidence I have regarding interest on Ms. Gabriel's loans is Mr. Ward's reference in an e-mail to Ms. Bellamy on May 31, 2008. He says that the loans were to be interest-free because "in lieu of interest on the advances it was agreed that [Ms. Gabriel] should receive 50,000 shares in NuShape prior to the Company's IPO." This is evidence that the parties agreed that Ms. Gabriel was to receive something in addition to the principal. Unfortunately Mr. Ward could not proceed with NuShape and Ms. Gabriel did not receive her shares.
- [45] In the same e-mail Mr. Ward says that he will transfer shares into the name of the Gabriels' son, Jonathan, in place of an "interest settlement". This is an acknowledgement that something in addition to the principal remained owing. The debts are owed to the Estate and not to Jonathan. In addition, it is not open to Mr. Ward to unilaterally decide what compensation the Estate is to receive for his failure to transfer 50,000 NuShape shares into Ms. Gabriel's name as required by the terms of their agreement. Mr. Ward's failure to transfer the shares is a breach of their loan agreement and the Estate is entitled to damages for breach of contract.
- [46] There is no evidence before me on which I can assess the value of the 50,000 NuShape shares promised. As the shares were promised in lieu of interest, I find that the interest payable on the funds advanced is an adequate measure of the damages owed by Mr. Ward to Ms. Gabriel in lieu of the NuShape shares.
- [47] I therefore find that the advances made jointly by the Gabriels and individually by Ms. Gabriel were made pursuant to oral loan agreements which included a term requiring Mr. Ward to pay interest.

4. The Limitation Act

- [48] I have found the advances are contingent loans which should reasonably have been repaid within five and ten years. It has now been more than twenty years since the first advance was made. Mr. Ward has not made repayment a priority and now argues that his friends' forbearance deprives them of an opportunity to recover their money.
- [49] Pursuant to s. 3(5) of the Limitation Act, an action may not be brought to recover this debt "after the expiration of six years after the date on which the right to do so arose".
- [50] The right to recover a contingent loan arises on the happening of the contingency. However where the contingency does not occur, the right to recover arises after the expiry of a reasonable time. I adopt the language of Wallace J.A. in *Berry* at 290-91: 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 limitations runs, from the earliest time at which repayment can be required (*Chitty on Contracts*, 25th ed. (1983), vol. I, para. 1843, p. 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: [citations omitted]. Case law supports the proposition that if money

is lent to be repaid at a particular time in the future, or upon the happening of a specified contingency, then the cause of action arises at the time specified or upon the happening of the contingency: [citations omitted]. In these circumstances, the cause of action does not arise, and the statute of limitations does not run until the contingency is satisfied.

- [51] Section 5(1) and (2) of the Limitation Act are also relevant: 5 (1) If, after time has begun to run with respect to a limitation period set by this Act, but before the expiration of the limitation period, a person against whom an action lies confirms the cause of action, the time during which the limitation period runs before the date of the confirmation does not count in the reckoning of the limitation period for the action by a person having the benefit of the confirmation against a person bound by the confirmation.
- (2) For the purposes of this section,
- (a) a person confirms a cause of action only if the person
- (i) acknowledges a cause of action, right or title of another, or (ii) makes a payment in respect of a cause of action, right or title of another,
- (b) an acknowledgment of a judgment or debt has effect
- (i) whether or not a promise to pay can be implied from it, and (ii) whether or not it is accompanied by a refusal to pay,
- [52] The Gabriels' loans were advanced between January 31, 1994 and May 1994. In May 2004, Mr. Ward e-mailed Mr. Gabriel saying he would "touch base in order to settle-up". I am unable to find that this vague statement is an acknowledgment of the debt.
- [53] Mr. Gabriel sought repayment in an e-mail dated November 10, 2006. Mr. Ward's reply was "I shall be in touch with you when I am sufficiently recovered to deal with this issue". Again, I find this response too vague to permit it to act as an acknowledgement of the debts.
- [54] In several e-mails in July 2007 Mr. Ward accepts certain amounts are due, refers to the principal and his ability to repay it, and refers to "Ali's half of the advances made prior to the separation". These may be sufficiently specific to constitute acknowledgement of the debts pursuant to the Limitations Act. However I prefer to rely on the September 10, 2007 e-mail from Mr. Ward to Mr. Gabriel in which he says: The situation is really very simple in that there were advances by the Gabriels as a couple then further advances directly from Ali after your separation. At a later date I sent a couple of transfers to Ali in the UK and settled an account for her in BC in partial payment of her advances[.] The quantum of the "joint" advance is \$13,855 of which half should be repaid to you and the other half to the estate. The aggregate of the balance owed to the estate is \$23,272.87, which includes half of the joint advance.

- [55] I have determined that a reasonable time for repayment of the Gabriels' loans was ten years from the date of each advance. The applicable limitation period is six years. Therefore the right to bring an action on each advance expired sixteen years from the date of the advance, unless the debt was first confirmed by Mr. Ward.
- [56] I have determined that a reasonable time for repayment of Ms. Gabriel's loans was five years from the date of each advance. The applicable limitation period remains six years. The right to bring an action on each of Ms. Gabriel's advances expired eleven years from the date of each advance, unless the debt was first confirmed by Mr. Ward.
- [57] For ease of reference, I will summarize the advances, limitation dates and dates the loans were confirmed, below:
- | Date | Details | Amount | Original Limitation Date | Date Debt Confirmed |
|------------------|--------------------------|-------------|--------------------------|---------------------|
| Jan 31, 1991 | Advance by Gabriels | \$500.00 | Jan 31, 2007 | September 10, 2007 |
| Oct 9, 1991 | Advance by Gabriels | \$1,000.00 | Oct 9, 2007 | September 10, 2007 |
| Oct 5, 1992 | Advance by Gabriels | \$1,600.00 | Oct 5, 2008 | September 10, 2007 |
| Nov 4, 1992 | Advance by Gabriels | \$600.00 | Nov 4, 2008 | September 10, 2007 |
| Oct 6, 1993 | Advance by Gabriels | \$1,500.00 | Oct 6, 2009 | September 10, 2007 |
| Nov 8, 1993 | Advance by Gabriels | \$8,000.00 | Nov 8, 2009 | September 10, 2007 |
| May 1994 | Advance by Gabriels | \$655.00 | May 2010 | September 10, 2007 |
| Jan 27, 1999 | Owing to the Gabriels | \$13,355.00 | Jan 27, 1999 | September 10, 2007 |
| January 27, 2010 | Advance by Ms. Gabriel | \$7,500.00 | September 10, 2013 | September 10, 2007 |
| June 12, 2010 | Advance by Ms. Gabriel | \$5,000.00 | September 10, 2013 | September 10, 2007 |
| October 7, 2010 | Advance by Ms. Gabriel | \$3,000.00 | September 10, 2013 | September 10, 2007 |
| December 7, 2000 | Repayment to Ms. Gabriel | \$2,500.00 | September 10, 2013 | September 10, 2007 |
| January 26, 2001 | Repayment to Ms. Gabriel | \$320.00 | September 10, 2013 | September 10, 2007 |
| | Owing to Ms. Gabriel | \$10,407.90 | | |
- [58] Mr. Ward's September 10, 2007 e-mail confirmed the debts and restarted the six-year limitation period on all loans which remained within the initial six-year limitation period. In the result, all advances except for the January 31, 1991 loan of \$500 are recoverable.
- Conclusion on Debt Claim
- [59] Monies were advanced. Mr. Ward has not persuaded me that they were gifts. The plaintiffs have demonstrated that the loans were made to Mr. Ward in his personal capacity. The loans advanced by the Gabriels were contingent loans to be repaid when Mr. Ward was able or in ten years. Mr. Ward confirmed the loans by September 10, 2007. Only the initial loan of \$500 advanced on January 31, 1991 is statute-barred. The plaintiffs are entitled to recover \$13,355, plus interest from the date of each advance.
- [60] The loans advanced by Ms. Gabriel were contingent loans to be repaid when Mr. Ward was able or in five years. Mr. Ward had also confirmed those loans by September 10, 2007. The Estate is entitled to recover \$10,407.90, plus interest from the date of each advance.

5. Costs

- [61] The defendant says that this matter is within the jurisdiction of Small Claims Court and that the plaintiffs should be denied costs.
- [62] Rule 14-1(10) of the Supreme Court Civil Rules reads: A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.
- [63] The Court of Appeal in *Reimann v. Aziz*, 2007 BCCA 448 at para. 13, observed:
- [13] At the outset, I observe that the application of Rule 57(10) [now 14-1(10)] does not involve an exercise of discretion. For a plaintiff who recovers a sum within the jurisdiction of the Small Claims Court to recover more than disbursements, the court must make a finding that there was sufficient reason for bringing the action in the Supreme Court.
- [64] Rule 1(4) of the Small Claims Rules makes it clear that that Court has jurisdiction over claims of \$25,000 or less: Rule 1(4) A claimant who has a claim amounting to more than \$25 000, not including interest and expenses, may abandon part of the claim so that the balance of the claim may be heard in the court. [Emphasis added.]
- [65] I cannot find sufficient reason for bringing this action in the Supreme Court. While there was some correspondence between the parties suggesting the value of the claim was \$35,000, this amount included interest. When the Notice of Civil Claim was filed, the amount claimed was under \$25,000.
- [66] The plaintiffs will have their disbursements. Each party will bear its own costs. "RUSSELL J."

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