C.A. No. 135212

NOVA SCOTIA COURT OF APPEAL
Cite as: Layes v. Chishol, 1997 NSCA 81
Hallett, Jones and Freeman, JJ.A.

BETWEEN:

ETHEL MAYE LAYES Appellant in person		
Appellant		Clarence A. Beckett, Q.C. for the respondent Chisholm
- and -		Daniel J. MacIsaac for the Respondent Stewart
DUNCAN J. CHISHOLM and JAMES STEWART		
Respondents		Appeal Heard: April 11, 1997
		Judgment Delivered: April 30, 1997

THE COURT: Appeal from decision refusing appellant's motion to disallow the limitation defence is dismissed; and the appeal from the decision dismissing the appellant's action is allowed per reasons for judgment of Hallett, J.A.; Jones and Freeman, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from a decision of a Supreme Court judge in Chambers. He dismissed the appellant's application for an order disallowing the respondents' defence that the appellant's action is barred by the **Limitation of Actions Act**, R.S.N.S. 1989, c. 258 (the **Act**). He also dismissed her action.

After hearing argument the Chambers judge reserved for a short time and then rendered an oral decision, the relevant parts of which (amended to correct typing errors) are as follows:

> "Having carefully considered the documents on file, the briefs and oral submissions and the provisions of the Statute of Limitations, particularly Section 3(2), (4) and (6), as the facts apply to this application, I would accept that the law is properly stated by Mr. Beckett. The action is in contract and tort and as stated in Supreme Court of Canada case, Central Trust v. Rafuse. Mr. MacIsaac, as I understand it, adopts the position taken by Mr. Beckett in this regard as he represents Mr. Stewart. I would find that the application is dismissed and the action is statute barred."

The appellant's action, which is framed in deceit, contract and negligence was required to be commenced within six (6) years after the cause of action arose (s. 2(1)(e) of the **Act**).

The action arose out of two property transactions; the sale of the appellant's home on St. Mary's Street in the Town of Antigonish and the purchase of a home in Ohio, Antigonish County. The respondent Chisholm was the appellant's solicitor with respect to both transactions. The respondent Stewart, is a real estate agent involved in the purchase of the property at Ohio. The transactions were completed at the end of June 1983 and were finalized by the report letters from Mr. Chisholm to the appellant in July of 1983.

The action was not commenced until July 13, 1996; 13 years after the

transactions in question.

Pursuant to s. 3(2) of the **Act** a court may, upon application by a plaintiff, disallow a defence based upon time limitations in certain circumstances. The factors to be considered by the court on such an application are set out in s. 3(4).

Sub-section 3(6) provides:

> "3. (6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired."

There is no jurisdiction to extend the time to commence an action in contract if more than four (4) years has passed after the time limitation expired. The appellant's action in contract arose, at the latest, in July of 1983, the time when the services were performed by the respondents. The time limitation in contract, therefore, expired in July of 1989. The action in contract ought to have been commenced by July 1993 to avoid the effect of s. 3(6) of the **Act**. Therefore, with respect to the action in contract there was no jurisdiction in the Chambers judge to grant relief as provided for in the **Act**. The Chambers judge did not err in refusing to disallow the defence to the contract action.

The general rule in a tort action is that a cause of action arises for the purpose of a limitation period when the material facts upon which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence (**Central Trustco v. Rafuse**, [1986] 2 S.C.R. 147; and **MacCulloch v. McInnes Cooper & Robertson** (1995), 140 N.S.R. (2d) 220). This rule governs the appellant's action framed in negligence, misrepresentation and deceit.

As can be seen from the decision of the Chambers judge, he did not make an express finding with respect to the discoverability issue.

A review of the material before the Chambers judge shows that the appellant offered no evidence on the application to prove that the action was not statute barred or that she was entitled to any other relief under the **Act**. On the contrary, based on the pleadings and the extensive evidence adduced by the respondents, it is clear that the main issues in the tort action, framed in negligence, misrepresentation and deceit are barred under the Statute. The evidence satisfies me that the material facts on which the main issues in the appellant's action are based were known or ought to have been known to the appellant and her late husband at the latest when they received the reports from Mr. Chisholm respecting the completion of the sale of the home on St. Mary's Street in Antigonish and the purchase of the Ohio property. This was in July, 1983. Mr. Chisholm's reports were clear. The main issues I refer to are the allegations: (i) that the appellant ought to have received from Mr. Chisholm $25,000 more than they did as the proceeds from the sale of the St. Mary's Street home; and (ii) that the Ohio property was represented to be 150 acres, not 50 acres. While we are not in a position to determine what representations Mr. Stewart or Mr. Chisholm may have made that the property at Ohio consisted of 150 acres, the appellant ought to have known that the property consisted of only 50 acres when she received Mr. Chisholm's report in July of 1983. She had signed an agreement which stated that the property being purchased at Ohio was 50 acres. The mortgage inspection certificate which she received from Mr. Chisholm in July of 1983 contained a description which stated the property was 50 acres more or less. This description was also in the deed which was

forwarded to her in July of 1983 by Mr. Chisholm. All the appellant had to do to ascertain that she was acquiring a property of 50 acres was to read Mr. Chisholm's report and the documents enclosed.

Mr. Chisholm's reports correctly showed the funds the Layes realized from their sale. They also showed that the Layes had acquired a 50 acre property in Ohio. The Layes claim they should have received a 150 acre property, based on representations made to them by the respondents prior to the purchase of their property. Both respondents filed affidavits denying making such a representation.

The Layes allege that they were given to understand that the property was intact, unchanged from old descriptions, and ran from a public highway to a base line. If the property had been intact and conformed to that description it might well have contained 150 acres. However their immediate predecessors in title had themselves acquired, and therefore could convey to the Layes, only a 50 acre property. The original lot was not intact. A predecessor in title had reserved to himself portions of land adjacent to the base line and the highway. While the discrepancy in the acreage might not have been obvious to persons inexperienced in land measurement, the ownership of the lands separating the Layes' property from the highway and the base line was clearly shown on their deed description. The description also included a right of way from the highway to their 50-acre lot across the lands previously reserved. Whether or not the Layes were given a faulty understanding as to what they were buying, they are out of time in seeking a remedy.

In short, the cause of action relating to the main issues, whether framed in contract or tort, arose in July of 1983, some 13 years prior to the

commencement of the action. Section 3(6) of the **Act** has application. Therefore, the Chambers judge had no jurisdiction, with respect to the main issues, to grant the appellant's application to disallow the limitation defence.

In addition to the two main issues raised in the proceedings, the statement of claim alleges that the appellant and her late husband were not advised by Mr. Chisholm that the Ohio property was subject to an agreement between a previous owner and the Government of Nova Scotia respecting the management of the lands as a woodlot nor advised that there was an easement to a neighbour to access a well on the property. However, the appellant has not put forward any evidence that the woodlot management agreement constituted an encumbrance on the property nor that an easement exists. Mr. Chisholm's affidavit states that his title search failed to discover the woodlot management agreement as it was incorrectly indexed at the Registry of Deeds. Mr. Chisholm's affidavit does not contain a statement as to whether or not there is registered a document granting an easement over the Ohio property. A review of the certificate of title shows that there is no mention of either the woodlot management agreement or the alleged easement.

The appellant also asserts that her application to have the Court disallow the limitation defence ought not to have been set down by Justice MacLellan for hearing prior to the hearing of an application she had brought for the production of documents. The appellant appeared before Justice MacLellan on October 15, 1996. The purpose of the hearing was to fix a date for the hearing of the two applications. The transcript shows that the appellant agreed that her application to disallow the limitation defence be set for hearing on January 6th, 1997, and that the application for the production of documents

would be dealt with at a pre-trial conference subsequent to the January 7th, 1997 hearing. Therefore, Justice MacLellan did not err in setting this matter down; it was set down by consent.

The appellant also submits that when the application to disallow the limitation defence came on for hearing before Justice Anderson on January 6th, 1997, he erred in refusing to grant her an adjournment which she requested at that time. She wished to have that application postponed until the hearing for the production of documents was disposed of as she was, and is, of the opinion that it is essential to have the documents produced prior to a court making a decision on the application to disallow the defence. Having been advised by the appellant during the hearing of this appeal of the nature of the documents that she was seeking, I am satisfied that they would have added nothing to the record that could possibly influence the outcome of a decision on the application to disallow the limitation defence. That aside, adjournments are within the discretion of a Chambers judge. This adjournment came at the last minute on a hearing that had been set down with the appellant's consent since October 15th, 1996. The Chambers judge cannot be said to have erred in refusing the adjournment.

During her oral submission on this appeal the appellant continued to make serious allegations of fraud and dishonesty against Mr. Chisholm, none of which were supported by any evidence. In fact, the evidence clearly shows that upon receiving the two reports on these property transactions from Mr. Chisholm in July of 1983, the Layes ought to have known, with the exercise of reasonable diligence, that they were not short changed in the amount of $25,000 on the sale of their home and that they were acquiring a 50 acre property at Ohio, not a 150 acre property.

On the hearing of the appeal the appellant made scandalous, irrational and irresponsible allegations of bias against Justices MacLellan and Anderson and counsel for both respondents.

The appellant is of the view that there was a widespread conspiracy to defraud her, both with respect to the sale of her St. Mary's Street property and the purchase of the Ohio property. Based on her submissions made to the Court, this distorted view of these transactions appears to have its genesis in a letter dated 1983/05/28 from Catherine M. MacNeil, solicitor, practicing with Jean C. MacPherson, Q.C. to Mr. Chisholm. In that letter Ms. MacNeil, who was acting for the purchaser of the St. Mary's Street property, forwarded their firm cheque in the amount of $46,113.75 to Mr. Chisholm stating that the sum represented payment in full of the purchase price. It was forwarded on the express understanding that he would pay off the Layes mortgage on the St. Mary's Street property.

From a review of all the documents relating to these transactions, it is quite apparent that this letter should have been dated 1983/06/28 as it was at the end of June that these transactions were completed. Based on this one letter, the appellant has convinced herself that there was some sort of a deal cooked up between the lawyers to sell the St. Mary's Street property to the MacIsaacs even before the Layes' counter offer of May 27th was made and accepted by the purchaser on May 30th, 1983.

With respect to the questions relating to the woodlot management agreement and the alleged easement, the appellant had the onus to put forward evidence to support the application that the limitation defence should be disallowed. The appellant failed to do so, thus, Justice Anderson did not err in

dismissing her application. However, Justice Anderson not only dismissed the application made pursuant to s. 3(2) of the **Act**, but also dismissed the appellant's action.

There was no application before Justice Anderson pursuant to **Civil Procedure Rule** 14.25 to strike the appellant's statement of claim nor was there before him an application pursuant to **Rule** 25 to determine whether the appellant's action was barred by the Statute. Such an application should only be made where the parties agree to submit a question of law to the court based upon an agreed statement of facts (**Binder v. Royal Bank of Canada et al.** (1996), 150 N.S.R. (2d) 234 (C.A.)). Accordingly, Justice Anderson erred in dismissing the action.

Conclusion

The appeal from the decision refusing the appellant's motion to disallow the limitation defence is dismissed.

The appeal from the decision dismissing the appellant's action is allowed.

There has been divided success on the appeal, therefore, there will be no order of costs against any party.

Hallett, J.A.

Concurred in:

Jones, J.A.

Freeman, J.A.

C.A. No. 135212

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ETHEL MAYE LAYES

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Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	
DUNCAN J. CHISHOLM and JAMES STEWART	)	HALLETT, J.A.
	)	
Respondents	)	
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