
CANADA / JUDGMENT

BNSF Railway Company v. Teck Metals Ltd.

2015 BCSC 1082

COURT

Supreme Court of British Columbia

DECIDED

24 June 2015

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2015 BCSC 1082 BNSF Railway Company v. Teck Metals Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

BNSF Railway Company v. Teck Metals Ltd.,

2015 BCSC 1082

Date: 20150624

Docket: S100978

Registry: Vancouver

Between:

BNSF Railway Company

Plaintiff

And

Teck Metals Ltd.,

6317057 Canada Ltd. and

Canadian National Railway Company

Defendants

And

Canadian National Railway Company

Third Party

Before: The Honourable Mr. Justice E. Myers

Reasons for Judgment

Counsel for BNSF Railway Company:

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Kaitlyn M. Meyer

Place and Date of Hearing:

Vancouver, B.C.

June 5, 2015

Place and Date of Judgment:

Vancouver, B.C.

June 24, 2015

- [1] This is an application by the defendants Canadian National Railway ("CNR") and 6317057 Canada Ltd. to strike part of this action - a claim in constructive trust for money paid by mistake.
- [2] The application is brought under Rule 9-5(1)(a). For a claim to be struck as disclosing no cause of action it must be plain and obvious that it is bound to fail. The Supreme Court of Canada has written a number of judgments on constructive trusts, which I find to be determinative of this application. For the reasons that follow I agree with the defendants that the constructive trust claim should be struck.
- [3] The claim involves transport charges for ore moved by railway from Vancouver Wharves in North Vancouver to Waneta, B.C., which is near Trail. 6317057 Canada Ltd. is the company that used to operate as BC Rail. In 2005 BC Rail was acquired by CNR, when it was renamed as the numbered company. I will refer to this defendant as BC Rail.
- [4] Three railway legs were involved in the ore transport:
 - 1. from Vancouver Wharves to an interchange a short distance away, also in North Vancouver. This was done by BC Rail, until CNR's acquisition in 2005, after which it was done by CNR;
 - 2. from the interchange to New Westminster, by CNR; and
 - 3. from New Westminster to Waneta by BNSF.

- [5] From July 1990 to March 30, 2005, BC Rail invoiced BNSF approximately \$14 million for the first leg, which BNSF paid. BNSF alleges that BC Rail was charging two different parties (Vancouver Wharves and BNSF) for the same transport services and that it had no legal obligation to pay BC Rail. It says it paid the invoices mistakenly. There is no allegation of fraud.
- [6] BNSF makes the same allegations with respect to the approximate \$3.8 million it paid to CNR when CNR began doing the transport for leg 1 (in addition to leg 2) after it acquired BC Rail in April 2005. CNR billed BNSF for those services to September 30, 2007.
- [7] BNSF alleges that CNR and BC Rail were unjustly enriched by the receipt of the shipping charges. BNSF asks for the proprietary remedy of a declaration that the charges were and are held subject to a constructive trust. In the alternative, BNSF claims the monetary remedy of the return of the payments.
- [8] CNR has agreed with BNSF to pay any judgment against BC Rail.
- [9] The significance of the constructive trust claim relates to the limitation period. By pleading constructive trust, the plaintiff hopes to get the benefit of s. 3(3) of the Limitation Act, RSBC 1996, c. 266, which provides for a 10-year limitation with postponement provisions. The applicable limitation period is not something I am asked to decide.
- [10] In *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71, the Supreme Court of Canada summarised its earlier jurisprudence and the two grounds on which a constructive trust could be imposed:
- [144] Since this Court's decision in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, there have been two grounds on which a court can impose a constructive trust: (1) breach of an equitable obligation, and (2) unjust enrichment. The appellants have argued both in this appeal.
- [145] In *Soulos*, McLachlin J. (as she then was) held that a constructive trust "may be imposed where good conscience so requires" (para. 34). In her view, good conscience might require the imposition of such a trust in two situations: (1) where property is obtained wrongfully by the defendant (such as by breach of fiduciary duty or breach of loyalty), or (2) where the defendant has been unjustly enriched.
- [146] Regarding the first category, McLachlin J. identified four conditions which are generally required before a constructive trust for wrongful conduct may be imposed:
- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
 - (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [Soulos, at para. 45]
- [11] In this case, there is no allegation of a breach of an equitable obligation. The case is pleaded as one of unjust enrichment based on mistake; in other words, it falls into the second category of constructive trust claims identified by the Supreme Court of Canada. In several decisions, the Court has made it clear that in cases of unjust enrichment, a constructive trust is imposed only in limited circumstances. A plaintiff must show there is a link between the contribution that founds the action and the property in which the constructive trust is claimed. It must also establish that a monetary remedy would be inadequate. This was described in *Kerr v. Baranow*, 2011 SCC 10:
- [50] The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). *Pettkus* made clear that these principles apply equally to unmarried cohabitants, since "[t]he equitable principle on which the remedy of constructive trusts rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs" (pp. 850-51).
- [51] As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As *Dickson C.J.* put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

- [52] The plaintiff must also establish that a monetary award would be insufficient in the circumstances (Peter, at p. 999). In this regard, the court may take into account the probability of recovery, as well as whether there is a reason to grant the plaintiff the additional rights that flow from recognition of property rights (Lac Minerals, at p. 678, per La Forest J.).
- [12] Kerr was a family law case. Recently, in two judgments dealing with commercial class action cases handed down at the same time, the Court reiterated the same requirements: Sun-Rype Products Ltd. v. Archer Daniels Midland Company, 2013 SCC 58 and Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57. Both of these cases alleged breaches of the Competition Act, R.S.C. 1985, c. C-34, and other anti-competitive wrongs that resulted in overcharges to direct and indirect purchasers of the products. (Sun-Rype involved both types of purchasers; Pro-Sys only indirect ones.) The plaintiffs, who were seeking certification of the class actions, claimed that the defendants were unjustly enriched by the overcharges and claimed a constructive trust over those overcharges. In both cases the Supreme Court struck the constructive trust claims.
- [13] In Pro-Sys, the Court noted that Kerr was the controlling authority on constructive trusts (para. 90). After quoting from it, the Court continued:
- [92] In the present case, there is no referential property; Pro-Sys makes a purely monetary claim. Constructive trusts are designed to "determine beneficial entitlement to property" when "a monetary award is inappropriate or insufficient" (Kerr, at para. 50). As Pro-Sys's claim neither explains why a monetary award is inappropriate or insufficient nor shows a link to specific property, the claim does not satisfy the conditions necessary to ground a constructive trust. On the pleadings, it is plain and obvious that Pro-Sys's claim that an amount equal to the overcharge from the sale of Microsoft operating systems and Microsoft applications software in British Columbia should be held by Microsoft in trust for the class members cannot succeed. The pleadings based on constructive trust must be struck.

In Sun-Rype the majority reached the same conclusion.

- [14] Based on these cases, the railway defendants seek to have the claim in unjust enrichment struck on the basis that there is no link to property and a monetary remedy is adequate.
- [15] The plaintiff says this line of authority is not applicable. It bases this argument on the distinction between a remedial constructive trust and a substantive constructive trust. (Although the plaintiff did not plead a substantive constructive trust nothing in my decision turns on that.) The distinction was noted in Atlas Cabinets and Furniture Ltd. v. National Trust Co. (1990), 45 B.C.L.R. (2d) 99 (C.A.), at p. 108:

A substantive constructive trust must be distinguished from a remedial constructive trust. In a substantive constructive trust, the acts of the parties in relation to some property are such that those acts are later declared by a court to have given rise to a substantive constructive trust and to have done so at the time when the acts of the parties brought the trust into being. The difference

between a substantive constructive trust and a resulting trust may, in cases where the property reverts to the settlor, be no more than a matter of terminological preference. In a remedial constructive trust, on the other hand, the acts of the parties are such that a wrong is done by one of them to another so that, while no substantive trust relationship is then and there brought into being by those acts, nonetheless a remedy is required in relation to property and the court grants that remedy in the form of a declaration which, when the order is made, creates a constructive trust by one of the parties in favour of another party. The remedial constructive trust so created would have effect from the date of the court order unless there was some provision in the order to the contrary. But, of course, the order itself could give the remedial constructive trust a retroactive or prospective effect in an appropriate case. [citations omitted]

Lambert J.A. went on to say that he did not need to deal with the distinction because a monetary remedy for the plaintiff was appropriate.

- [16] The two types of constructive trusts were again referred to by the Court of Appeal in a decision on a motion to strike in the Sun-Rype case: 2008 BCCA 278. (This was not the decision that went to the Supreme Court of Canada, which was the later certification decision.) The defendants applied to strike the plaintiffs' claim on the basis that, in part, it was brought outside the limitation period. The plaintiffs argued that the claim in constructive trust was subject to s. 3(3) of the Limitations Act. In response, the defendants argued that the section only applied to substantive constructive trusts. The Court concluded that s. 3(3) of the Act included remedial constructive trusts. Regarding a substantive constructive trust, the Court went on to consider, at para. 88, whether the pleadings alleged "the type of serious breaches contemplated by s. 3(3) of the Act." It stated:
- [90] In this case, the factual allegations are serious. As we find at para. 100, *infra*, they constitute an allegation of equitable fraud; that the defendants wrongfully obtained the plaintiffs' money through a sophisticated, international price-fixing conspiracy for the purpose of making substantial profits at the expense of these and other plaintiffs. Similar allegations led to criminal charges against defendants in the United States with respect to related products. If proven and found to give rise to the imposition of a constructive trust, such conduct may also be found to come within s. 3(3) of the Act.
- [17] The plaintiff relies on another Court of Appeal decision - *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357. That case involved payday lenders charging criminal rates of interest. The Court of Appeal found that there was a sufficient connection between the funds or other property held by the defendants and the unlawful finance charges to satisfy the requirements for a constructive trust.
- [18] The plaintiff argues that each mistaken payment was subject to a constructive trust at the time of the payment. It is not asking the court to order a remedial constructive trust over the payments as a remedy; rather, it is seeking a declaration that the trust existed at the time of each payment. Therefore, it says, the requirements for the remedial constructive trust do not apply.

- [19] I do not think the Court of Appeal decisions or this argument avail the plaintiff. First, there is nothing in the Notice of Civil Claim indicating a "serious breach", which the Court of Appeal seemed to regard as a necessary element for a substantive constructive trust. There is no conduct or relationship between the parties alleged that could impress each payment with a trust at the time it was made, as argued by the plaintiff.
- [20] Second, the Supreme Court of Canada decisions in Kerr, Public Service of Canada, Sun-Rype and Microsoft were all later than the Court of Appeal's decisions. As quoted above, the Supreme Court in Public Service was explicit in stating the two circumstances in which constructive trusts are available. It did not allow for the separate concept of a substantive constructive trust, subject to a different set of principles.
- [21] Most tellingly, in Sun-Rype the Supreme Court dismissed the constructive trust claims. It is true that decision was an appeal of the certification issue and not the appeal from the Court of Appeal's decision relied on by the plaintiff here (quoted above); nevertheless, I find it impossible to conclude, as argued by the plaintiff, that the Supreme Court ignored another type of constructive trust that would have been available to the plaintiffs and was argued by the plaintiff in prior proceedings in the case. That is tantamount to saying that had the magic phrase "substantive constructive trust" been uttered, a different result would have followed.
- [22] There is no factual basis pleaded to establish any proprietary nexus to the funds being claimed. There is no issue of collectability in this case because CNR has agreed to stand behind any judgment that might be awarded against BC Rail and the plaintiff has not argued that CNR does not have the financial wherewithal to pay the full amount claimed. There is nothing pleaded to establish the inadequacy of a monetary remedy. If no constructive trust was allowed in Pro-Sys or Sun-Rype, I see no basis to allow it here.
- [23] The plaintiff's claim of constructive trust is bound to fail and is therefore struck.

"E.M. MYERS, J."

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