

CANADA / JUDGMENT

Royal Bank of Canada v. Jones

2000 BCSC 520

COURT

Supreme Court of British Columbia

DECIDED

24 March 2000

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Citation:

Royal Bank v. Jones

Date:20000324

2000 BCSC 520

Docket:

C912747

Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

royal bank of canada
plaintiff

AND:

larry michael jones
defendant

REASONS FOR JUDGMENT

OF THE

HONOURABLE mr. JUSTICE chamberlist

Counsel for Plaintiff:

D.G. Blois

Counsel for Defendant:

R.F. Brookfield

Date and Place of Hearing/Trial:

March 6, 2000

Vancouver, BC

INTRODUCTION

- [1] This is the defendant's motion for, firstly, an order dismissing the plaintiff's claim for want of prosecution pursuant to R. 2(7) and R. 3(5) of the Rules of Court; and secondly, an order pursuant to R. 40(48) and R. 52(8) that the plaintiff produce Ms. Cathy Buffham for cross-examination on her affidavit filed December 4, 1995 in these proceedings.
- [2] Both defendant's motions were filed in response to the plaintiff's R. 18A application for summary judgment and dismissal of the defendant's counterclaim application dated October 8, 1999.
- [3] Given the threshold nature of the defendant's applications, I adjourned the plaintiff's 18A application pending these reasons as success on the want of prosecution motion would do away with the plaintiff's action and alternatively, success on the application to cross-examine would, of necessity, result in an adjournment of the 18A application.
- [4] I turn to the want of prosecution application.
- [5] As usual in this type of application, the chronology is of utmost import.

CHRONOLOGY

- [6] On March 7, 1989, the defendant executed a demand promissory note in the principal amount of \$49,300.00 with interest payable monthly at the personal loan base rate of the plaintiff plus 2% per annum and calculated as therein provided.
- [7] On April 24, 1990, the defendant executed a second promissory note in the principal amount of \$5,500.00 with interest payable thereon at a fixed rate of 17¼%. Monthly payments were to be paid as stipulated therein.
- [8] The March 7, 1989 demand loan was secured by a marine mortgage granted by the defendant to the plaintiff covering marine vessel number 802 804, known as "Land's End". This was in fact a float-house or houseboat used by the defendant as his home. It was moored at the time at Tradewinds Marina in Coal Harbour, British Columbia.
- [9] On January 7, 1991, the plaintiff demanded payment on both notes. The total amount outstanding at January 4, 1991, was \$54,485.42 plus per diem interest as provided.
- [10] As payment was not made by the defendant as demanded, on or about the 28th day of January 1991 the plaintiff authorized and directed a bailiff to seize and take control of the float-home.
- [11] The float-home was seized and the defendant given a further 21 days to pay the outstanding balance. Following a request by the defendant and thereafter by his solicitor, Douglas G. Schmitt, on February 18, 1991, the plaintiff extended the deadline for refinancing by the defendant until February 22, 1991.

- [12] The alternate financing hoped for by the defendant never realized and ultimately the float-home was sold for \$50,000.00 plus applicable taxes.
- [13] The float-home was sold by the bailiff and ultimately a net amount of \$36,331.87 was applied against the obligation of the defendant after payment of realization expenses of \$8,668.13.
- [14] The statement of claim in these proceedings was dated April 9, 1991. The original statement of defence was filed May 1, 1991 but in November 1993 an amended statement of defence and counterclaim was filed.
- [15] As of October 3, 1991, after applying the proceeds of the sale, \$8,191.81 was left owing on the larger loan and \$4,977.54 owing on the smaller loan.
- [16] As of October 31, 1997, the amount owing on the larger loan had increased to \$14,763.18 and the amount on the smaller loan had increased to \$9,706.14. The counterclaim filed by the defendant alleges essentially that the plaintiff bank failed to sell the float-home for a provident price.
- [17] Over the past decade the plaintiff has been represented by three solicitors starting with Bull, Housser & Tupper in April of 1991 when the writ was filed, and thereafter the firm of Little Burns and Ames until approximately November 1995 and since November 1995 the present solicitors Bilkey, Quinn.
- [18] The defendant Jones has had an array of solicitors acting on his behalf.
- [19] After the loans went into default but before the plaintiff issued its writ, the firm McEwen Schmitt & Co. acted for the defendant. Mr. Jones ultimately filed his own statement of defence in May of 1991. In 1993 the lawfirm of Oreck Chernoff Tick and Farber filed a notice of change of solicitors. Thereafter, the lawfirm of Scarlett Manson Angus filed the amended statement of defence and counterclaim in November 1993 and in December of 1995 that lawfirm filed a notice of intention to withdraw, but apparently no notice of withdrawal. Thereafter, in January 1996 the defendant acted for himself but requested of the plaintiff time to obtain new counsel. In February of 1996, the lawfirm of Boughton Peterson Yang Anderson requested an adjournment of the summary judgment application brought by the plaintiff, but approximately 11 months later, that lawfirm advised the plaintiff that they had never actually been retained. The defendant acted for himself until June 1999 at which time the present solicitors filed their notice of appointment of solicitors.
- [20] The plaintiff first moved for judgment by way of summary trial in April of 1993 and thereafter in December of 1995. Relative to the 1993 application, it was after serving that application that the defendant's then solicitors moved to get off the record, but in the meantime the date for the plaintiff's summary trial application had come and gone. The December 1995 application by the plaintiff did not proceed due to a request by Mr. Jones to obtain new counsel and then having that counsel request an adjournment.

- [21] The delays in December 1995 through to February 1996 I find were caused solely by the defendant in seeking and obtaining an adjournment of the plaintiff's summary trial application. From February 1996 to January 1997, further accommodation was given to the defendant and his counsel.
- [22] The plaintiff again attempted in February of 1997 to serve another summary trial application but by then the defendant regretfully was no longer at the last address he had left with counsel for the plaintiff, his previous solicitors having failed to provide an address for delivery as required by the Rules. Thereafter, the plaintiff obtained an order for substitutional service in May of 1997 and again moved for summary trial in September of that year, pursuant to R. 65.
- [23] Regrettably, that application by the plaintiff contained a typographical error in the notice of motion which did not make it clear that the plaintiff was seeking not only judgment on the two promissory notes but also dismissal of the counterclaim filed by the defendant in November of 1993.
- [24] There was contact between the defendant and plaintiff's counsel in October 1997 at which time it appears there was some confusion in Mr. Jones' interpretation of what was stated. In any event, the plaintiff filed a new notice of motion and served it in January of 1998. Regrettably Mr. Jones, acting on his own behalf again, did not appreciate the significance of filing an outline as required by R. 65 in response to the plaintiff's motion. Between March 1998 and July 1998, Mr. Jones made several requests for documents and information and for some reason after July 1998 counsel for the plaintiff lost contact with Mr. Jones.
- [25] The January 1998 notice of motion was proceeded with by the plaintiff in February of 1999 with the plaintiff obtaining judgment and dismissal of the defendant's counterclaim. Mr. Jones immediately upon being apprised of the judgment having been obtained applied successfully in June of 1999 to have the judgment set aside.
- [26] The present notice of motion was served on the defendant's current solicitors in October 1999. Upon being served, counsel for the defendant requested that the summary trial application of the plaintiff be delayed and as a result the matter proceeded before me on March 6, 2000.

ANALYSIS

- [27] The leading case on application to dismiss for want of prosecution is our Court of Appeal's decision in *Irving v. Irving* (1982) 38 B.C.L.R. 318 (C.A.). Seaton, J.A., at p. 323, cited with approval, the decision of Salmon L.J., in *Allen v. Sir Alfred McAlpine & Sons et al*, (1968) 2 Q.B. 229, [1969] 1 All E.R. 543 (C.A.), setting out a three-part test to establish what is required to establish a want of prosecution making dismissal appropriate -
- (1) that there has been inordinate delay

- (2) that this inordinate delay is inexcusable. As a rule, until a credible excuse is made out, the natural inference would be that it is inexcusable.
- (3) that the defendants are likely to be seriously prejudiced by the delay.
- [28] The burden of proof with respect to serious prejudice has recently been clarified by our Court of Appeal in *Busse v. Chertkow* (May 10, 1999), unreported, Vancouver Registry Nos. CA024464, CA024502, CA024512. Simply put, once the defendant has established that the delay complained of has been inordinate and is inexcusable, a rebuttable presumption of prejudice arises. A court hearing a writ of prosecution application must dismiss the action for writ of prosecution unless the plaintiff establishes on a balance of probabilities that the defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action. Thus, the defendant need only establish that there has been inordinate delay. Once established, the inference is that the delay is inexcusable less the plaintiff has presented some excuse. Serious prejudice will be presumed to the defendant unless the plaintiff rebuts that presumption.
- [29] Viewing this action in its entirety, I have concluded that the delay in this matter has not been inordinate. While the total delay from the time the writ was issued in 1991 to the present time may be inordinate, the relevant time period should be viewed from the close of pleadings being November 1993. The defendant in essence by filing his counterclaim initiated a new cause of action for damages for which the defendant himself could have proceeded whether or not the plaintiff proceeded with its action. In effect, the pleadings were not closed until November 1993 due to the defendant's own delay in getting his action underway.
- [30] Similarly, the bank's second attempt at judgment in December 1995 was delayed through the defendant's actions.
- [31] Dealing with the second of the three-part test, I have concluded that the delay on the bank's part is in fact excusable as the delays were either to accommodate the defendant's request for delay or due to the defendant's failure to provide an address for delivery.
- [32] With respect to the prejudice to the defendant, the defendant has claimed prejudice on two bases. The first being the high rate of contractual interest on the smaller of the two loans (17 ¼% per annum) and the second one being the fact that the appraiser who appraised the float-home in 1991 has since died and would not be available to give evidence with respect to his appraisal.
- [33] Dealing with the second item of prejudice first, the appraiser, Richard Roberts, died on May 14, 1992, only one year after the writ was filed. It would have, in all likelihood, been impossible to conclude these proceedings before Mr. Roberts died even without any delay. Also important is the fact that Mr. Roberts died before the defendant filed its counterclaim in 1993. Further, the appraisal done in 1991 is in evidence in these proceedings.

- [34] Turning to the second ground of prejudice, being the high rate of contractual interest accruing on, in particular, the 17 ¾% loan, the defendant referred me to the decision of Master Bolton in *Bank of Montreal v. Csincsik and Hough* (1992) 9 C.P.C. (3d) 137 (B.C.S.C.). That case was decided before our Court of Appeal's decision in *Busse v. Chertkow*, supra. The facts of *Csincsik* are amply set forth in the headnote.
- [35] In 1980, the defendants provided the plaintiff with a guarantee of corporate indebtedness limited to \$30,000.00 plus interest at the annual rate of 17 ¾% from the date of demand. On August 10, 1987, the plaintiff made a demand under the guarantee for interest and principal totaling \$25,383.76. On September 9, 1987, the plaintiff commenced an action against the defendants claiming that amount plus contractual interest at 17 ¾% from the date of demand to the date of judgment. The plaintiff obtained default judgment against the defendant C. on October 5, 1987. The defendant H. entered an appearance and a statement of defence contesting liability. The plaintiff set down an application for summary judgment under R. 18 in March 1988 and the defendant brought a counter-motion to strike out the statement of claim. The matter came before a chambers judge on April 5, 1988, with the chambers judge refusing both applications. The defendant H. said that he heard nothing from the plaintiff or its lawyer after June 1989 and as the years past came to believe that the plaintiff had lost interest in the matter. In 1992, after the plaintiff filed a notice of intention to proceed, the defendant H. applied to have the action against him dismissed for want of prosecution. When the matter came before Master Bolton he allowed the defendant's application on the basis that he found real prejudice accruing to the defendant as a result of the inactivity of the plaintiff. At p. 140, Master Bolton said:
- [10] However, prejudice may arise in a more tangible, quantifiable manner than those discussed above. The guarantee relied on by the plaintiff was made in 1980, when interest rates were close to a historic peak. That agreement fixed the interest rate chargeable against the defendant at 17 ¾%. Since then, rates have declined to levels that would have been barely imaginable 10 years ago. When the guarantee was made, the prime rate of interest on which the registrar's rate of prejudgment interest is determined was 15 per cent. When the writ was issued in August 1987, it was 9½ per cent. It is now 7 per cent. By my calculations, interest at 17 ¾ per cent on a principal of \$25,383.76 from August 1987 to August 1992, compounded annually, would amount to \$32,075.57 or well over double the unpaid principal. During the period of inactivity from, say, August 1988 to date, the total claim for principal and interest will have jumped from about \$29,900 to \$57,500. If Mr. Hough, like his co-defendant, had suffered default judgment to be taken against him, the interest to date pursuant to the then-applicable statutory rate of 5 per cent would have amounted to about \$7,000. If the matter had gone to trial soon after the R. 18 applications were dismissed in April 1988, the plaintiff, if successful, would have obtained a judgment for principal and interest of about \$26,650, compared to the present claim of \$57,500 or so.

- [11] I was referred to no cases where prejudice of the type I have described has been discussed, but, in my respectful opinion, the prejudice is there, in black and white, and incontrovertible arithmetic. The result may well be different if there were an equal obligation on the part of a defendant to ensure that an action comes on for trial within a reasonable length of time, but, in general, there is no such obligation; *Farrar v. McMullen*, [1971] 1 O.R. 709 (C.A.).
- [12] In all the circumstances, I am satisfied that the inordinate, inexcusable delay from the summer of 1988 to the summer of 1992 has caused serious prejudice to the defendant. On the other hand, striking out the claim will obviously prejudice the plaintiff instead. I do not know if this prejudice to the plaintiff would be insuperable, or whether it could commence a new action without being met by a limitations defence. I will, however, assume that no new action can be maintained if this claim is thrown out. In very general terms, it seems to me that the prejudice in losing a potentially viable claim for \$25,000 or so, plus interest at the contractual rate for a reasonable length of time is of very similar degree to the prejudice to the defendant I have described above. As the onus of prosecuting the case is the plaintiff's, it is the plaintiff who has brought about the present situation where a choice must be made between comparable prejudice to each party. In that light, it is not much of a choice at all; the balance of prejudice must be decided in favour of the innocent party. Pursuant to R. 2(7), this proceeding is dismissed as against the defendant Hough. Mr. Hough should have his costs of this application, but as there has been no decision on the merits of the underlying claim, I see no reason why he should have the costs of the entire proceeding, when he was quite happy to let the case lie dormant until the plaintiff stirred to life of its own accord.
- [36] That decision was applied by Mr. Justice Cowan in *H.M.Q.B.C. v. Therrien and B & I Resources Ltd.*, unreported, Docket No. 931464, Victoria Registry. In that case, the court also had to deal with a defendant's application for want of prosecution under R. 2(7). The application was heard April 13, 1999. The action itself had been commenced by the plaintiff on May 4, 1993, relating to a claim by the plaintiff for payment of stumpage and royalty payments. The chronology was that following the issuance of the writ on May 4, 1993, an appearance was entered on May 12, a statement of defence filed on October 18, 1993 and an examination for discovery of the plaintiff representative was held September 11, 1995. Thus there had been no further proceedings taken in the action since September 11, 1995, a period of some almost 4 years. The decision was handed down prior to the Court of Appeal decision in *Busse v. Chertkow*, *supra*. His Lordship found that there had been inordinate delay based on the facts of the case. At para. 9 he said:
- . . . The claim by the plaintiff is a straightforward claim for money due and owing. Nearly six years have expired since the issuance of the writ and yet no steps have been taken by the plaintiff to bring the case to trial.

He then went on to conclude that the plaintiff had not provided a credible excuse for the inordinate delay. Dealing with prejudice to the defendant occasioned by the delay, his Lordship adopted what Master Bolton had stated in *Csincsik* as being the basis for prejudice. At para. 19 his Lordship concluded:

In the present case I am satisfied that the interest rate situation involved here as well will cause serious prejudice to the defendants since the longer the delay the greater will be the defendants' liability should the plaintiff succeed on its claim. On the other hand, the plaintiff will lose nothing by delaying the proceedings, but rather will gain the additional interest which will accrue if it is ultimately successful.

[37] With regret, I find that I am unable to follow the logic utilized by Master Bolton. The factual situation in the *Therrien* decision is somewhat different as there was no contractual provision for interest freely and voluntarily entered into between the plaintiff and defendant with respect to the amount of interest to be paid. That interest which was accruing was accruing as a result of regulations made under the Financial Administration Act at the rate of 3% "above the prime lending rate of the principal banker of the province". (S.4) The following section of the same regulations provided that:

On money owed to the government interest shall be

(a) compounded monthly

[38] I do not know the basis for the invoice in the *Therrien* matter. However, in the *Csincsik* matter, I believe Master Bolton mistakenly confused concepts of negligence with concepts of contract law. How can one say that they are prejudiced in the legal sense by a provision of a contract they have freely and voluntarily entered into?

[39] The defendant here has not attacked the contractual provisions of the promissory notes and has not raised a non est factum defence. If the plaintiff is successful at trial it will obtain its contractual interest. If the plaintiff is not successful, then the contractual interest will not be paid. It sits ill in the mouth of any debtor to suggest he is prejudiced because of a contractual provision for interest being leveled against him for which he had contractually agreed to pay.

[40] The common law has always been that a debtor must seek out his creditor. It would have been open for the defendant at any time to seek out the plaintiff, pay the amount claimed on the loan having the high rate of interest, and still proceed with the counterclaim which is relevant to the first loan at the floating rate of interest.

[41] I would therefore dismiss the defendant's application for dismissal of the plaintiff's claim for want of prosecution.

[42] With respect to the second motion of the defendant, namely the defendant's application to cross-examine Cathy Buffham or as sought at the hearing of this motion any other authorized representative of the plaintiff if Ms. Buffham is not available, one must look to

the rationale of the court in allowing cross-examination of deponents' affidavits. In *Brown v. Garrison* (1967) 63 W.W.R. 248 at p. 250, the Court of Appeal made it clear that the discretion of this Court in allowing cross-examination on affidavits must be exercised on proper principles and in the normal course will be ordered where the deponents affidavit contains facts that are in issue. However, in keeping with the exercise of discretion, there is also the general rule that a party must file its affidavit before he or she can cross-examine a deponent on the opposing side (*Paterson v. Hodges* (1914), 20 B.C.R. 598 at 602, 601 (B.C.C.A.)). Ms. Buffham swore her affidavit in support of the 1995 summary trial application which was filed and delivered to the defendant on December 8, 1995. As a result, the defendant has had that affidavit for approximately four years. The defendant has had several different law firms available to him to advise on whether or not to cross-examine Ms. Buffham or another representative failing her availability.

- [43] On the eve of the plaintiff's application for summary judgment the defendant now moves to cross-examine her. The defendant's outline in support of this application discloses that two issues are sought to be covered in any cross-examination on Ms. Buffham. Firstly, the exact amount owing on the two loans in January 1991; and, whether the two loans were in fact in default.
- [44] Ms. Buffham has deposed in her affidavit that the larger loan for which the collateral mortgage over the float-home was granted was a demand loan and therefore could be called by the plaintiff at any time. Loan number two, the smaller loan, required periodic payments and provided that the entire amount would become immediately due on default. As a result the only loan for which default is in issue would be the smaller loan.
- [45] Ms. Buffham has deposed that she has personal knowledge as the credit manager overseeing accounts that the amounts owing were as stated in her affidavit. The defendant states that the Buffham affidavit lacks enough documentation to corroborate her personal knowledge. The plaintiff says that such a stance by the defendant is logically unsound to which I agree. If the defendant states that a bank officer's sworn personal knowledge is not sufficient evidence of indebtedness, how can he say that a bank generated document, like an account statement, would be any more trustworthy? The fact is that the plaintiff bank sent demand letters to the defendant by registered mail on January 7, 1991, setting out the amount owing on each loan. The plaintiff bank received letters from the defendant and his solicitors in which the defendant admitted making late payments on loan number one and requesting an extension of time to put the loans in good standing. The bank granted an extension. It is noteworthy that in none of that correspondence did the defendant challenge the fact that he was in default or the amounts claimed by the plaintiff bank.
- [46] Of greater relevance to the application to cross-examine is the fact that there is no evidence anywhere on the record that contradicts Ms. Buffham's affirmative statements as to the amounts outstanding on the two promissory notes or the fact of default. While the defendant denies the amount owing in his statement of defence, he states that he has no knowledge of the amount owing. On the issue of the amounts owing on the loans the

defendant has adduced no evidence contrary to that of Ms. Buffham. The defendant does not swear that the amount owing on the loans was any amount other than what was deposed to by Ms. Buffham in 1995 and he produces no loan statements showing the amount owing was anything than that deposed to by her.

- [47] Relative specifically to the issue of default, that issue would only apply to the smaller loan as the larger loan was a demand loan that could be called at any time. The only evidence the defendant adduces to contradict Ms. Buffham and that issue is a bank statement which shows the balance in the defendant's account as at January 7, 1991, when the demand letters were sent, were in overdraft some 62¢. That fact does not contradict Ms. Buffham's evidence that the loans were in default. While it also appears that the defendant made a deposit of \$800.00 on January 7th, which would appear to be enough to cover one month's payment on the loans, the loans had, by that time, already fallen into default and by the terms of the promissory notes the plaintiff bank could and did demand payment of the entire amount due. With specific reference to the smaller loan, the periodic monthly payments required to be made were to be made on the 24th day of each month in accordance with the terms of the promissory note.
- [48] As indicated previously, the discretion to order cross-examination on affidavits will normally occur where the deponent's affidavit contains facts that have been put in issue by the denial of those facts in other affidavit material. The cross-examination exists to expose credibility problems in conflicting affidavit material. For the reasons set out above, there is no credibility problem extent here. Ms. Buffham has given direct evidence on matters that are within her personal knowledge. There is no contradiction in the defendant's affidavit material that would require cross-examination in order to clear up any discrepancy.
- [49] In the end result, the defendant's application to cross-examine Ms. Buffham or another officer of the bank in the event of her unavailability is denied.
- [50] The issue of costs on this application may be addressed on the hearing of the plaintiff's application for summary judgment pursuant to R. 18A.

"E.G. Chamberlist, J."

The Honourable Mr. Justice E.G. Chamberlist

March 31, 2000 -- Corrigendum to the Reasons for Judgment issued by Justice Chamberlist advising that on Page 3, Paragraph 8, which reads:

" It was moored at the time at Tradewinds Marina in Cole Harbour, British Columbia."

And should read:

" It was moored at the time at Tradewinds Marina in Coal Harbour, British Columbia."

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