C.A. No. 122686

NOVA SCOTIA COURT OF APPEAL
Cite as: Binder v. Royal Bank of Canada, 1996 NSCA 87

Hallett, Freeman and Bateman, JJ.A.

BETWEEN:

FABIAN LOWELL BINDER	)	Robert Murrant, Q.C.
	)	Chris Lockwell
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	William L. Ryan, Q.C.
	)	John E. MacDonell
	)	for the Respondent
	)	The Royal Bank of Canada
	)	
	)	John D. MacIsaac, Q.C.
THE ROYAL BANK OF CANADA, a body corporate and THE BANK OF MONTREAL, a body corporate	)	for the Respondent
	)	The Bank of Montreal
	)	
	)	
	)	
Respondents	)	Appeal Heard:
	)	April 1, 1996
	)	
	)	
	)	Judgment Delivered:
	)	April 1, 1996
	)	

THE COURT: Leave to appeal is granted and the appeal allowed per oral reasons for judgment of Bateman, J.A.; Hallett and Freeman, JJ.A. concurring.

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

BATEMAN: J.A.

This is an appeal from the decision of a chambers judge striking the appellant's Statement of Claim.

The appellant and Max Gordon were equal shareholders in a company known as "Gorbin". It is alleged that (i) in 1972, without the appellant's knowledge or consent, Mr. Gordon placed a $75,000 second mortgage on certain property owned by the company; (ii) the cheque for the third and final instalment of the mortgage proceeds, drawn on the Bank of Montreal, was made payable to Mr. and Mrs. Gordon and Gorbin; (iii) Mr. Gordon endorsed that cheque on behalf of Gorbin and deposited the proceeds to the Royal Bank account of Gordon's Concrete Products Ltd., a company owned by him; (iv) Gorbin's shareholder's resolutions and banking resolutions required the signatures of both Mr. Gordon and the appellant on legal documents and cheques; (v) Gorbin did its banking with the Bank of Nova; (vi) the appellant first became aware of the mortgage in 1982 when it was foreclosed.

In August of 1995 the appellant initiated this action against the respondent Banks. The appellant's action alleges conversion, breach of fiduciary duty and negligence by the Banks.

The respondents applied to the Chambers judge under **Civil Procedure Rule 14.25(a)**, to strike the Statement of Claim on the basis that it disclosed no reasonable cause of action or, alternatively, "for an Order striking the Statement of Claim as being barred by the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258, as amended". In a thorough and thoughtful decision the Chambers judge determined, pursuant to **Civil Procedure Rule 25.01**, that the action was statute barred and struck the Statement of Claim. Having done so, it was unnecessary for her to consider the application under **Rule 14.25**.

The relevant part of **Civil Procedure Rule 25.01(1)** provides in part:

> 25.01(1) The court may, on the application of any party or on its own motion, at any time prior to a trial or hearing,
>
> > (a) determine any relevant question or issue of law or fact, or

both;

It appears from the material before us that neither of the parties brought to the attention of the Chambers judge, the law regarding applications pursuant to **Civil Procedure Rule 25.01**.

In **Curry v. Dargie** (1984), 62 N.S.R. (2d) 416 (A.D.), MacDonald, J. A. wrote, in a concurring judgment, at p. 430:

> To my mind the only proper method of having the issue determined in this case before trial was on a proper application under Rule 25. This rule, however, appears to be applicable only where the parties agree to submit a question of law to the court based upon an agreed statement of fact - *McCallum v. Pepsi Cola Canada Ltd. et al.* (1974), 15 N.S.R. (2d) 27; . . .

These comments were approved by this court in **Seacoast Towers Services Ltd. v. MacLean** (1986), 75 N.S.R. (2d) 70. (see also **Brown v. Dalhousie Board of Governors** (1995), 142 N.S.R. (2d) 98 (N.S.C.A.))

This court held in **Abbott and Steeves v. Cook** (1980), 40 N.S.R. (2d) 614 that the **Statute of Limitations** "does not authorize any procedure for deciding prior to trial the limitation issue pleaded in the defence", per MacKeigan, C.J.N.S..

The parties here did not submit an agreed statement of fact to the Chambers judge. Each party filed Affidavits at the Chambers hearing. Counsel for the Royal Bank argued that there was not a dispute on the facts, and to the extent that there was, the Chambers judge accepted the evidence of the appellant, as to when he discovered the existence of the mortgage and the improper actions of Mr. Gordon. Nevertheless, the Chambers judge might not have accepted his evidence on this issue in view of the contents of Mr.

Crawford's affidavit which clearly contradicted certain of the appellant's assertions. Therefore the determination by the Chambers judge did require findings of fact, in particular regarding the timing of the discoverability of the material facts by the appellant. In the absence of an agreed statement of fact, it cannot be assumed that the appellant brought forward all facts relevant to an application under **Rule 25.01** and may have been relying upon **Rule 14.25** under which evidence is not considered. **Rule 25.01** was not specifically plead by the respondents in the Notice of Application. It was recognized in **Seacoast Towers**, **supra**, that there may be exceptional cases where an agreed statement of fact is unnecessary, for example, where the facts underlying the resolution of the legal issue are a matter of public record. This case does not fall within any such exception. Accordingly, the Chambers judge erred in proceeding with the application pursuant to **Civil Procedure Rule 25.01**.

It is unnecessary to consider the application to amend the Notice of Appeal.

Leave to appeal is granted. The appeal is allowed with costs to the appellant, on the Chambers application, in the amount of $350 and on the appeal in the amount of $750 plus disbursements. The Order of the Chambers judge striking the appellant's Statement of Claim is set aside.

J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.

C.A. No.122686

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

FABIAN LOWELL BINDER	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
THE ROYAL BANK OF CANADA	)	
and the BANK OF MONTREAL	)	
BATEMAN,	)	J.A.
Respondents	)	