

CANADA / JUDGMENT

Leatherman v. 0969708 B.C. Ltd.

2018 BCCA 33

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 33 Leatherman v. 0969708 B.C. Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Leatherman v. 0969708 B.C. Ltd.,

2018 BCCA 33

Date: 20180130

Docket: CA44488

Between:

Charles Brooke Leatherman and Sandra Lea Leatherman

Respondents

(Petitioners)

And

0969708 B.C. Ltd. and Kootenay Lake Estates Ltd.

Appellants

(Respondents)

And

Oliver Berkeley and Her Majesty the Queen in Right of Canada

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia,
dated May 15, 2017 (Leatherman v. 0969708 BC Ltd., 2017 BCSC 793,
Nelson Registry H19731).

Counsel for the Appellants:

T.W. Pearkes

Counsel for the Respondents:

A.A. Edgar

Place and Date of Hearing:

Vancouver, British Columbia

January 8, 2018

Place and Date of Judgment:

Vancouver, British Columbia

January 30, 2018

Written Reasons by:

The Honourable Mr. Justice Savage

Concurred in by:

The Honourable Mr. Justice Lowry

The Honourable Mr. Justice Willcock

Summary:

Appeal from an order granting foreclosure to the respondent mortgagees. The appellant mortgagors say the respondents commenced the underlying action more than two years after they discovered their right to realize on the mortgage security and therefore, the proceeding was filed out of time as s. 15, not s. 14, of the Limitation Act applied. Because of his findings, the judge did not determine whether the limitation periods had been postponed. Held: Appeal allowed in part. Under the mortgage the covenant to pay was a demand obligation, s. 14 applied, and had not tolled. Subject to postponement (1) the interest payments, due annually, were not demand obligations, and therefore the mortgagees were barred from suing to recover payments missed more than two years prior to the commencement of the action, and (2) the ability to realize on

the security was governed by s. 15 of the Act and was time barred as the mortgagees' right to realize on the security arose more than two years prior to commencement of the action. The matter is remitted to the court below to determine whether the running of the limitation periods were postponed.

Reasons for Judgment of the Honourable Mr. Justice Savage:

I. Introduction

- [1] This appeal arises out a mortgage transaction between former friends. The central issue in the appeal is whether the debt and the mortgage security were demand obligations, in which case they would be subject to the limitation period prescribed by s. 14 of the Limitation Act, S.B.C. 2012, c. 13 [Act], as found by the judge below.
- [2] The appellant mortgagors say that the obligations were contingent obligations and s. 15 of the Act applies. Since the respondent mortgagees commenced this proceeding more than two years after they discovered their right to realize on the mortgage security, the proceeding was filed out of time. The appellants therefore submit that the appeal must be allowed and remitted for a trial of the issue that the borrowers acknowledged liability, and thereby postponed running of the limitation period, a matter not determined by the chambers judge.
- [3] The respondent mortgagees say that the obligations were demand obligations. The failure of the mortgagors to comply with their demand for payment triggered the running of the limitation period pursuant to s. 14 of the Act. The decision of the chambers judge should be upheld and the appeal dismissed. Alternatively, the mortgagees say this Court should find that the mortgagors confirmed the cause of action within the meaning of s. 24 of the Act, thereby postponing the running of the limitation period, and the appeal should be dismissed.

II. Background

- [4] On May 28, 2013, Kootenay Lake Estates Ltd. ("KLE") granted a mortgage to Mr. and Ms. Leatherman (collectively, the "Leathermans") with respect to KLE's interest in land, securing a \$1,500,000 debt owed by KLE to the Leathermans (the "Mortgage").
- [5] KLE subsequently sold its interest in the land to 0969708 B.C. Ltd. ("708 B.C. Ltd."), which assumed KLE's obligations under the Mortgage on August 2, 2013. Mr. Oliver Berkeley was the principal and operating mind of KLE, while his wife, Ms. Siara Berkeley was the authorized signatory of 708 B.C. Ltd.

- [6] Under the Mortgage, the date of payment is on demand. Until the demand was made by the mortgagees, the mortgagors were obliged to pay accrued interest. The Mortgage defined "maturity date" as the balance due date shown on the mortgage form, or any earlier date on which the mortgagees could lawfully require payment of the mortgage money. The Mortgage incorporated the provisions of Schedule B - The Prescribed Standard Mortgage Terms.
- [7] KLE and 708 B.C. Ltd. gave the Leathermans a General Security Agreement ("GSA") over the proceeds of sale of lots that might be subdivided from the mortgaged land. The GSA provided that if the mortgagors were in breach of the Mortgage, the mortgagees were free to realize on the GSA.
- [8] 708 B.C. Ltd. first failed to make a required interest payment on October 31, 2013. No action was taken by the Leathermans in response to this failure. 708 B.C. Ltd. continued to fail to make the required interest payments in the subsequent years. Correspondence was exchanged in relation to the debt and its repayment between the mortgagees and the mortgagors in November 2015.
- [9] The Leathermans issued a demand for payment of the whole amount of the principal and interest due on the debt (and are now seeking only 6% annual interest, the lowest amount of interest contemplated by the Mortgage) after 708 B.C. Ltd. again failed to make an interest payment on October 31, 2016. This demand was made on November 9, 2016. The Leathermans filed a petition seeking repayment and foreclosure in December 2016.
- [10] The mortgagors responded to the petition by arguing it was statute barred because the two-year limitation period commenced on November 1, 2013 when the mortgagors first failed to make a required payment. According to the mortgagors, their failure to make payment on October 31, 2013 was a breach of the promise contained in the agreement, and an act of default pursuant to Clause 7, which triggered the right of the mortgagees to accelerate payment pursuant to Clause 8 Schedule B - The Prescribed Standard Mortgage Terms ("Clause 8 of the Prescribed Terms"). In support of this argument, the mortgagors relied on ss. 6(1) and 15 of the Limitation Act.
- [11] Conversely, the Leathermans submitted the failure of the mortgagors to comply with their demand for payment, made November 9, 2016, was the triggering event for the purposes of the Limitation Act. They referred to s. 14 of the Limitation Act, which provides that 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". Thus, the mortgagees submit, there is no merit to the limitation period response made by the mortgagors. Alternatively, they say that the limitation period was postponed.

Decision of the Chambers Judge

- [12] In reasons indexed as *Leatherman v. 0969708 BC Ltd.*, 2017 BCSC 793, Mr. Justice Rogers found that the Mortgage and assumption agreement are governed by the provisions of the 2013 iteration of the Limitation Act. The earlier iteration of the Limitation Act [R.S.B.C. 1996, c. 266] did not apply. The judge considered the authorities submitted by the mortgagors, namely *492621 B.C. Ltd. v. Bustin Farms Ltd.*, 2009 BCSC 1464, and *Kong v. Saunders*, 2014 BCCA 508. The judge concluded that the case at bar was distinguishable from both those cases.
- [13] *Bustin Farms* was not instructive because the mortgage at issue stipulated a maturity date, unlike the Mortgage at issue, which indicated the mortgagee could demand payment at any time. While Clause 8 of the Prescribed Terms was incorporated into the Mortgage, the judge held that its inclusion was superfluous as the mortgagees could in fact realize on the Mortgage at any time.
- [14] Likewise, *Kong* did not help the mortgagors. *Kong* noted that the ability of a lender to realize on a demand loan arises from the moment the agreement is reached. However, the judge noted the 2013 amendments to the Limitation Act modified the law.
- [15] Section 14 of the Limitation Act provides that a pure demand loan will be treated like a delayed-demand loan in which the lender may demand payment at any time but stipulates that payment occur upon some future event. The effect of s. 14 is that the limitation period for pure demand loans commences not upon the making of the loan but rather when a demand is made and the borrower fails to comply.
- [16] The judge said the mortgagors' argument confused the legal right to sue with the start of a limitation period. Section 14 does not modify when the lender may make a demand for payment on a demand loan. It simply modifies when the limitation period commences once the lender has issued such a demand. The judge was unpersuaded by the further submission that the existence of the GSA indicated the parties did not intend to create a simple demand loan.
- [17] Accordingly, the *Leathermans* had the right to demand repayment of the loan at any time once the agreement was made, and the limitation period to seek foreclosure was triggered by their request for repayment in November 2016. An order nisi was therefore entered, pursuant to the terms requested by the mortgagees, granting a six-month redemption period and \$1,934,827.65 due with 6% interest accruing per annum.

III. Legislation

- [18] British Columbia's new Limitation Act came into force on June 1, 2013. Unlike the former act, the new Act sets out the governing limitation period unless modified by another law.

- [19] The new Act created a single two-year basic limitation period for most civil claims (s. 6), modifying the limitation periods found in the prior Act which varied between two, six, and ten years depending on the cause of action: see Graeme Mew, Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3d ed. (Markham, Ont.: LexisNexis, 2016) at 11. The two-year basic limitation period commences once the claim has been discovered (s. 6(1)).
- [20] Significantly, for the matter at bar, the new Act introduced discovery rules for certain types of claims, including the enforcement of demand obligations and realizing or redeeming securities in the secured transactions context.
- [21] Prior to the enactment of the amended Act, there was no special rule in place for demand obligations, which are financial arrangements with no fixed conditions for repayment and are payable on the demand of the lender.
- [22] Absent specific statutory provisions, the common law interpretation was that the limitation period for demand loans commenced the day at which the parties entered into the demand loan. In *Berry v. Page* (1989), 38 B.C.L.R. (2d) at 247 (C.A.), the Court said:

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 limitation 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: *Barclay Const. Corp. v. Bank of Montreal* (1988), 28 B.C.L.R. (2d) 376 at 381 (S.C.); *Henback v. Sprague*, [1933] 3 D.L.R. 647 (Man. C.A.).

[Emphasis added.]

- [23] On the other hand, in the context of delayed-demand or contingent loans, the cause of action and thus, the limitation period, would commence on the repayment date or upon the happening of the contingency: see *Ewachniuk Estate v. Ewachniuk*, 2011 BCCA 510; *Kong v. Saunders*, 2014 BCCA 508. In *Berry v. Page*, at 247, the Court said this:

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: *Ingrebretsen v. Christensen*, 37 Man. R. 93, [1927] 3 W.W.R. 135 (C.A.); *Re Gould; Ex parte Garvey*, [1940] O.R. 250, [1940] 3 D.L.R. 12 (C.A.). In these circumstances, the cause of action does not arise, and the statute of limitations does not run until the contingency is satisfied.

- [24] The relevant sections of the new Act are as follows:

Discovery rule for claims for demand obligations

14 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.

Discovery rule for claims to realize or redeem security

15 A claim to realize or redeem security is discovered on the first day that the right to enforce the security arises.

[25] It is the impact of these provisions that is in issue in this appeal.

IV. Standard of Review

[26] The issue on appeal concerns both the interpretation of the Limitation Act and the interpretation of the Mortgage. The judge's interpretation of the Limitation Act is reviewable on the standard of correctness. The interpretation of the Mortgage is a question of mixed fact and law, and reviewable on the more deferential palpable and overriding error standard, unless there is an extricable question of law.

V. Discussion and Analysis

(i) The New Act

[27] The inclusion of s. 14 in the amended Act was designed to address the difficulties arising from the application of the limitation period to pure demand obligations. Lenders who enter into such obligations range from unsophisticated parties lending to friends, to institutions such as banks and credit unions lending in a commercial context.

[28] Under the former Act, the limited timeframe in which a lender could seek recourse to enforce repayment could be problematic as persons who entered into demand loans included unsophisticated parties, or family members, whose agreements were often informal. Unfairness could also occur where a lender died before recovering payment and the lender's beneficiaries, for example, did not know of the informal arrangement: see Civil Policy and Legislation Office, British Columbia Ministry of Justice, "White Paper on Limitation Act Reform: Finding the Balance" (Victoria: Ministry of Attorney General, September 2010), at 75; John D. Morrison & Navnit Duhra, "New B.C. Limitation Act More Favourable to Lenders Holding Demand Obligations," (2014) 31:1 Nat'l Insolv Rev 4 at 4; Katherine A. Reilly & Jamieson D. Virgin, "The "Discovery" of Demand Obligations under B.C.'s Limitation Act" (2014) 34 Est. Tr. & Pensions J. 288 at 293.

[29] The effect of s. 14 in the new Act brings the limitation period for demand obligations in line with delayed-demand obligations. Pursuant to s. 14, a claim for repayment of a demand obligation is discovered on the first day there is a failure to make repayment once a demand has been made. The two-year limitation period thus commences once there is a default after a demand for repayment is made.

- [30] While deciding an appeal in the context of the prior Act, Mr. Justice Tysoe of this Court noted that with the passage of s. 14 of the new Act addressing the limitation period for demand obligations "the limitation period does not begin running until demand is made": Kong at para. 23. While obiter dicta, this interpretation is consistent with legislative intent given the harms the amended legislation sought to address.
- [31] In the secured transactions context, s. 15 of the new Act modified the limitation period for secured parties seeking to bring a claim to realize or redeem their security. Under s. 3(4) of the prior Act, there was no limitation on the period in which a secured party could bring an action to realize on collateral that they already possessed. If the collateral was not in the possession of the secured party, then the six-year limitation period applied (s. 3(6)(a)). This provision was often cited in mortgage foreclosure proceedings: see e.g., *Taylor Ventures Ltd. (A Bankrupt) v. High Meadow Holdings Ltd.*, 2006 BCSC 1095 at para. 23, aff'd 2008 BCCA 80 at para. 13.
- [32] The effect of s. 15 of the new Act is that the general two-year limitation period applies to actions seeking to realize or redeem a security, but the time starts running from the first day the right to enforce the security arises. This change would not have an adverse effect on secured parties holding demand obligations, for which the limitation period will only commence once a demand has been made: see *Morrison & Duhra* at 4-5.
- [33] If a security is realizable or redeemable upon default, then the limitation period commences when the default - or right to enforce the security - occurs. If the security is enforceable on demand, then logically the limitation period will commence once the demand has been made, and there has been a default.
- [34] Sections 14 and 15 of the new Act have yet to receive judicial consideration, apart from the present proceedings. On its face, s. 14 modifies the commencement date for the limitation period for demand obligations to the date of demand. On its face, s. 15 did not modify the law regarding the commencement date for tolling the limitation period for a claim to realize or redeem security.

(ii) The Mortgage

- [35] The Mortgage in this case was for the principal amount of \$1,500,000. The first payment of interest was October 31, 2013. The last payment day is specified as "On Demand" and the balance due date is "On Demand". The Prescribed Standard Mortgage Terms are checked off as applying.
- [36] Under "Payment Dates" the following provision occurs:

This Mortgage is due On Demand. Until Demand is made, the Borrower must make minimum payments of interest only, such payments of interest to be paid on the earlier of (a) any sale of any lot subdivided from the Mortgaged Lands, and (b) on October 31st of each and every year commencing October 31, 2013.

[37] Clause 8 of the Prescribed Terms provides:

8(1) If a default occurs, all the mortgage money then owing to the lender will, if the lender chooses, at once become due and payable,

- (2) if a default occurs the lender may, in any order that the lender chooses, do any one or more of the following:
 - (a) demand payment of all the mortgage money;
 - (b) sue the borrower for the amount of money due
 - (f) apply to the court for an order that the land be sold on terms approved by the court;
 - (g) apply to the court to foreclose the borrower's interest in the land so that when the court makes its final order of foreclosure the borrower's interest in the land will be absolutely vested in and belong to the lender;

[38] The term "mortgage money" is defined to mean:

the principal amount, interest and any other money owed by the borrower under this mortgage, the payment of which is secured by this mortgage.

[39] The judge interpreted Clause 8 of the Prescribed Terms to be "superfluous". This was because the Mortgage did not have a maturity date and the right to demand payment was not contingent on some act of default by the mortgagor.

(iii) Application

[40] The appellants argue that the Mortgage is not a pure "demand obligation", relying on *Bustin Farms* and the authorities cited therein, to claim that the running of the limitation period begins immediately upon default by the borrower. In *Bustin Farms*, the mortgage in question was not a demand mortgage, it provided for monthly payments, had a last payment date and balance due date. Upon the first incident of default the lender had the option to accelerate the debt. The cases relied on in *Bustin Farms* did not concern demand obligations: each had an explicit payment due date and required an acceleration provision to seek payment in full after default.

[41] The situation in *Kong* is an example of a demand obligation under the old Limitation Act. The Court found that the limitation period began to run on the date the loan was made, and expired six years later. The Court noted that s. 14 of the new Limitation Act would have treated the case differently, as the limitation period would not have commenced to run until demand was made.

- [42] The appellants submit that the Mortgage here is a "contingent loan with a demand element" and the use of the term "payable on demand" does not make the Mortgage a "demand obligation". The appellants rely on Ontario authorities saying that loans that have demand elements may not be considered "demand obligations" for the purposes of parallel provisions under the Ontario legislation.
- [43] In my view, the Ontario authorities are not particularly helpful. In *Berry v. IPC Securities Corp.*, [2009] O.J. No. 1598, the loan called for monthly interest payments and had an explicit due date for the principal sum (para. 17). In *Urbas Estate v. Home Savings and Loan Corp.*, 2015 ONSC 6399, the demand component was inherent in the loan, which was found to be a "demand obligation" in circumstances where the demand date was uncertain (paras. 47-56). A debt obligation that does not specify a date for repayment is a demand obligation. Where a debt obligation was payable on a specified date, it was found not to be a demand obligation: *Skuy v. Greenough Harbour Corporation*, 2012 ONSC 6998 (paras. 50-51).
- [44] I agree that the mere insertion of the term "payable on demand" does not render a mortgage a "demand obligation". In my view, the agreement here reflects a reasonable arrangement in a high-risk lending environment where there was little prospect for repayment on strict terms or on a specified due date. As such, it included both a demand obligation and a contingent obligation.
- [45] This Mortgage, like most mortgages, includes both a covenant to pay and security for the debt. The covenant to pay the principal, considered on its face, and alone, is a demand obligation. With respect to it, s. 14 applies; that is, it is not payable until demand. The obligation to pay interest, however, is not a demand obligation because it was payable without demand on October 31 of each year. The Mortgage also provides that the property mortgaged is security for the debt. With respect to security for the debt, s. 15 of the Act applies. The right to realize on the security arises upon discovery of that right.
- [46] Discovery of the right, by s. 15, arises upon default. The default occurred when an interest payment was not made under the Mortgage, and thus the right to realize on the security arose on such default, and the two-year limitation period would apply from default, unless postponed.
- [47] With respect to the demand obligation, s. 14 applied. Thus, the limitation period with respect to the ability to seek judgment enforcing the covenant to pay ran from November 9, 2016, the first day of a failure to pay after demand. With respect to the right to realize on the security, the limitation period ran from the first day that the right to enforce the security arose, namely, the date of default, October 31, 2013, by virtue of s. 15.

- [48] Accordingly, absent postponement, the limitation period has expired with respect to the Leathemans' ability to realize on the security and some of the interest. However, the limitation period had not tolled with respect to their ability to seek judgment on the covenant to pay, except to the extent of the interest payable more than two years prior to the commencement of the foreclosure action.
- [49] The appellants submit that the incorporation of the Clause 8 of the Prescribed Terms accelerates the due date of the Mortgage to the first instance of default: when the first payment of interest was due and not paid. The appellants submit that, as in *Bustin Farms*, the first missed interest payment commenced the limitation period for the entirety of the Mortgage, that is, for actions on the covenant as well as enforcement of the security.
- [50] The judge found that the inclusion of Clause 8 of the Prescribed Terms into the Mortgage was superfluous, but I do not see how that can be so. Rather, the Prescribed Terms must be read alongside the stipulated terms of the Mortgage.
- [51] Clause 8 of the Prescribed Terms provides that "if a default occurs, all the mortgage money then owing to the lender will, if the lender chooses, at once become due and payable". As noted above, "mortgage money" is defined to include the "principal amount, interest and any other money owed by the borrower under this mortgage, the payment of which is secured by this mortgage".
- [52] In the context of this particular Mortgage, the parties stipulated that the principal was payable on demand. Therefore, consistent with the language of the Prescribed Terms, the repayment of the principal remains a demand obligation. Pursuant to s. 14 of the new Act, the limitation period for this demand component will only commence once demand is made. In my view, the Prescribed Terms cannot render inapplicable the changes to the Limitation Act concerning demand obligations.
- [53] This does not render the Prescribed Terms superfluous. Certain other obligations stipulated by the Mortgage that are not demand obligations may be impacted by the Prescribed Terms. For example, while the parties did not make submissions to the effect that the interest and principal owing should be treated differently with respect to limitation periods, the Prescribed Terms' effect is to treat these moneys differently.
- [54] The judge found it unnecessary to deal with the postponement issue. However, as I have concluded the limitation period has tolled with respect to the respondents' ability to realize on the security, and to sue for some of the interest, it is necessary to consider whether postponement actually occurred in this case.
- [55] In general, it is inappropriate for this Court to determine factual issues at first instance. To do so would require appellate fact-finding, something, ordinarily, this Court will not do: *Swiss Reinsurance Company v. Camarin Limited*, 2015 BCCA 466 at para. 65; *Winstanley v. Winstanley*, 2017 BCCA 265 at para. 64. I see no reason to depart from that principle here.

VI. Conclusion

[56] In the result, I would dismiss the appeal from the order granting judgment on the covenant. I would allow the appeal as it pertains to the ability to realize on the security, and the obligation to pay some of the interest, set aside the order nisi, and remit the matter to the court below to deal with the postponement issue and any residual issues.

"The Honourable Mr. Justice Savage"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Willcock"

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