SUPREME COURT OF YUKON

Citation: *Lavoie v Ewert*, 2023 YKSC 25

Date: 20230530
S.C. No. 21-A0128
Registry: Whitehorse

BETWEEN:

ÉMILIE LAVOIE AND SCOTT WESTBERG

PLAINTIFFS

AND

BARBARA ANNE EWERT, GERRY DARREL EWERT, 535885 YUKON INC. dba RE/MAX ACTION REALTY, WENDY CLOSE, NORTHERN GUARDIAN INSPECTIONS LTD., DARRYL FRASER, THE CITY OF WHITEHORSE, AND RODNEY SCOTT BREITENBACH

DEFENDANTS

Before Justice K. Wenckebach

Counsel for the Plaintiff	Gary W. Whittle
Counsel for the Defendants, Barbara Anne Ewert and Gerry Darrel Ewert	Don Dear, K.C.
Counsel for the Defendants, 535885 Yukon Inc. dba Re/Max Action Realty and Wendy Close	Kurtis Kruse, by video
Counsel for the Defendants, Northern Guardian Inspections Ltd. and Darryl Fraser	Michael Colwell, by video
Counsel for the Defendant, The City of Whitehorse	Brian Rhodes, by video
Counsel for the Defendant, Rodney Scott Breitenbach	Luke S. Faught

REASONS FOR DECISION

Overview

[1] The plaintiffs, Émilie Lavoie and Scott Westberg, bought a house in 2021. They allege that when they bought the house it had mould, water damage, an insect

infestation, and other issues: it is so damaged that it is uninhabitable. Ms. Lavoie and Mr. Westberg are now suing the builder, Rodney Scott Breitenbach, who built the house between 1992-1993. They allege that his construction was faulty and led to the damage. Ms. Lavoie and Mr. Westberg have also named other defendants, including the owners from whom they bought the house, the real estate agent who sold them the home, the inspector they hired to inspect the home before purchase, and the City of Whitehorse.

[2] Mr. Breitenbach has brought an application for summary trial. He seeks that the plaintiffs' claim against him be dismissed on the grounds that it is barred by the time limits set out in the *Limitation of Actions Act*, RSY 2002, c. 139 (the "*LLA*").

[3] In response, Ms. Lavoie and Mr. Westberg have brought an application seeking that Mr. Breitenbach's application be dismissed because the relief sought is not suitable for a summary trial. Both applications were heard at the same time.

[4] As part of the applications, Ms. Lavoie and Mr. Westberg filed an affidavit containing hearsay. They asked that the evidence be admitted despite being hearsay. In the end, I have not used Ms. Lavoie and Mr. Westberg's hearsay evidence in my decision. I therefore do not need to consider whether the evidence should be admitted.

[5] On the substantive issues, for the reasons below, I conclude that Mr. Breitenbach's application is suitable for summary trial. I also conclude that Ms. Lavoie's and Mr. Westberg's claims against him are not barred by the *LLA*.

Issues

A. Is the issue of whether the action is barred because it was brought after the limits set out in the *LLA* appropriate for summary trial?

B. If so, is the claim barred because it was filed after the time limits set out in the *LLA*?

Analysis

A. Is the issue of whether the action is barred because it was brought after the limits set out in the *LLA* appropriate for summary trial?

[6] I conclude that the issue is appropriate for summary trial.

[7] In the case at bar, Mr. Breitenbach is seeking to have one issue decided by way of summary trial, rather than the whole matter. Section 19 of the *Rules of Court* of the Supreme Court of Yukon, which is the provision about summary trials, does allow for single issues to be resolved by way of summary trial. It is important to identify whether a party is seeking a summary trial on an issue or the entire action, however, as the court's analysis is somewhat different when the summary trial will be of an issue rather than when the summary trial is of the entire matter.

[8] The court uses special caution in determining whether to decide an issue by way of summary trial. Special caution is required because resolving an issue through summary trial can result in proceeding through the case in piecemeal fashion. This can cause more delays and the expenditure of resources than if all issues are dealt with together. It can also result in multiple appeals. Additionally, how facts and issues interlink may not be readily apparent when questions are presented in isolation (*Coast Foundation v Currie*, 2003 BCSC 1781 ("*Coast Foundation*") at paras. 16-18).

[9] Whether a summary trial is a good use of resources is also a concern where the answer to an issue sought to be tried by way of summary trial will resolve the whole of the proceeding only if one answer is given (*SmartCentres Inc v EBA Engineering Consultants Ltd*, 2014 BCSC 2271 at para. 24).

[10] In addition to the factors cited in *Norcope Enterprises v. Yukon,* 2012 YKSC 25 at paras. 26-28, the court may address the following questions when determining if a summary trial of a single issue is appropriate:

> …
>
> a) whether the court can find the facts necessary to decide the issues of fact or law;
>
> b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
>
> i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
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> (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
>
> (2) the potential for multiple appeals; and
>
> (3) the novelty of the issues to be determined;
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> ii. the amount involved;
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> iii. the complexity of the matter;
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> iv. its urgency;
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> v. any prejudice likely to arise by reason of delay; and
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> vi. the cost of a conventional trial in relation to the amount involved.

(*Ferrer v 589557 B.C. Ltd.*, 2020 BCCA 83 at para. 27, citing *Greater Vancouver Water District v Bilfinger Berger AG,* 2015 BCSC 485 at para. 110).

[11] In my analysis, I will consider the following factors: whether the court can make the necessary findings of fact; the nature and complexity of the issue; and the costs to the court system and the parties.

Findings of Fact

[12] This factor supports proceeding by way of summary trial.

[13] Mr. Breitenbach's position is that the discoverability principle does not apply to Ms. Lavoie and Mr. Westberg's claims. Discoverability is a common law concept that describes the triggering event for determining when the clock for a limitation period starts running. It is defined as: "when the material facts on which [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence" (*Central Trust Co v Rafuse*, [1986] 2 SCR 147 ("*Rafuse*") at 224).

[14] Mr. Breitenbach argues that, in the claims at bar, the calculation of the time limits did not begin to run when Ms. Lavoie and Mr. Westberg knew or ought to have known about the damage. Instead, it began to run at the time their home was damaged.

[15] His argument arises purely from statutory interpretation of the wording of the *LLA*. The only facts to be determined are when Mr. Breitenbach is alleged to cause the damage, and when Ms. Lavoie and Mr. Westberg commenced the action.

[16] These facts are readily ascertained. Ms. Lavoie and Mr. Westberg allege that Mr. Breitenbach caused the damage when he was building the home. It is uncontroverted that he built the house between late 1992 and the end of March 1993. It is also uncontroverted that Ms. Lavoie and Mr. Westberg bought their house in 2021 and filed their action on February 24, 2022. If Mr. Breitenbach's argument is correct, then Ms. Lavoie and Mr. Westberg are out of time for bringing their claims against him.

[17] The facts involved are few and agreed upon. There is little evidence needed, no credibility findings to be made, nor are the legal conclusions heavily reliant on findings of fact. This factor suggests that summary trial is appropriate.

Nature and Complexity of the Issue

[18] This factor also supports proceeding by way of summary trial.

[19] Ms. Lavoie and Mr. Westberg's counsel submits that a matter is not suitable for disposition by way of summary trial where discoverability may be an issue. He relies on *The Board of School Trustees of School District No. 72 (Campbell River) v IBI Group Consultants Ltd,* 2007 BCSC 280 at para. 14, in support of his position. The court in *Campbell River* did reference this proposition. In doing so, it cited *MacMillan v McDermid* (2004), 70 OR (3d) 252 (Ont CA) at para. 1. However, *MacMillan* concerns an application for summary judgment, not summary trial. It is not apparent to me that the principles for summary judgment applications are the same as for summary trial applications.

[20] In my opinion, the subject matter of the issue does not determine whether a matter is appropriate for summary trial. Thus, if it is necessary to make a significant assessment of evidence and credibility, then it is inappropriate to determine the issue of discoverability at a summary trial. However, where the evidence is sufficiently clear, and the legal questions sufficiently simple, the question of discoverability may be appropriate for summary trial.

[21] Counsel to Ms. Lavoie and Mr. Westberg also submits that summary trial is not appropriate because there is another action which overlaps with these proceedings. That action is between Ms. Lavoie and Mr. Westberg and their insurers. (*Émilie Lavoie and Scott Westberg v TD General Insurance Company, et al.*, SC No. 22-A0060). Mr. Breitenbach is not a party in the second action. It seems to me that Mr. Breitenbach should not be required to be a party in this action simply to facilitate the determination of another action in which he plays no legal role.

[22] Mr. Breitenbach's arguments are not complex and there is case law addressing similar issues. The question of discoverability is also, on its face, not related to the other issues in litigation. Therefore, it can be decided on its own in a summary trial.

Costs to the Court System and the Parties

[23] I find that resolving the question by way of summary trial will not cause delay nor impose additional unreasonable costs to the parties, and could lead to efficiencies.

[24] Citing *Coast Foundation*, Ms. Lavoie and Mr. Westberg's counsel submits that a summary trial on the issue of limitation dates will not create efficiencies. He argues that Ms. Lavoie and Mr. Westberg's resources, as well as court resources, are required to hear the summary trial. There will be no commensurate savings, even if Mr. Breitenbach is successful, however, because the action will proceed against the other defendants. The action, therefore, will continue.

[25] Moreover, Mr. Breitenbach's involvement would still be necessary as other defendants allege, in part, that he is contributorily negligent. The court would therefore be required to assess whether Mr. Breitenbach is negligent, and if so, the proportion of damages that should be apportioned to him. Thus, Ms. Lavoie and Mr. Westberg's counsel argues that, rather than simplifying the proceedings and creating efficiencies, a summary trial will add unneeded complexity.

[26] In contrast, Mr. Breitenbach argues that a summary trial will assist in simplifying the matter. If Mr. Breitenbach is successful, there will be one less party at trial. There will therefore be one less party entitled to examine and cross-examine witnesses, and to make submissions on legal issues. In contrast, the summary trial application took less than half a day to be heard.

[27] I agree with Mr. Breitenbach. *Coast Foundation* is distinguishable. In that case, even if the defendants were successful on the limitations issue, the plaintiff still had other claims against them. Litigation between the plaintiffs and the defendants would therefore continue (para. 7). Here, although Mr. Breitenbach's involvement would still be required, he would no longer be a party. This would entail efficiencies both in preparations for trial and during the trial itself.

[28] There are only a few uncontroverted facts required to be found; the issue to be resolved is not complex; and there would be some efficiencies gained if a summary trial were held. Considering all the factors, a summary trial is appropriate.

B. If so, is the claim barred because it was filed after the time limits set out in the *LLA*?

[29] I conclude that the claim is not barred by the *LLA*.

[30] As noted above, Mr. Breitenbach's counsel argues that under the *LLA*, discoverability does not apply to the timelines for the action brought by Ms. Lavoie and Mr. Westberg. Instead, the timelines for their action are calculated from the point at which the harm was incurred.

[31] Mr. Breitenbach's counsel bases his argument on the wording of s. 2 of the *LLA*, which sets out the time limits for bringing different causes of action. He notes that under ss. 2(g) (concerning fraudulent misrepresentations) and 2(h) (concerning equitable causes of action) the limitation dates run "from the discovery of the" cause of action. Mr. Breitenbach submits that the legislation imports the principle of discoverability into these two provisions by using the word "discovery".

[32] Counsel to Mr. Breitenbach points out that, in contrast, under most of the other provisions in s. 2, including those applicable to Ms. Lavoie and Mr. Westberg, the

limitation date starts running “after the cause of action arose”. Mr. Breitenbach submits that applying the presumption of statutory interpretation that the same words in a legislative instrument have the same meaning, and different words have different meanings, the phrase “after the cause of action arose” must have a different meaning from the phrase “from the discovery of the” cause of action.

[33] He further submits that, as the phrase “from the discovery of the” cause of action incorporates discoverability, then the other provisions must not incorporate discoverability. Instead, under the other provisions, the time for bringing an action begins running from the point at which the harm occurs. Counsel to Mr. Breitenbach concludes that, for Ms. Lavoie and Mr. Westberg, then, the clock for determining the time limits for bringing their action occurred when Mr. Breitenbach built the house. They are therefore barred from bringing their action.

[34] I am not persuaded by counsel’s arguments. The Supreme Court of Canada has already applied the principle of discoverability to other limitation of actions legislation using language similar to the phrase “after the cause of action arose” (*Rafuse* at 217 and 224).

[35] Subsequent to *Rafuse*, moreover, the Supreme Court of Canada considered whether discoverability applies to limitation of actions legislation using the phrase “damages were sustained” (*Peixeiro v Haberman*, [1997] 3 SCR 549 (“*Piexeiro*”) at 564). Although the legislative language in *Peixeiro* could suggest that the limitations date is to run from when the damage was caused rather than when it is or should have been discovered, even in that instance the Supreme Court determined that discoverability applied. In coming to this conclusion, it applied the presumption that the legislature does not intend to change existing common law principles in the absence of

clear and unequivocal language ousting it. It found that the phrase "damages were sustained" was not sufficiently explicit to oust the principle of discoverability.

[36] It also explained the rationale behind the discoverability principle, stating at 565:

> … to hold that the discoverability principle does not apply to [the legislation at issue] would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action. In balancing the defendant's legitimate interest in respecting limitation periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. …

[37] This reasoning applies equally to the *LLA*.

[38] Moreover, the legislature is presumed to know the law (*2747-3174 Québec Inc v Quebec (Régie des permis d'alcool*), [1996] 3 SCR 919 at 1032. Thus, the Yukon legislature is presumed to know that, pursuant to *Rafuse* and *Peixeiro*, the phrase "the cause of action arose" incorporates the discoverability principle. If the legislature wanted to oust the principle of discoverability from s. 2 of the *LLA*, after *Rafuse* and *Peixeiro* were decided, it would have amended the legislation to omit the phrase "cause of action arose" and used different wording. It did not do so.

[39] It is possible, as Mr. Breitenbach suggests, that the phrase "discovery of the" cause of action means something different than the "cause of action arose". Based on *Rafuse* and *Peixeiro*, however, if the two phrases are different, then the conclusion is that "cause of action arose" incorporates discoverability, while "discovery of the" cause of action does not. It could be, for instance, that ss. 2(g) and (h) provide for time limits to begin running only when the injured party actually learns of the harm done to them and do not have a due diligence component, unlike discoverability.

[40] The question of what “discovery” of the cause of action means is not before me, however. It is sufficient to conclude that the provisions applicable to Ms. Lavoie and Mr. Westberg do incorporate the principle of discoverability; and they are not barred from bringing their action.

Conclusion

[41] I therefore conclude that the application for summary trial should be heard and decided on. However, I also conclude that the plaintiffs’ claim against Mr. Breitenbach is not barred by the *LLA* and shall continue against him.

[42] Counsel to Ms. Lavoie and Mr. Westberg is seeking costs in any event of the cause, to be payable forthwith. The parties’ results are mixed. Costs may be spoken to in case management if the parties are unable to agree.

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WENCKEBACH J.