Date: 20010530
Docket: C.A. 00-YU437
Registry: Whitehorse

COURT OF APPEAL FOR THE YUKON TERRITORY

ORAL REASONS FOR JUDGMENT:

CORAM: The Honourable Madam Justice Ryan
The Honourable Mr. Justice MacKenzie
The Honourable Madam Justice Proudfoot

BETWEEN:

SHAWN RAYMOND CARRECK

PLAINTIFF
(RESPONDENT)

AND:

VLB RESOURCE CORPORATION and
VICEROY RESOURCE CORPORATION

DEFENDANTS
(APPELLANTS)

ROBERT BLACK — For the Appellants (not appearing)

DEBRA FENDRICK — Appearing for the Respondent

REASONS FOR JUDGMENT

[1] MacKENZIE J.A. (Oral): This is an appeal from the order of Mr. Justice Tallis in chambers allowing an amendment to the plaintiff/respondent's

pleadings to add a claim under the *Survival of Actions Act*, R.S.Y 1986, c. 166, to an action for damages for wrongful death under the *Fatal Accidents Act*, R.S.Y. 1986, c. 64.

[2] The claims arise out of the death of Raymond Dale Carreck in a motor vehicle accident on September 7, 1996. The amendment would add a claim for loss of future earnings by the estate, caused by the wrongful death.

[3] The writ of summons in the name of Shawn Raymond Carreck, the son of the deceased, was issued on September 5, 1997. The endorsement on the writ claimed damages under the *Fatal Accidents Act* on behalf of the spouse and dependent children of the deceased. More than two years after the death, on March 18, 1999, the plaintiff filed a statement of claim including a claim under the *Survival of Actions Act*. The plaintiff also applied to be appointed administrator *ad litem* of the estate of Dale Raymond Carreck and to add the estate as a plaintiff. The defendants opposed the application and applied to strike the claim under the *Survival of Actions Act* from the statement of claim under rule 19(24) of the Rules of Court on the ground that the two-year limitation period had expired and the claim was statute-barred. Mr. Justice Tallis in chambers allowed the plaintiff's application and dismissed the defendants' rule 19(24) application.

[4] The learned chambers judge relied on rule 15(5)(a) of the Rules of Court, which is identical to the equivalent British Columbia rule, as follows:

Removing, adding or substituting party
(5)(a) At any stage of a proceeding, the court on application by any person may
(i)...
(ii)order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure

> that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
>
> (iii)order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
>
> (A) with any relief claimed in the proceeding, or
>
> (B) with the subject matter of the proceeding, which in the opinion of the court it would be just and convenient to determine as between the person and that party.

The jurisdiction under rule 15(5)(a) is discretionary where "in the opinion of the court it would be just and convenient."

[5] At this point, however, Yukon and British Columbia diverge. In British Columbia, a rule 15(5)(a) amendment normally forecloses a limitation defence by reason of s. 4 of the *Limitation Act*, R.S.B.C. 1979, c. 236, as follows:

> 4(1)Where an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to
>
> ...
>
> (d)adding or substituting of a new party as plaintiff or defendant, under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.
>
> ...
>
> (4)In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, notwithstanding that between the issue of a writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

[6] The equivalent Yukon provision, s. 17 of the *Yukon Judicature Act*, R.S.Y. 1986, c. 104, states:

> 17.Where an action is brought to enforce any right, legal or equitable, the Court may permit the amendment of any pleading or other processing therein upon such terms as to costs or otherwise as it deems just notwithstanding that, between the term of issue of the Statement of Claim and the application for amendment the right of action brought, has been barred by the provisions of any statute or Act, if such amendment does not involve a change of parties other than a change caused by the death of one of the parties.

[7] Section 17 is more limited in its scope than s. 4 of the B.C. statute, as Mr. Justice Maddison noted in *Lebel v. Roe*, [1993] Y.J. No. 49 (Y.T.S.C.). In the Yukon an amendment does not overcome the limitation defence if it involves "a change of parties other than a change caused by the death of one of the parties." The appellants contend that the amendment sought does involve a change of parties beyond the two-year limitation period and that it should have been refused by the chambers judge because it was outside the saving terms of s. 17 and clearly statute-barred. The respondent submits that the chambers judge did not decide the limitation issue and left it as a matter to be determined at trial. In these circumstances he contends that the respondents have not been significantly prejudiced by the amendment, which simply permits all issues to be canvassed at trial.

[8] I agree that on the chambers judge's reasons the limitations issue has not been determined by the amendment and it remains open as an issue for trial. I propose to approach the issues on this appeal on that footing.

[9] The British Columbia cases under rule 15(5)(a), illustrated by *Lui v. West Granville Manor Ltd.*, [1987] 4 W.W.R. 49 (B.C.C.A.), must be considered with caution because of the result that the limitation defence is eliminated under the different statutory provisions in British Columbia. We were referred to several authorities in the Northwest Territories and Alberta, most recently *Cunningham v. Irvine-Adams*, [2001] A.J. No. 157 (Alta. C.A.), for the proposition that where it is clear that a claim under the equivalent of the *Yukon Survival of Actions Act* is barred by a limitation defence, an amendment to an action, within time, for dependants under fatal accident legislation should be refused. In *Cunningham*, the Alberta Court of Appeal concluded *inter alia* that an application to amend on the ground the claims for loss of earnings by the estate could not be added on discoverability grounds because of a change in the law. The Court, in a memorandum of judgment, concluded that the discoverability doctrine applied only to facts, not changes in law. The Court also concluded that if the Alberta law had changed on this point or had been clarified, that change or clarification occurred several years before the fatal accident in issue. It should be noted that the Alberta Rules do not have a counterpart to rule 15(5)(a).

[10] The affidavit of the solicitor for the plaintiff in support of the amendment states as follows:

> 1....
> 2.I commenced an action on behalf of Shawn Raymond Carreck for the benefit of the spouse and children of Raymond Dale Carreck, who died on September 7, 1996, in a motor vehicle accident near Dawson City, in the Yukon Territory.
> 3.The aforesaid action was commenced pursuant to the *Fatal Accidents Act*, S.Y.T. 1986, C.64.
> 4.On March 27 and April 8, 1997, the *Duncan Estate v. Baddeley* was decided in the Alberta Court of Appeal. An application for leave to

> appeal to the Supreme Court of Canada was dismissed with costs, without reasons, on November 6, 1997.
>
> 5.The *Duncan Estate v. Baddeley* case established that a claim for loss of future earnings survives the death of the victim.
>
> 6.I did not consider adding the Estate of Dale Raymond Carreck as a Plaintiff until it was brought to my attention in October of 1998 that a separate claim would have to be brought on behalf of the Estate of Raymond Dale Carreck under the *Survival of Actions Act* in order to take advantage of the new law in *Duncan Estate v. Baddeley*.
>
> 7.I am informed by Shawn Raymond Carreck, the son of Dale Raymond Carreck, that no family member has become executor or administrator of the Estate of Raymond Carreck, and that he is prepared to represent the estate as administrator *ad litem* if it is added as a party to this action.
>
> 8.I make this affidavit in support of an application to add the Estate of Raymond Dale Carreck as a plaintiff who ought to be joined as a party to effectively adjudicate all matters in issue.

[11] The grounds advanced are therefore similar to those rejected as insufficient in *Cunningham*, in part on the ground that any change or clarification of Alberta law resulted from decisions several years before *Duncan Estate v. Baddeley* (1997), 50 Alta. L.R. (3d) 202 (Alta. C.A.), [1997] S.C.C.A. No. 315 (S.S.C.) and that those earlier decisions were publicized in legal circles in Alberta. However, I think it is arguable that the implications of the Alberta cases for actions under the Yukon *Survival of Actions Act* did not become apparent until after *Duncan Estate v. Baddeley*. It was after that decision that s. 59(1) of the *Estate Administration Act*, 1998 S.Y.T., c. 7, was enacted to preclude such claims in the future. It appears to have been earlier assumed in the Yukon that the *Survival of Actions Act* did not permit a loss of earnings claim on behalf of the deceased's estate.

[12] The respondent also relies on *Basarsky v. Quinlan*, [1972] 1 W.W.R. 303 (S.C.C.), where the Supreme Court of Canada allowed an amendment to add a claim for dependants on the Alberta *Fatal Accidents Act* to an action by the estate

administrator under the *Trustee Act* after the expiration of the limitation period. The appellants argue that *Basarsky* is distinguishable because in that case only a new claim was added and not a new party. Here, the amendment names the existing plaintiff, Shawn Raymond Carreck, as administrator *ad litem* of the estate in addition to his representative capacity on behalf of *Fatal Accidents Act* dependants. He is not administrator of the estate generally. Whether this status adds a new party as distinct from a new claim is arguable.

[13] Postponement of a limitation period on grounds of discoverability has not been codified by statute in the Yukon and remains a common-law issue. In my view, the Yukon law is not so clear on the authorities that the limitation defence must succeed. I think it remains an arguable issue to be determined at trial. That being so, I think it was within the discretion of the chambers judge to allow the amendment as "just and convenient" under rule 15(5)(a). I do not think that the appellants are significantly prejudiced by the amendment. The limitation defence remains open, no new issue of liability will arise by the amendment, and I do not think that the scope of discovery and evidence on damages will be materially expanded. Accordingly, I would dismiss the appeal and allow the parties to make written submissions on costs.

[14] RYAN J.A.: I agree.

[15] PROUDFOOT J.A.: I agree.

[16] RYAN J.A.: The appeal is dismissed and parties are permitted to submit written argument with respect to costs.

MacKENZIE J.A.