
CANADA / JUDGMENT

Walters v. Meiner

2004 BCSC 393

COURT

Supreme Court of British Columbia

DECIDED

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2004 BCSC 393 Walters v. Meiner et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walters v. Meiner et al,

2004 BCSC 393

Date: 20040326

Docket: 02/4743

Registry: Victoria

Between:

Edward F. Walters

Plaintiff

And:

Herbert Ladislavis Meiner and

Brenher Construction Ltd.

Defendants

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

Counsel for the Plaintiff:

D.R. Wilson

Counsel for the Defendants:

A. Kempf

Date and Place of Trial:

20030530 and 20040220

Victoria, B.C.

[1] The hearing of the plaintiff's application for summary judgment under Rule 18A proceeded in two phases. Following submissions on the first occasion, I directed cross-examination of all deponents on their affidavits. These individuals were the plaintiff ("Mr. Walters"); the personal defendant ("Mr. Meiner"), who is also the sole shareholder and director of the corporate defendant ("Brenher"); and Mr. McKeever, a bookkeeper employed by Brenher at the material time. My earlier reasons may be found at 2003 BCSC 1071. Counsel have since completed the cross-examinations. At the further hearing, counsel provided me with transcripts which I reviewed and then heard further submissions. I am satisfied that I can make the necessary findings of fact and that there would be no injustice in deciding the issues under Rule 18A.

[2] Mr. Walters loaned \$388,000 to Brenher, as follows:

- (a) June 2, 1995: \$100,000;
- (b) November 15, 1995: \$30,000;
- (c) November 21, 1995: \$130,000; and,
- (d) February 23, 1996: \$128,000.

Each loan was secured by promissory note due on demand and subject to annual interest of 17 per cent payable monthly. Brenher never paid any interest.

[3] In each case, the promissory note contained a guarantee at the end of the document which Mr. Meiner signed. Each guarantee was worded identically:

For good and valuable consideration, the sufficiency of which is hereby acknowledged, the undersigned, and if more than one, then jointly and severally, guarantee the payment of the above Promissory Note.

As no one else signed the guarantees, I have added underlining to illustrate the material wording.

[4] By letter sent by his solicitors dated October 2, 2002, Mr. Walters demanded payment on the notes from both Brenher and Mr. Meiner. Mr. Walters then commenced the lawsuit on October 18, 2002. Counsel for Mr. Walters agreed that the claims are out of time under s. 3 of the Limitation Act, R.S.B.C. 1996, c. 266, but the central issue before the court is whether a payment by Brenher of \$5,000 on February 24, 2000, constituted a confirmation of the cause of action thereby extending the limitation period so that the claims are not barred.

- [5] Because no other payment was made apart from the \$5,000, an amount considerably less than the total advanced on the first note, another issue follows: if the payment of \$5,000 constituted a confirmation, does it apply to the claims on all the notes or just the claim on the first? Finally, if the payment was a confirmation by Brenher, was it also a confirmation by Mr. Meiner?
- [6] As set out in my earlier reasons, apart from a general denial of liability, the defendants pleaded only that the plaintiff missed the limitation period. The applicable limitation period was six years and, as a result, the limitation period for the final note expired several months before the action was commenced. Given the date of the first demand note, the earliest date on which a limitation period could expire was June 2, 2001.
- [7] The \$5,000 payment was made within the limitation period and thus is capable of extending it so that the action was commenced well within time. The parties agreed that a defendant may confirm a cause of action by making a payment in respect of it.
- [8] I set out the sequence of events and the content of relevant documents as disclosed by the affidavit evidence in my earlier reasons, commencing at para. [8]. At that time, I also identified the divergence in the positions of the parties. For convenience, I repeat those parts of my judgment here:
- [8] At first blush, the evidence of confirmation seems straightforward. The plaintiff, Mr. Walters, deposed that shortly before February 24, 2000, he spoke to the personal defendant, Mr. Meiner, and told him that he wanted some payment on the indebtedness secured by the promissory notes. According to him, Mr. Meiner promised to pay \$9,000. On February 24, 2000, well within the applicable limitation period for all the notes, Mr. Walters received a cheque in the amount of \$5,000 drawn on the account of the corporate defendant.
- [9] In response, Mr. Meiner denied that he had the alleged conversation with the plaintiff and deposed that the cheque was issued by his bookkeeper, Mr. McKeever, on the latter's own initiative and without instructions or authorization. According to Mr. Meiner, he never gave Mr. McKeever any authority to conduct any personal business on his behalf or to make payments on behalf of the corporate defendant without his express instructions.
- [10] Notwithstanding Mr. Meiner's evidence, it is apparent that he gave Mr. McKeever some instructions related to the issuing of the cheque. On its face, the cheque reads "repayment of principle (sic) on loan" and appears to be signed by Mr. McKeever on behalf of the corporate defendant. There is also a record of e-mail transmissions between Mr. McKeever and Mr. Meiner on February 24 and 25, 2000.
- [11] In the first message, written in the late afternoon of the 24th, Mr. McKeever wrote "Talk with Ed [the plaintiff] regarding the money (he decided to take it as payment of principle (sic) on his loan to Brenher [the corporate defendant])". Mr. Meiner responded the next morning as follows:

Huge mistake should have gone to KBJV as a receivable. A total f---up with the funds to Ed. Have you gotten to him yet? I know you asked me but sometimes you suggest things that I do not have time to think about.

- [12] Mr. McKeever responded the same day acknowledging that he had already given the money to the plaintiff. I note that this message includes a third misspelling of the word principal. While ordinarily this error would be insignificant, it tends to indicate that Mr. McKeever filled in the reference on the cheque rather than the plaintiff who, I note, spelled the word correctly in his own records at the time. Mr. McKeever went on in his final e-mail to ask, "Why is it a mistake?"
- [13] Mr. McKeever deposed that he could not recall which of Mr. Walters or Mr. Meiner first contacted him requesting a payment for monies owed by the corporate defendant. He did recall discussing the matter by telephone with Mr. Meiner on or about February 24, 2000 and asking whether he should issue the cheque to the plaintiff personally or to a corporation. Mr. Meiner instructed him to ask the plaintiff. He did so and, at the request of the plaintiff, made the cheque out personally. Mr. McKeever denied that he acted on his own initiative and without instructions or authorization. He further deposed that he believed at the time that he had the necessary authority.
- [9] As a result of my review of the transcripts of cross-examination, I prefer the evidence of Mr. Walters and Mr. McKeever where it conflicts with that of Mr. Meiner. This is for two reasons. First, their evidence was consistent with the content of the contemporaneous documents whereas Mr. Meiner's evidence was not. Second, their cross-examination did not reveal any material inconsistency but that of Mr. Meiner did.
- [10] Mr. Walter's evidence was reinforced, rather than detracted from, in my view, by his acknowledgement under cross-examination that he sought payment in part as a confirmation of the cause of action. Any discrepancies in his evidence as to who initiated the first call or whether there were two calls rather than one were minor, at most.
- [11] Mr. McKeever's evidence was consistent with the course and content of the e-mails exchanged between Mr. Walters and him. I am not persuaded that Mr. McKeever was a biased witness as suggested by counsel for the defendants. I am satisfied that he was a cautious witness who tried to distance himself from both sides in the litigation. I do not agree that his cross-examination revealed any material contradictions.
- [12] As to Mr. Meiner, I cannot adequately reconcile his affidavit evidence or his answers under cross-examination with the content of the e-mail exchange. Mr. Meiner denied instructing Mr. McKeever to make any payment but insisted that if he did the payment was for the purpose of a joint venture described in his e-mail as KBJV. Mr. Meiner never communicated to Mr. Walters the position that the payment related to the joint venture until faced with the application for summary judgment. The implicit suggestion that Mr. Walters agreed defies common sense in any event.

- [13] As Mr. Walters had already expended considerable funds directly attributable to his potential personable liability associated with that venture, it would make no sense for him to agree that Mr. Meiner should advance the payment to the joint venture as he would not benefit. Instead, as I have already pointed out, Mr. Walters wanted a payment on the promissory notes capable of constituting a confirmation of his personal cause of action.
- [14] Although I did not set it out as an issue, counsel for Brenher and Mr. Meiner also contended that Mr. McKeever did not have actual or ostensible authority to act on behalf of Brenher. I am satisfied on the evidence that he had actual authority on behalf of Brenher to write the cheque as described by him and to deliver it to Mr. Walters. I find that Brenher allocated its payment to the principal owing but did not specify which note or notes.
- [15] Mr. Walters testified, and his records support, that he recorded the notes as a global debt and set off the payment on principal received against the account as a whole. I am satisfied that he requested a payment on principal intending to rely on any payment as a confirmation and that he appropriated the funds received to the principal portion of the debts owed. None of this detail was communicated to Mr. Meiner but, in my view, it was not necessary that Mr. Walters do so.
- [16] As earlier set out, the central issue before the court is whether the payment by Brenher of \$5,000 in February 2000 constituted a confirmation of the cause of action thereby extending the limitation period so that the claims are not barred.
- [17] Where a series of debts are kept as a running account, the debtor, the creditor or the court may determine how a payment is to be appropriated. Maczko J. summarized the law in this regard in *Crescent Petroleum Ltd. v. Portserv Ltd.* (1997), 37 B.L.R. (2d) 118 (S.C.) at 121:
- [11] Where a debtor has a number of debts with a creditor and the debtor pays to the creditor an amount of money insufficient to cover the total amount of all the debts, the debtor has the right to declare which debt will be paid first. If the creditor accepts the money, he or she must abide by the debtor's appropriation. If the debtor does not make the appropriation, that right devolves upon the creditor. (Chitty on Contracts, 27th ed. (London: Sweet & Maxwell, 1994), pp. 1055-1057). Where the appropriation is not made by the creditor, the law will in certain circumstances substitute the presumption that the oldest debt will be paid first. This is sometimes referred to as the rule in *Clayton's Case*, a 19th century English decision cited more completely as *Devaynes v. Noble*, (1816) 1 Mer. 572, [1814-1823] All E.R. Rep. 1 (Eng. Ch. Div.).

The Court of Appeal approved the above as a concise summary of the law in *Kamloops Estates Ltd. v. Avon Holdings Ltd.*, [2001] B.C.J. No. 2585 (C.A.), at para. 9.

- [18] Although Brenher could have specified the note or notes to which the payment on principal was to be appropriated, it did not do so. Nor was there any evidence from which I could properly infer such an intention. The intention of Brenher was limited to making a payment to, or as directed by, Mr. Walters in relation to the outstanding promissory notes.

- [19] The debtor having failed to specify, Mr. Walters was free to appropriate. He was not required to give notice of his decision and, indeed, could have waited until during the proceedings to appropriate: *Seymour v. Pickett*, [1905] 1 K.B. 715 (C.A.), cited in *Crescent Petroleum* at para. 30. The creditor having appropriated, there is no need to consider the application of the rule in *Clayton's Case*. I find that the payment by Brenher on February 24, 2000, constituted a confirmation of the plaintiff's cause of action on all the promissory notes.
- [20] The next question is whether the payment by the debtor Brenher also constitutes a confirmation by the guarantor, Mr. Meiner. Counsel for the plaintiff contended that Brenher was the agent of Mr. Meiner and accordingly is bound by the confirmation. In my view, the evidence does not support this contention.
- [21] Brenher was the sole principal debtor on each promissory note. Mr. Meiner was a guarantor in each case but never a principal debtor. The fact that he was also a director and officer of Brenher does not create an agency relationship as contended. The significance of this finding is plain upon a review of ss. 5(7) and (9) of the Limitation Act. This is because s. 5(7) defines who is bound by a confirmation and s. 5(9) provides expressly that a confirmation made by an agent "has the same effect as if made by or to the principal".
- [22] Unless Mr. Meiner is bound directly under s. 5(7), there has been no confirmation of the cause of action against him. Counsel agreed that the limitation period ran against Mr. Meiner in tandem with the limitation period against Brenher. This was right because the terms of the particular guarantee did not modify the general rule that the liability of the surety and the principal debtor are coterminous.
- [23] Mr. Meiner's obligation under the guarantee always existed. The terms of the guarantee did not import any requirement that his obligation was to be triggered only by a demand. As each promissory note was payable on demand, the cause of action against both the principal debtor and the guarantor arose at the time of making the note or, at the very latest, at the time of the debtor's default in failing to make the first monthly interest payment. I have considered and applied the reasoning in *Canadian Imperial Bank of Commerce v. Pittstone Developments Ltd.*, [1985] B.C.J. No. 3013 (S.C.), although it leads to a different result here because of the lack of a trigger in the guarantee under consideration.
- [24] Despite the coterminous nature of the guarantee, part payment by the principal debtor does not extend the running of the limitation period against a guarantor. Section 5(7) clearly limits the effect of a confirmation. The subsection provides that a person "is bound by a confirmation only if" any of the enumerated circumstances apply. The person bound here must be either the maker Brenher or a successor of Brenher in relation to the cause of action: ss. 5(7)(a) and (b). As Mr. Meiner is neither a successor of Brenher nor its principal in the sense contemplated by s. 5(9), he cannot be bound by the confirmation. Accordingly, the action against him personally is out of time and must be dismissed.

[25] The action against Brenher is within time. I am satisfied that Mr. Walters is entitled to judgment against Brenher for the outstanding principal and interest at the rate set out calculated to judgment on each of the promissory notes. I leave the revised calculation of the amount to counsel with leave to speak to it if necessary. There will also be leave to speak to costs if counsel cannot agree.

"M.D. Macaulay, J."

The Honourable Mr. Justice M.D. Macaulay

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