IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Herbin v. Halifax Atlantic Investments Ltd., 2002 NSSC 287

Date: 20021209
Docket: S. BW. 181049
Registry: Bridgewater

Between:

Linda Herbin

Plaintiff

v.

Halifax Atlantic Investments Limited, a body corporate, carrying on business as Wandlyn Inns

Defendant

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	November 26, 2002, in Bridgewater, Nova Scotia
Decision:	December 9, 2002 (Orally)
Written Release of Decision:	January 13, 2003
Counsel:	Rubin Dexter, for the plaintiff R. Barry Ward, for the defendant

By the Court:

[1] This is an application by the defendant for an order striking out the originating notice and statement of claim pursuant to Civil Procedure Rule 14.25.

[2] Linda Herbin went to the Wandlyn Inn at Bridgewater, Nova Scotia on May 22, 2000 to dine at the restaurant in the motel. Upon sitting herself, the chair broke and she injured herself. On June 7, 2002, Ms. Herbin commenced

action against the defendant, the owner of the Wandlyn Inn at the time of the incident.

[3] The basis of the defendant's application to strike is the action was commenced after the expiry of the limitation period for such an action. The defendant says the action has a two year limitation period pursuant to s. 2(1)(b) of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 which provides:

> **2(1)** The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:
>
> . . . .
>
> (b) actions for penalties, damages or sums of money given to the parties aggrieved by any statute, within two years after the cause of any such action arose;

[4] Conversely, the plaintiff says s. 2(1)(e) of the *Limitation of Actions Act* applies with a six year limitation period. Section 2(1)(e) of the *Limitation of Actions Act* provides:

> (e) all actions grounded upon any lending, or contract, expressed or implied, without specialty, or upon any award where the submission is not by specialty, or for money levied by execution, all actions for direct injuries to real or personal property, actions for the taking away or conversion of property, goods and chattels, actions for libel, malicious prosecution and arrest, seduction and criminal conversation and actions for all other causes which would formerly have been brought in the form of action called trespass on the case, except as herein excepted, within six years after the cause of any such action arose;

[5] Is an action for damages for occupiers' liability an action "which would formally been brought in the form of action called trespass on the case"? I find it is. In dealing with the issue of what is trespass on the case, Sharpe, J.A. stated in giving the judgment of the Ontario Court of Appeal in *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 at paras. 22 and 23:

> The action on the case was a derivation from the action of trespass. Maitland explained at p. 359 that all personal actions branched out from trespass. The writ of trespass contained the words "*vi et armis contra pacem*". The need to allege violence necessarily limited the scope of trespass, and gradually the clerks

of Chancery allowed modified versions of the writ that omitted the words "*vi et armis*". In these instances, the plaintiff was said to bring an action "upon his case" or "upon the special case", the particular facts of which were set out in the writ. By the end of the 14th century, a new and very flexible form of action had evolved. It became what Maitland described at p. 361 as "a sort of general residuary action; much particularly, of the modern law of negligence developed within it". Blackstone, *Commentaries on the Laws of England*, vol. 3 (Philadelphia: Rees Welsh & Co., 1897), at p. 122, described the action on the case as "a universal remedy, given for all personal wrongs and injuries without force; so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ". The writ of trespass was available for immediate injury to person or property "but where there is no act done, but only a culpable omission, or where the act is not immediately injurious, but only by *consequence* and collaterally; there no action of trespass *vi et armis* will lie, but an action on the special case, for the damages consequent on such omission or act". Bacon's *Abridgment*, 7th ed. (London: J. & W.T. Clarke Co., 1832) vol. 1 at p. 86 explained that "where the law has made no provision, or, rather, where no general action could be framed before-hand, (the ways of injuring, and methods of deceiving being so various,) every person is allowed ... to bring a special action on his own case, which is liberal action."

The action on the case was general and flexible and it allowed for the evolution of new claims based upon unintended and consequential harm. Much of the modern law of torts derived from the action on the case. The actions for deceit and nuisance were developed as actions on the case, as were the more modern actions of defamation and negligence. The historical evolution of the action on the case is canvassed in J.G. Fleming, *The Law of Torts*, 8th ed. (Sydney: The Law Book Company, 1992) and L. N. Klar, *Tort Law*, 2d ed. (Scarborough: Carswell, 1996). Both authors explain that the action on the case developed to provide a remedy for cases where the injury suffered was not "direct", but was due to an omission or an act only consequently injurious to the plaintiff's interests.

[6] An action for damages for occupiers' liability is an action formally known as trespass on the case.

[7] Does the enactment of the *Occupiers' Liability Act*, S.N.S. 1996, c. 27 change the limitation period for an action formerly known as trespass on the case to two years, pursuant to s. 2(1)(b) of the *Limitation of Actions Act*? There is nothing in the *Occupiers' Liability Act* dealing with limitation periods. Is an action for damages for occupiers' liability an action for "penalties, damages or sums of money given to parties aggrieved by any statute"?

[8] In dealing with the limitation period applicable under the Ontario *Limitations Act* in an action for statutory damages for patent infringement under the *Patent Act*, in giving the judgment of the Federal Court of Appeal in *Johnson Controls, Inc. v. Varta Batteries Ltd. (F.C.A.)* (1984), 53 N.R. 6, Urie, J. stated at p. 19:

> Mr. Justice Ryan, speaking for the court, at page 216 of the judgment referred to the English case of *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718. I quote at length the relevant passage from his reasons, since it disposes of the argument that the right to damages given by section 57 permits the utilization of the two year prescription period.
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> > In *Thomson v. Lord Clanmorris*, [1900] 1 Ch. 718, the English Court of Appeal was called upon to construe that part of section 3 of the *Civil Procedure Act, 1833*, which established a two-year limitation period in respect of " ... All Actions for Penalties Damages or Sums of Money given to the Party grieved, by any Statute now or hereafter to be in Force ...", the provisions which finds its counterpart in paragraph 2(1)(b) of the Nova Scotia *Statute of Limitations, 1967*. Lord Lindley, M.R., said at page 725:
> >
> > > The point raised on this appeal is a new one to us all, and no doubt there is some difficulty about it.
> > >
> > > In construing s. 3 of the Act of 1833, as indeed in construing any other statutory enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided. And when we look at the state of the law before the Act of 1833 we can see pretty plainly what was the mischief at which it was aimed. There were certain causes of action as to which there was no defined time of limitation. Some of them are enumerated in the earlier part of s. 3; for instance, "actions of debt upon any bond or other speciality," and others which are there mentioned. They were not provided for by the then existing Statutes of Limitations, and they are brought in. That was the first defect. There was another class of actions as to which there was no definite limitation of time, namely, "actions for penalties, damages or sums of money given to the party grieved" by various Acts of Parliament, by way of penalty or punishment; not by way of compensation to the person injured, but where, as was pointed out by Lord Esher M.R.

> when commenting in *Saunders v. Wiel* upon *Adams v. Batley*, punishment was the object; and where the money to be paid, whether it was called penalty, or damage or sum of money, was not assessed with the view of compensating the plaintiff, although he might put some of it in his pocket. That is the class of action which was contemplated by the latter part of s. 3. In other words, they were what are popularly called "penal actions". We arrive at this from the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured.

> The reasoning of Lord Lindley in respect of a statutory provision which is almost identical in terms to section 45(1)(h) of the *Ontario Limitations Act*, makes it clear, it seems to me, that that subsection relates to "penal actions" not actions the object of which is to compensate an aggrieved party for losses occasioned by the acts of another. An action for damages for infringement of a patent brought pursuant to the provisions of the *Patent Act* and in particular section 57 thereof is not a penal action. Its purpose is to give to the aggrieved party (the patentee) a right to damages to the extent of the actual loss suffered by him due to the acts of an infringing party. (see: *Lightning Fastener Co. Ltd. v. Colonial Fastener Ltd.*, [1937] S.C.R. 36, at 41). In my view, therefore, the time limitation imposed by subsection 45(1)(h) does not apply to actions of this kind.

[9] An action for damages for occupiers' liability has as its purpose to compensate the aggrieved person for losses by the acts of another and is not a "penal action". Section 2(1)(e) of the *Limitation of Actions Act* applies and not s. 2(1)(b).

[10] The application to strike the originating notice and statement of claim is dismissed.

[11] If I am wrong in finding the appropriate limitation period is six years and not two years, the plaintiff has brought an application for an order, if required, pursuant to s. 3(2) of the *Limitation of Actions Act* disallowing any defence based on the time limitation. The incident which is the basis of the action occurred on May 22, 2000. The plaintiff commenced action on June 7, 2002 - sixteen days after the expiration of two years from the date of the incident.

[12] Having regard to the factors set out in s. 3(4)(a) to (g) of the *Limitation of Actions Act* and the degree to which the time limitation prejudices the plaintiff and defendant, I am satisfied it would be inequitable to allow the limitation defence if the limitation period is two years instead of six years. In that case, I allow the plaintiff's application and disallow any defence based on the time limitation.

[13] The plaintiff shall have costs of the application in the amount of $750.00, payable forthwith.

C. Richard Coughlan, J.