



The reasons for judgment of the Court were delivered orally by:

**GLUBE, C.J.N.S.:**

Bruce R. Brett (the respondent) commenced an action on May 30, 1997 against Anthony & Boulton and James N. Horwich (the appellants).

Mr. Horwich is a chartered accountant and partner in the Anthony & Boulton firm. Mr. Brett has a number of business interests, including a fifty percent ownership of Empire Excavators Limited held for him in the name of an employee. The remaining shares in Empire were held by one James Taylor, the President of Empire.

In March 1990, the Bank of Montreal placed Empire in receivership. In June 1990, the Bank sued Messrs. Brett and Taylor on their personal guarantees. On November 5, 1991, Mr. Brett joined Anthony & Boulton as a third party to the Bank's action. The claim alleged negligence by Mr. Horwich in preparing the 1987 and 1988 Empire financial statements and that Mr. Brett relied upon the alleged inaccuracies when he executed his Guarantee to the Bank. Mr. Horwich filed a defence on November 18, 1991, denying any liability.

Mr. Brett settled with the Bank early in 1992, but the third party claim remained outstanding. In March 1993, Mr. Brett filed a complaint against Mr. Horwich with the Institute of Chartered Accountants of Nova Scotia (ICANS). The solicitors for Mr. Horwich objected to the complaint proceeding while the civil action was outstanding. On May 19, 1993, Mr. Brett discontinued the third party claim. Mr.

Brett would not agree to the case being dismissed. The decision of ICANS was released June 14, 1995.

In July 1995, Mr. Brett instructed his accountant, Robert Teale, to meet with a solicitor to brief him on the claim against Anthony & Boulton. When that solicitor had not commenced an action by the fall of 1996, Mr. Brett instructed Mr. Teale to meet with a different solicitor. This occurred in January and March of 1997. The present action, commenced on May 30, 1997, contains the same allegations of negligence against Mr. Horwich and reliance by Mr. Brett on the financial statements as did the third party action. In addition, the claim contains allegations of fraudulent misrepresentation and conspiracy against Mr. Horwich.

The defence denies any liability. Paragraph 5 of the Defence specifically states:

The Defendants say that the Plaintiff's action herein was commenced out of time and the Defendants plead and rely upon the provisions of the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258.

On April 22, 1998, Mr. Brett filed an application for:

1. An order under **Rule 14.25** of the **Civil Procedure Rules** striking out paragraph 5 of the Defence filed on October 30, 1997, on the grounds that it is false, vexatious and may prejudice, embarrass or

delay the fair trial of the proceeding.

2. In the alternative, an order under subsection 3(2) of the **Limitation of Actions Act**, R.S.N.S., 1989, c. 27, as amended, disallowing the defence in paragraph 5 of the Defence based on the time limitation and allowing the action to proceed, on the grounds that it is equitable to do so.

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On June 22, 1998, the appellants (defendants) filed an application pursuant to **Civil Procedure Rule** 42.01 requiring Mr. Brett to post security for costs; and on June 24, 1998, filed an application for an order dismissing the plaintiff's claim pursuant to **Civil Procedure Rule** 14.25(1)(d).

The applications were heard on July 8 and 9, 1998, in Chambers. In the written decision of Justice Goodfellow released on July 13, 1998, he found the action was substantially out-of-time, but exercised his discretion and allowed the action to proceed pursuant to s. 3(2) of the **Limitation of Actions Act**. He declined to order security for costs. The order dated August 5, 1998 contains the following: It dismisses the application to strike paragraph 5 of the defence; it disallows the limitation defence; it dismisses the application for security for costs; and, it gave no

costs on the application.

The issues raised on appeal are as follows:

1. Did the Learned Chambers Judge err in exercising his discretion so as to disallow the Appellants' limitation defence?
2. In the alternative, did the Learned Chambers Judge err in declining to order that this proceeding should be stayed pending Brett posting security for costs?

Both of the orders made by Justice Goodfellow are discretionary. It is not our function to determine whether we would have made the same disposition, but rather whether the Chambers judge erred in so doing. We hold the reasons of the Chambers judge do not disclose any error in principle and the results do not give rise to manifest injustice.

Leave to appeal is granted, but the appeal is dismissed without costs.

We would add with respect to security for costs, this result is without prejudice to the right of the appellants "to bring a further application for security for costs if additional cogent evidence on the relevant issue is developed." ( **Motun (Canada) Ltd. et al. v. Detroit Diesel-Allison Canada East** (1998), 165 N.S.R. (2d)

217; 495 A.P.R. 217 at p. 225.)

C.J.N.S.

Concurred in:

Chipman, J.A.

Cromwell, J.A.