

CANADA / JUDGMENT

Northland Bank (In Liquidation) v. Walters

1999 BCCA 175

COURT

British Columbia Court of Appeal

DECIDED

12 March 1999

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Citation: Northland Bank v. Walters Date: 19990312 1999 BCCA 0175 Docket: CA024199 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT: Before: THE HONOURABLE MR. JUSTICE ESSON March 12, 1999 THE HONOURABLE MR. JUSTICE CUMMING THE HONOURABLE MR. JUSTICE HALL Vancouver, B.C. BETWEEN: NORTHLAND BANK (In Liquidation) PLAINTIFF (RESPONDENT) AND: VICTOR RUSSELL WALTERS DEFENDANT (APPELLANT) R.E. Eades appearing for the Appellant W.B. McAllister, Q.C. and S.D. Frame appearing for the Respondent

- [1] ESSON, J.A.: This is an appeal by the defendant from the decision of Mr. Justice Macaulay which is now reported at (1998) 38 D.L.R. (2d) 75.
- [2] The facts, very briefly, are that Mr. Walters, along with his wife and a corporation were jointly and severally liable to the plaintiff for about \$1 million, which was the balance owing after mortgaged properties were disposed of in foreclosure proceedings. The bank, having reached that point, granted a release to all three debtors in exchange for their giving up their right to sue the bank on allegations of improvident liquidation of the properties. Part of the consideration stipulated for and received by the bank, however, was more express representations to support the assertions by Mr. Walters and Mrs. Walters that they had no remaining assets of substance.
- [3] With respect to Mr. Walters, the bank learned that that representation was not true. The bank brought action to rescind the release as against him on the ground of fraud, and judgment was given in that action in favour of the bank. Having had the release rescinded, the bank then brought this action against Mr. Walters on the debt.
- [4] The issue raised at trial by the defendant was based on the historic rule that a creditor who releases one or more joint and several debtors loses its right to recover against the other joint and several debtors. Mr. Justice Macaulay gave very extensive reasons for finding that, in the particular circumstances of this case, that rule did not apply, and for holding Mr. Walters liable on his debt. One of the cases on which he relied was *Shoker v. Vollans*. That was a case of two debtors, jointly and severally liable, one of whom paid his part of the debt

and therefore was released. As in this case, the decision at trial was that, in the particular circumstances, the transactions between the creditor and debtor amounted to a covenant not to sue by the creditor.

- [5] Since the trial in this action, the appeal by the defendant in *Shoker v. Vollans* has been heard and dismissed. See (1998) Vancouver Registry No. CA023181 (July 10 1998). The Court held that it was time to do away with what it considered to be the anomalous rule that the automatic release would apply in the case of a joint and several indebtedness as distinct from a joint indebtedness simpliciter. In giving judgment for the Court, Madam Justice Newbury said this: Where the reason for this rule does not apply, it seems to me that we should not continue blindly to follow it unless there is binding authority, i.e., a decision of this court or of the Supreme Court of Canada on point that requires us to do so. None was cited to us, and I have located none in my research. I would therefore dismiss the appeal, not on the basis that the release in question was in fact a covenant not to sue, but on the basis that the rule should not be applied where one debtor who is jointly and severally obliged pays his "share" of the debt, obtains a release from the creditor, and is therefore not liable for any contribution at the behest of his co-obligor.
- [6] Mr. Eades for the appellant has sought to persuade us that there is a distinction to be made between that case and this. In my respectful view, it is a distinction without a difference. The law as stated by this Court in *Shoker v. Vollans* applies to this case. It is therefore unnecessary to decide whether the trial judge's reasoning was sound, but I do not suggest that it was not. I wish to make clear that this Court has not considered that reasoning.
- [7] I would dismiss the appeal.
- [8] CUMMING, J.A.: I agree.
- [9] HALL, J.A.: I agree.
- [10] ESSON, J.A.: The appeal is dismissed. The Honourable Mr. Justice Esson

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