

CANADA / JUDGMENT

Bremner v. Patterson

2001 BCSC 1161

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MARION BREMNER
APPELLANT

AND:

CINDY PATTERSON
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE BAUMAN

(IN CHAMBERS)

The Appellant: In person

The Respondent: In person

Date and Place of Hearing: 16 July 2001

Kelowna, B.C.

[1] Marion Bremner appeals from a decision of a Provincial Court judge holding her personally liable on a promissory note held by Cindy Patterson.

- [2] Ms. Patterson was at all material times an employee of Ms. Bremner's company, L.T.D. Business Training Institute of Canada Inc.
- [3] While so employed, Ms. Patterson apparently used her own funds to purchase various supplies for the company. She did so allegedly at the request of Ms. Bremner.
- [4] The company was facing difficult financial challenges and Ms. Patterson insisted that Ms. Bremner provide her with a demand promissory note for the sums advanced by Ms. Patterson.
- [5] Ms. Bremner did so, but she alleges only because Ms. Patterson undertook to remain with the company. Ms. Bremner alleges that Ms. Patterson was, in the circumstances of the company's difficulties, a key employee and her continued employment was critical to the company's survival. Ms. Patterson left the company shortly after execution and delivery of the note.
- [6] That, in brief compass, are the central allegations which were before the Provincial Court judge.
- [7] At the trial, Ms. Bremner endeavoured to raise the defence that she personally received no consideration for her promise to pay or, alternatively, that there was a total failure of consideration flowing to her from Ms. Patterson.
- [8] The Provincial Court judge did not give reasons in the usual sense but the grounds for her disposition of the claim in favour of Ms. Patterson against Ms. Bremner personally can be gleaned from the transcript.
- [9] I extract these portions:

MS. BREMNER: On September the 14th, the college was in serious trouble. Barb Bowmar had threatened to quit. Cindy had threatened to quit if I didn't sign the promissory note, a demand note. Well, actually she said a promissory note and then I discovered it was a demand note. Your Honour, the bank had been bouncing cheques. We had to try and find other means of paying our obligations. There was a lot of stress. I'd resigned as the C.E.O. a week and a half prior to that and I was very concerned that if Cindy quit, Barb Bowmar would quit and so I made the promise to pay personally and I made the promise on behalf of the company to pay to her on the basis that she'd promise to me that she would not quit. Barb Bowmar quit the day I signed the promissory note. Cindy Patterson quit -- this was Tuesday. Cindy Patterson quit Friday morning. I came into the office, the lights were out. She was extremely hungover. We had a Chamber of Commerce event the Thursday night and she and another instructor --

MS. PATTERSON: Your Honour, this is totally irrelevant.

THE COURT: It is irrelevant. You signed a promissory note. There are no conditions on this promissory note. They are - there is nothing that says provided that blah, blah, blah. You're bound. You signed it. You're bound.

MS. BREMNER: But, Your Honour, I signed it on the basis that she promised -- I received no value for the promissory note.

THE COURT: Well, I don't really care why you signed it. You committed yourself to the debt and that's as simple as that. There it is. Black and white.

MS. BREMNER: But isn't there a requirement for value received to -- to get some benefit back? Like, there was a total lack of consideration for the promissory note.

THE COURT: You signed the note. You come to me now two years later and tell me there was no value when you signed the note in September of 1999, when this business was floundering and someone was demanding that they be paid for expenses that they'd incurred on behalf of the business. You put your name on the line. That's that.

MS. BREMNER: I put my name on the line because she promised to remain there.

THE COURT: No, it doesn't work that way. You put your name on a promissory note. There is nothing that binds it to anything else. You owe the money.

MS. BREMNER: But isn't there some -- indication -- there's no fail -- that there was total failure of consideration for the note? I received no personal benefit.

THE COURT: It doesn't matter. You took on the debt. You signed your name to a debt.

[10] I note that Ms. Bremner never had the opportunity to give evidence at the trial. Apparently the Provincial Court judge's view of the law, expressed during Ms. Bremner's cross-examination of Ms. Patterson, made it clear to Ms. Bremner that the judge had effectively arrived at her decision.

[11] From a review of the transcript, it is clear to me that the judge below did not direct her mind to the merits of Ms. Bremner's defence to personal liability on the note. And she did not do so because she appears to have concluded that even if factually made out, a plea of no consideration or total failure consideration could not at law have availed Ms. Bremner.

[12] In so concluding, the Provincial Court judge, in my view, erred.

[13] Ms. Bremner and Ms. Patterson are "immediate parties" to this promissory note.

[14] In *Quantum Financial Services (Canada) Ltd. v. Yip* (1999), 173 D.L.R. (4th) 366, 46 B.L.R. (2d) 61 (B.C.S.C.) Vancouver C951990, my colleague, L.C. Smith, J. considered s. 73 of the Bills of Exchange Act, R.S.C. 1985, B-4, and then discussed the distinction between holders of a promissory note in due course and others.:

[7] As may be seen in s. 73(b), the legislation distinguishes between persons who are holders in due course and those who are not. The significant difference is between remote parties and "immediate parties" to the note. B. Crawford, Crawford and Falconbridge on Bills of Exchange, vol. 2, 8th ed. (Toronto: Canada Law Book Inc., 1986) at 1519 provides this definition:

Persons are immediate parties, relatively to each other, if their legal relations as parties to an instrument arise out of their direct dealings with each other.

Crawford and Falconbridge further states:

The general, theoretical rule is that as between immediate parties (as, for example, if an action is brought by the original payee of a note against the maker) the defendant may set up any defence that he might have set up if the action had been brought on any simple contract. But if the parties to the action are not immediate parties (as, for example, if the endorsee of a note sues the maker) it becomes necessary to draw distinctions between different kinds of holders and between different kinds of defences.

The learned authors acknowledge that the term "immediate parties", although used in the Bills of Exchange Act (s. 39), is not defined and that it has not received much judicial use. However, they point to *Ashley Colter Ltd. v. Scott*, [1942] 3 D.L.R. 538 (S.C.C.) in which Rinfret J. wrote (at 541):

Assuming there be partial failure of consideration between the immediate parties to a bill, such a failure cannot affect the title of remote parties.

[8] The wording of s. 73(b) and of Mr. Justice Rinfret's judgment in *Ashley Colter*, supra, suggest that defences, such as partial failure of consideration, remain open to the immediate parties to the note. Although the matter is not free from controversy, both Crawford (at 1429-39) and Benjamin Geva in *J. Ziegel, B. Geva and R.C.C. Cuming, Commercial and Consumer Transactions: Cases, Text and Materials*, vol. II, 3rd ed. (Toronto: Edmond Montgomery Pub. Ltd., 1995) at 167 support the view that the defences do remain open. Crawford points out that the Canadian approach has differed from that in England, where there is more tendency to treat bills of exchange as if they were cash. Geva, in "Equities as to Liability on Bills and Notes: Rights of a Holder Not in Due Course" (1980-81), 5 Can Bus. L.J. 53 at 89, examines the question in some detail and concludes:

It thus appears that the proposition that a holder not in due course holds the instrument subject to all defences available in an action on the underlying contract is supported by policy considerations as well as by a close analysis as to the nature of a negotiable instrument and the concepts underlying the scope of liability under it.

[15] Although not stated expressly by the learned Provincial Court Judge, it may be that her concern with Ms. Bremner's position was that evidence tending to show a failure of consideration or a collateral agreement was not admissible because of the parole evidence rule. However, it seems that such evidence in a case of this sort is admissible as an exception to the rule: among others see *Gallen v. Allstate Grain Co.* (1984), 9 D.L.R. (4th) 496, 53 B.C.L.R. 38, 25 B.L.R. 314 (C.A.).

[16] Ms. Bremner is entitled to advance and have judicially considered any defence that she might have set up if the action had been brought on any simple contract. She has not had that opportunity in this case and there must accordingly be an order for a new trial.

[17] The appeal is allowed and a new trial is ordered.

[18] Costs of this appeal will be in the cause before the Provincial Court on the new trial.

"R.J. Bauman, J."

The Honourable Mr. Justice R.J. Bauman

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