EB-2011-0087

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF an application by Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight under section 19 of the *Ontario Energy Board Act*, 1998, S.O. 1998, for an Order of the Board determining that the contracts, filed with the Application, between the Applicants and Union Gas Limited /Ram Petroleums Limited have been terminated;

AND IN THE MATTER OF an application by Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight under section 38(2) of the *Ontario Energy Board Act*, 1998, S.O. 1998, for an Order of the Board determining the quantum of compensation the Applicants are entitled to have received from Union Gas Limited and Ram Petroleums Limited.

RESPONDENTS' BOOK OF AUTHORITIES

(Re: Union Gas Limited's Notice of Motion dated June 22, 2011)

July 21, 2011

DONALD R. GOOD A PROFESSIONAL CORPORATION
Barristers and Solicitors
43 Roydon Place, Suite 207
Ottawa, ON, K2E 1A3

Donald R. Good, P.Ag.,
LSUC No. 21253J

Tel: 613-228-9676
Fax: 613-228-7404
farmlaw@on.aibn.com

Solicitor for Applicants

TO: **Ontario Energy Board**
P.O. Box 2319
2300, Yonge Street, 27th Floor
Toronto, ON, M4P 1E4

Attention: Board Secretary

Tel: 1-888-632-6273
Fax: 416-440-7656

AND TO: **TORYS LLP**
Barristers and Solicitors
Suite 3000, 79 Wellington St. W.
Box 270, TD Centre
Toronto, ON, M5K 1N2

Patricia D.S. Jackson
LSUC No. 18466S

Tel: 416-865-7323
Fax: 416-865-7380

Crawford Smith
LSUC No. 42131S

Tel: 416-865-8209
Fax: 416-865-7380

Solicitors for the Respondent, Union Gas (moving party)

AND TO: **RAM PETROLEUMS LTD.**
1166 Bay Street, Suite 1304
Toronto, ON, M5S 2X8

Richard Opekar

Tel: 416-921-7496
Fax: 416-921-7496

INDEX

Tab	Authority
1	*Rules of Civil Procedure*, RRO 1990, Reg 194 at s. 20.04
2	*Mensink v. Dale (1998)*, 39 O.R. (3d) 51
3	*Aguonie v. Galion Solid Waste Material Inc. (1998)*, 38 O.R. (3d) 161
4	*Mensah v. Robinson*, [1989] O.J. No. 239
5	*Davis v. Sawkiw* (1983), 38 O.R. (2d) 466
6	*Smyth v. Waterfall (2000)*, 50. O.R. (3d) 481
7	*Horton v. Joyce*, [1990] O.J. No. 1641
8	*Hi-Tech Group Inc. v. Sears Canada Inc*, [2001] O.J. No. 33
9	*Snopko v. Union Gas Ltd.*, [2010] O.J. No. 1335 (Ont. C.A.)
10	*Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177-184

TAB 1

Current to June 25, 2011

R.R.O. 1990, Reg. 194, r. 20.04

Courts of Justice Act

RULES OF CIVIL PROCEDURE

R.R.O. 1990, Reg. 194

Amended to O. Reg. 186/10

DISPOSITION WITHOUT TRIAL

RULE 20 - SUMMARY JUDGMENT

DISPOSITION OF MOTION

RULE 20.04

General

20.04 (1) REVOKED: O. Reg. 438/08, s. 13 (1), effective January 1, 2010 (O. Gaz. December 27, 2008).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Powers

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount.

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts.

** Editor's Table **

For changes prior to February 2001, please see other sources for in force information.

Provision	Changed by	Effective	Gazette Date
20.04	O. Reg. 438/08 s13	2010 Jan 1	2008 Dec 27
20.04(2)	O. Reg. 284/01 s6	2002 Jan 1	2001 Aug 4

*****

R.R.O. 1990, Reg. 194, r. 20.04; O. Reg. 533/95, s. 3; O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13.

TAB 2

Indexed as:

Mensink v. Dale

Between
Bernie Mensink, Sonya Ford, Ben Mensink, Patricia Hogan, Frank Dale, et al., (plaintiffs/appellants), and
Tracey Marie Dale, Jose G. Tavares and M.C.F. Concrete Forming Ltd., (defendants/respondents)

[1998] O.J. No. 821

39 O.R. (3d) 51

3 C.C.L.I. (3d) 267

77 A.C.W.S. (3d) 1272

Docket No. C26336

Ontario Court of Appeal
Toronto, Ontario

Finlayson, Carthy and Goudge JJ.A.

Heard: February 24, 1998.
Judgment: February 27, 1998.

(2 pp.)

Counsel:

D. Monteith, for the appellants.
D. Murray, for the respondents, Jose G. Tavares and M.C.F. Concrete Forming Ltd.
K. Kamra, for the respondent, Tracey Marie Dale.

The following judgment was delivered by

1 THE COURT (endorsement):-- With great respect to the motions judge, he appears to have considered the matter before him as if he was sitting as a trial judge. The issue is whether there was a triable issue, not how it should have been resolved.

2 The allegations of contributory negligence in this case are not spurious. Additionally, by discussing the last clear chance doctrine, the motions judge appears to have fallen into error in resolving his doubts on the evidence in favour of the respondents Tavares and M.C.F. Concrete Forming Ltd.

3 In our view, there was evidence upon which a jury could find some element of negligence on the part of the respondent Tavares. Accordingly, the appeal is allowed and the judgment below is set aside.

4 The appellant is entitled to solicitor and client costs on the Tavares and M.C.F. Concrete Forming Ltd. motion before McIssac J., fixed at $4.000 and payable forthwith. We would award no costs on the appellant's motion before McIssac J. The appellant is entitled to its costs in the appeal against the respondents Tavares and M.C.F. Concrete Forming Ltd. on a party and party basis. There is no other award of costs.

FINLAYSON J.A.
CARTHY J.A.
GOUDGE J.A.

cp/d'amp

TAB 3

Indexed as:

Aguonie v. Galion Solid Waste Material Inc.

Between
Mildred Aguonie, Jullian Aguonie and the minors, Lyman Aguonie Jr. Steven Aguonie, Amanda Aguonie, Melanie Aguonie and Janinne Aguonie by their litigation guardian Peter N. Downs, plaintiffs (appellants), and
Galion Solid Waste Material Inc. and Galion Dump Bodies Inc. operating as Peabody Galion Material Handling Products, Crysteel Mfg. Inc., Ron Strauss operating as R.J. Trucks and Monarch Hydraulic Inc., defendants (respondents)

[1998] O.J. No. 459

38 O.R. (3d) 161

156 D.L.R. (4th) 222

107 O.A.C. 115

17 C.P.C. (4th) 219

77 A.C.W.S. (3d) 520

Docket No. C27123

Ontario Court of Appeal
Toronto, Ontario

Carthy and Abella JJ.A and Borins J. (ad hoc)

Heard: December 10, 1997.
Judgment: February 9, 1998.

(24 pp.)

Family law -- Dependents' relief legislation -- Persons entitled to relief -- Practice -- Time for application -- Determination of, by summary judgment -- When available.

Appeal by the Aguonies from an order granting summary judgment against them on the basis that the limitation period under section 61(4) of the Family Law Act had expired. Aguonie was killed when carrying out repairs to a truck while employed by the First Nations Band. One year after Aguonie's death, the Aguonie family was provided with a report that suggested the accident may have been the fault of the defendants. The Aguonie children brought an action pursuant to section 61 of the Family Law Act for damages, which attracted a two-year limitation period from the time that cause of action arose. The statement of claim was issued two years and two months after the death of Aguonie. The Aguonies submit that the limitation period did not start to run at the time of Agounie's death, but rather one year later, when they received the report that alleged the fault of the defendants.

HELD: Appeal allowed. The order of the motions judge dismissing the action was set aside. The factual issues relating to the application of the discoverability rule and the factual issues relating to discretion under section 2(8) of the Act were genuine issues for trial. The trial judge exceeded his role in dismissing the action pursuant to a summary judgment. He unduly restricted the discoverability rule, which applied to section 61(4) of the Family Law Act.

Statutes, Regulations and Rules Cited:

Family Law Act, R.S.O. 1990, c. F.3, ss. 2(8), 61(1), 61(4). Limitations Act, R.S. O. 1990, c. L.15, s. 15.

Counsel:

David B. Williams and J. Caskey, for the plaintiffs, appellants.
J. Scott Maidment, for Peabody Galion Material Handling Products, defendant, respondent.
Bradley W. Stone, for Crysteel Mfg. Inc., defendant, respondent.
J. David Murphy, for R.J. Trucks, respondent and cross-appellant.

The judgment of the Court was delivered by

BORINS J. (ad hoc):--

OVERVIEW

1 The plaintiffs appeal the dismissal of their action following motions brought by the defendants pursuant to Rule 20 of the Rules of Civil Procedure. The motions judge held that the defendants had established that there was no genuine issue for trial upon his findings that the plaintiffs were precluded from commencing their action by the two-year limitation period in s. 61 (4) of the Family Law Act, R.S.O. 1990, c. F.3 ("FLA") and that this was not a proper case to extend the limitation period under s. 2(8) of the Act. He also held that the s. 61(4) limitation period, as it affected the minor plaintiffs, was not extended by s. 47 of the Limitations Act, R.S.O. 1990, c. L.15.

2 The defendant, R.J. Trucks, has appealed the order of the motions judge granting leave to the plaintiffs to amend the statement of claim by adding a claim for nervous shock on behalf of the plaintiff, Mildred Aguonie.

3 The plaintiffs' appeal raises the issues of the proper role of a motions judge when hearing a motion for summary judgment and the applicability of the discoverability rule to the circumstances of this case.

FACTS

4 Lyman Aguonie was an employee of the Sheguiandah First Nations Indian Band (the "Band"). On October 4, 1993, he was killed while carrying out repairs to a water tank truck owned by the Band. He was crushed to death when the water tank suddenly lowered itself from an upright position, pinning him between the cab of the truck and the water dump box. While still alive, he was found in this position by his wife, the appellant, Mildred Aguonie.

5 The other adult appellant, Jullian Aguonie, is Lyman Aguonie's brother. The five minor appellants are his children. At the date of their father's death, they ranged in age from 5 to 13 years. The appellants brought this action pursuant to s. 61(1) of the FLA. In addition to damages under the Act, they seek aggravated, punitive, exemplary and special damages.

6 About February 2, 1994, the appellants retained the law firm of Lerner & Associates ("Lerner") to prosecute a claim under s. 61(1) of the FLA. On March 30, 1994, Lerner issued a statement of claim in which the appellants sued the Band, Richard Shawanda, Gloria Manitowabi, Evelyn Aguonie, on their own behalf and on behalf of all other members of the Band, and the Queen in Right of Ontario as represented by the Minister Responsible for Indian Affairs, alleging that the defendants, as employers and owners of the truck, created an unsafe working environment and failed to properly maintain the truck, and seeking damages under s. 61(1) of the FLA.

7 In January 1995, Lerner retained Ronald Miller, of Miller Technology Inc., a mechanical technologist, to investigate the incident. On January 27, 1995, Mr. Miller provided a report which contained information, and his opinion, suggesting that the

accident may have been caused by the negligence of the respondents. Consequent to Mr. Miller's report, this action was commenced, based on the alleged negligence of the respondents. The statement of claim was issued on December 15, 1995, which was two years, two months and eleven days after Lyman Aguonie was killed. It was served on the respondents on January 12, 1996.

8 The evidence indicated that the appellants' solicitors concluded that this claim was a products liability claim which attracted a six-year limitation period and it was through inadvertence that they had failed to consider the provisions of the FLA. The evidence also indicated that the appellants had instructed Lerner to proceed with a claim against anyone responsible for Lyman Aguonie's death.

9 In response to the respondents' motions for summary judgment, an associate in the Lerner firm deposed that Mr. Miller had informed the firm, prior to the completion of his report, that he had contacted Mr. Steven Drexel, a service manager with the respondent, Peabody Galion Material Handling Products, and Mr. Ron Strauss, the owner of the respondent, R.J. Trucks, to discuss this matter, including certain technical aspects of the installation, manufacture and assembly of the water tank truck. The associate deposed to the belief that, as a result of these conversations, these respondents were aware of the appellants' potential claim, or ought to have realized there could be a potential claim arising out of manufacturing flaws and the lack of adequate warning about the dangers of the water tank truck.

10 Each of the respondents moved for summary judgment on the ground that the appellants' claims were statute-barred by the combined effect of s. 61(4) of the FLA and s. 38(3) of the Trustee Act, R.S.O. 1990, c. T.23.

STATUTORY PROVISIONS

11 It is helpful to reproduce the relevant statutory provisions.

The Family Law Act

61. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

....

(4) No action shall be brought under subsection (1) after the expiration of two years from the time the cause of action arose.

2. (8) The court may, on motion, extend a time prescribed by this Act if it is satisfied that,

(a) there are apparent grounds for relief;
(b) relief is unavailable because of delay that has been incurred in good faith; and,
(c) no person will suffer substantial prejudice by reason of the delay.

The Limitations Act

47. Where a person entitled to bring an action mentioned in section 45 or 46 is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which the action may be brought shall be reckoned from the date when such person became of full age or of sound mind.

The Trustee Act

38. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of

> the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased but if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the Family Law Act.
>
> ....
>
> (3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

THE REASONS OF THE MOTIONS JUDGE

12 The approach taken by the motions judge to the respondents' motions for summary judgment was to consider when "the cause of action arose" within the meaning of s. 61(4) of the FLA and the application of the discoverability rule. After apparently concluding that it arose on the date Lyman Aguonie was killed, October 4, 1993, he held that the discoverability rule did not apply to the circumstances of this case. He then concluded that s. 47 of the Limitations Act did not apply to extend the time for bringing the derivative claims of the minor appellants under s. 61(1) and (4) of the FLA. Finally, he concluded that the appellants had failed to satisfy the conditions of s. 2(8) of the FLA in respect to the claims of the adult respondents, and declined to exercise his discretion under that provision to extend the time for bringing their claims under s. 61(4) of the Act. Accordingly, he allowed the respondents' motions for summary judgment and dismissed the appellants' action. In doing so, he stated: "In reaching this conclusion I have considered all the well known indicia for summary judgment." However, he did not refer to any of the authorities which have interpreted, or applied, Rule 20.

13 The motions judge considered whether the determination of when the cause of action arose depends on the application of the discoverability rule as discussed in Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2 and Central Trust Company v. Rafuse, [1986] 2 S.C.R. 147. He applied the following characterization of the rule by Dubin J.A. in Consumers Glass Co. v. Foundation Co. of Canada (1985), 51 O.R. (2d) 385 (C.A.) at 398:

> In my opinion, in cases which are based on a breach of duty to take care, a cause of action does not arise, and time does not begin to run for the purposes of the Limitations Act, until such time as the plaintiff discovers or ought reasonably to have discovered the facts with respect to which the remedy is being sought, whether the issue arises in contract or in tort.

14 As the motions judge acknowledged, the position taken by counsel for the appellants was that the limitation period under s. 61(4) of the FLA did not commence to run until the appellants had discovered, or ought reasonably to have discovered, the facts on which the appellants' claim was based. The appellants' position was that they did not have knowledge of the facts which constituted the cause of action against the respondents until the receipt of Mr. Miller's report of January 27, 1995 and, therefore, that the limitation period commenced to run on that date. As I will discuss subsequently, the application of the discoverability rule to the facts of a particular case necessarily requires a finding of fact about when the plaintiff discovered the facts in respect to the remedy sought, or, through reasonable diligence, ought to have discovered the facts.

15 With due respect to the motions judge, it is not clear on what basis he determined this issue in favour of the respondents. He reviewed a number of authorities in which the discoverability rule had been applied, including the decision of this court in Peixeiro v. Haberman (1995), 25 O.R. (3d) 1, in which an appeal to the Supreme Court of Canada had been dismissed, with reasons to follow, on March 13, 1997, a date after the motions had been argued and before the motions judge had released his reasons for judgment. The reasons of the Supreme Court of Canada have since been released and are now reported: (1997), 151 D.L.R. (4th) 429. Another authority he reviewed was Murphy v. Welsh, [1993] 2 S.C.R. 1069 sub nom. Stoddard v. Watson. In the motions judge's opinion, the discoverability rule had been applied only in cases of "delayed manifestations," such as the extent of a plaintiff's injuries as in the Peixeiro case, or the collapse of a roof 18 years after the construction of a building where the plaintiffs were unaware of any defects until the roof collapsed, as in Central Trust Co. v. Rafuse, supra.

16 The conclusions of the motions judge concerning the application of the discoverability rule are as follows:

> So what then did the plaintiffs not know on October 4, 1993, the day after Mr. Aguonie's death, that would have prevented them from knowing they had a cause of action. They knew Mr. Aguonie was dead and they knew that his death probably resulted from the lowering of the truck's dump body. Indeed the evidence before me indicates that the information as to who manufactured the truck was

> readily apparent on the vehicle and a simple viewing would have made that clear. The same, it would appear, applies with respect to other of the defendants. What delayed manifestation therefore was there that only became apparent after Mr. Miller examined the vehicle? The defendants, while agreeing that the discoverability rule represents a sound principle, say that it ought to be applied only in appropriate cases. In other words what material facts were not available to the plaintiffs immediately after the death of Lyman Aguonie that were either not readily available or could not have been discovered by the plaintiffs by the exercise of reasonable diligence?
>
> On the basis of the foregoing, regrettably, I must conclude that the discoverability rule has no application in the present case. I turn now to the next issue. [Emphasis added.]

17 In my view, in the passage quoted, the motions judge reached a finding of fact which formed the foundation for his conclusion that there was no "delayed manifestation" which engaged the discoverability rule. As I will explain, in doing so, he misconceived the role of a motions judge hearing a motion for summary judgment and also unduly restricted the application of the discoverability rule to a particular category of cases.

18 The motions judge concluded that s. 47 of the Limitations Act did not apply to extend the time for bringing the derivative claims of the minor appellants under s. 61(1) of the FLA beyond the two-year limitation period from the time the cause of action arose prescribed by s. 61(4). In doing so, he applied the decision of this court in Coplen v. Bauman (1989), 71 O.R. (2d) 308 and that of the Supreme Court of Canada in Murphy v. Welsh, supra, and declined to follow the decision of the Divisional Court in Toner v. Cherrington (1993), 13 O.R. (3d) 617, leave to appeal refused.

19 The motions judge declined to exercise the discretion provided by s. 2(8) of the FLA to extend the s. 61(4) limitation period to permit the adult appellants to proceed with their claims. Although he was satisfied that there were "apparent grounds" for relief pursuant to s. 2(8)(a), he was not satisfied that the delay in bringing their claims had been incurred in good faith, nor that the respondents would not suffer substantial prejudice by reason of the delay, as provided by s. 2(8)(b) and (c). In reaching this conclusion, the motions judge examined the evidence and made findings of fact. He concluded, "on the facts presented, you either meet or fail to meet [the] cumulative test" under s. 2(8).

ANALYSIS

20 Overriding my consideration of the issues raised by this appeal is whether the motions judge exceeded his role in determining a motion for summary judgment. In my view, he did. However, before providing my reasons for this conclusion, it is necessary to consider other issues.

The discoverability rule.

21 As I understand the reasons of the motions judge, he restricted the application of the discoverability rule to a category of cases where there had been a "delayed manifestation" of the cause of a plaintiff's injuries, or where the negligence of a defendant had not become manifest until the occurrence of a particular event, such as the collapse of a roof as in Rafuse, supra. Since the decision of the Supreme Court of Canada in Peixeiro, supra, it is clear that the discoverability rule applies to all cases in which a limitation period applies. It is a rule of general application.

22 In Peixeiro, the issue was whether the discoverability rule applied to the limitation period under s. 206(1) of the Highway Traffic Act, R.S.O. 1990, c. H.8 in respect to when a plaintiff's damages constituted "permanent serious impairment" within the meaning of s. 266(1) of the Insurance Act, R.S.O. 1990, c. I.8. Section 206(1) provides a limitation period of two years from the time "when the damages were sustained." The plaintiff did not learn the seriousness of his injuries until more than two years after his accident. Thereafter, he commenced his action. In affirming a decision of this court, the Supreme Court of Canada held that, as the action was commenced within two years of the time the plaintiff first learned he had a cause of action, it was not statute-barred.

23 Writing on behalf of the Supreme Court of Canada, Major J. stated at pp. 440 - 1:

> Since this Court's decisions in Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, and Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, at p. 224, 31 D.L.R. (4th) 481, discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. See Sparham-Souter v. Town & Country Developments (Essex) Ltd., [1976] 1 Q.B. 858 (C.A.), at p. 868, per Lord Denning, M.R., citing Cartledge v. E. Jopling & Sons Ltd., supra:

> It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury, and therefore before it is possible to raise any action.

See also M. (K.) v. M. (H.), supra, at p. 32, and Murphy v. Welsh, supra, at pp. 1079 - 8.

In this regard, I adopt Twaddle J.A.'s statement in Fehr v. Jacob (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p. 206, that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.
> [Emphasis added.]

24 In my view, there is no principled reason why the discoverability rule does not apply to s. 61(4) of the FLA. While it is true that many of the cases in which it has been applied concern a plaintiff's discovery of the extent of an injury, or the delayed effect or result of a defendant's negligence, this case concerns the discovery of a tortfeasor. The discovery of a tortfeasor involves more than the identity of one who may be liable. It involves the discovery of his or her acts, or omissions, which constitute liability. As Major J. stated in Peixeiro, supra, at p. 442: "The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue." This being so, it follows that it applies to all cases in which the issue is the time when a cause of action arises for the purpose of determining the commencement of a limitation period. As I have stated, this principle provides that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. This principle conforms with the generally accepted definition of the term "cause of action" - the fact or facts which give a person a right to judicial redress or relief against another.

25 As the discoverability rule applies to this case, the factual issue which the trier of fact will be required to decide is "the time the cause of action arose" within the meaning s. 61(4) of the FLA so that it can be determined whether this action was commenced within the two-year limitation period. That time, logically, will be a date between Lyman Aguonie's death on October 4, 1993, and the availability of Mr. Miller's January 27, 1995, report, depending on the trial judge's finding about the exercise of reasonable diligence by the plaintiffs in learning the identity of the respondent tortfeasors and the necessary facts relative to their alleged negligence.

Section 47 of the Limitations Act.

26 With respect, I find it difficult to understand the reasoning of the motions judge in concluding that s. 47 of the Limitations Act did not apply to extend the time for bringing the derivative claims of the minor appellants under s. 61(1) of the FLA beyond the two-year limitation period from the time the cause of action arose prescribed by s. 61(4). In any event, because of the view I hold of this appeal, it is unnecessary to consider this issue. As well, there will be no need for the trial judge to consider it if the application of the discoverability rule, or the application of s. 2(8) of the FLA, results in the conclusion that the appellants' action is not statute barred.

Section 2(8) of the FLA

27 All that need be said about s. 2(8) is that, in providing that the "court may ... extend a time prescribed by [the FLA] if it is satisfied" that the three conditions stipulated in the section have been met, the Legislature has granted broad discretion to the court to extend any limitation period in the FLA. To do so, it is clear that the court must make a finding of fact about each

of the conditions. However, for the purposes of this appeal, the significant fact is that the motions judge considered the application in the context of a motion for summary judgment. In doing so, he made a number of findings of fact adverse to the adult appellants. I would also note that the motions judge considered the application of s. 2(8) with respect to the claims of the adult appellants only. No explanation was given why it was not considered in respect to the claims of the minor appellants, as it appears there is no reason why s. 2(8) does not apply to their claims.

The role of a motions judge under Rule 20.

28 As I have discussed, in considering the application of the discoverability rule and s. 2(8) of the FLA, the motions judge made a number of findings of fact which informed his conclusion that the discoverability rule did not apply and the limitation period should not be extended. In my view, in doing so he exceeded the proper role of a motions judge hearing a motion for summary judgment. There was, in my view, a genuine issue for trial on the facts regarding the applicability of the discoverability rule and of s. 2(8). In resolving these issues, the motions judge performed functions reserved for the trier of fact - the trial judge or the jury.

29 The starting point for the application of the discoverability rule and s. 2(8) is the same. It is the time when the appellants' cause of action arose. This will define the starting date of the limitation period. It is a question of fact when the cause of action arose and when the limitation period commenced. The application of the discoverability rule is premised on the finding of these facts: when the appellants learned they had a cause of action against the respondents; or, when, through the exercise of reasonable diligence, they ought to have learned they had a cause of action against the respondents. These facts constitute genuine issues for trial and, in resolving them, the motions judge assumed the role of a trial judge.

30 In any motion for summary judgment, rule 20.04(2) is always the starting point. It states:

> Where the court is satisfied that there is no genuine issue for trial with respect to a claim or a defence, the court shall grant summary judgment accordingly.

A motions judge hearing a motion for summary judgment is required to decide whether the moving party has established that there is no genuine issue for trial: Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.); 1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 21 O.R. (3d) 547 (C.A.). If the motions judge is satisfied that there is no genuine issue for trial, then summary judgment must be granted: TIT2 Limited Partnership v. Canada (1995), 23 O.R. (3d) 81 (Gen. Div.), aff'd (1995), 24 O.R. (3d) 546 (C.A.). If there is a genuine issue for trial, the motion will fail and a trial will be required to resolve the issue. Thus, as Osborne J.A. stated on behalf of this court in Ford Motor Co. of Canada, Ltd. v. Ontario Municipal Employees Retirement Board, released October 27, 1997, at 28: "What is, and is not, a genuine issue for trial is central to the operation of Rule 20."

31 In Ungerman, supra, Morden A.C.J.O. interpreted the phrase "genuine issue for trial" within the meaning of rule 20.04 (2) when, as in this appeal, there is an issue in respect to material facts. After reviewing a number of American authorities, at p. 551 he concluded:

> It would be convenient if the term "genuine issue" could be expressed in a precise formula for the ease of its application. Having regard, however, to the varied and unpredictable ways in which issues under Rule 20 may arise, it cannot - and the experience with Rule 56(c) in the United States has shown that it can be harmful to gloss the wording of the rule with expressions that fail to capture its meaning. (See Wright, Miller and Kane, supra, at vol. 10A, pp. 97 - 107 and 176 - 77.)
>
> It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. (See 6 Moore's Federal Practice, 2nd ed. (1987 release), p. 56 - 391; Wright, Miller and Kane, supra, at vol. 10A, pp. 574 - 75.)

32 An issue of fact must relate to a material fact. As Morden A.C.J.O. pointed out in Ungerman, supra, at p. 550: "[i]f a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a 'genuine issue for trial'." In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue

of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact. In this appeal, the factual issues relating to the application of the discovery rule, as they relate to s. 61(4) and s. 2(8) of the FLA, and the factual issues relating to the exercise of discretion under s. 2(8), are genuine issues which require resolution at trial.

33 I wish to point out that, although the court's role in respect to motions that involve factual issues must stop short of resolving such issues, rule 20.04(4) permits the motions judge to determine a question of law and grant judgment accordingly, where he or she is satisfied that the only genuine issue is a question of law.

34 In reasons for judgment delivered prior to the decision of this court in Ungerman, supra, Doherty J. considered the role of a motions judge hearing a summary judgment motion in Masciangelo v. Spensieri (1990), 1 C.P.C. (3d) 124 (Ont H.C.) Doherty J.'s helpful analysis on this subject can be found at p. 129 et seq. See, also, Filion v. 689543 Ontario Ltd. (1994), 68 O.A.C. 389 at 394 (Div. Ct.), where White J. made the observation that the principles in respect to the role of a motions judge hearing a motion for summary judgment enunciated by Henry J. in Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225 (Gen. Div.) have been modified considerably by the decision in Ungerman, supra, an observation with which I agree.

35 In reviewing the evolution of Rule 20, Doherty J. made this significant observation at p. 129: "The case law which has developed under Rule 20 promotes an expansive use of the rule as a means of avoiding expensive litigation where it is possible to safely predict the result without a trial." Morden A.C.J.O. made a similar observation in the passage which I have quoted from his reasons in Ungerman, supra: "It must be clear that a trial is unnecessary." As I read these observations, it must be clear to the motions judge, where the motion is brought by the defendant, as in this appeal, that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.

36 Ontario New Home Warranty Program v. 567292 Ontario Ltd. (1990), 71 O.R. (2d) 535 (Ont. H.C.) is a case which illustrates that, generally speaking, it is not appropriate for a motions judge, hearing a motion for summary judgment where the application of the discoverability rule is central to its resolution, to resolve this issue. At pp. 545 - 46 Philp J., after noting that the determination of when the cause of action arose for the purpose of the starting point of a limitation period depends on mixed fact and law, concluded: "I cannot answer the question of when the plaintiff knew or ought to have known that there were defects, or sufficient defects, for the limitation period to start running." Following the reasoning of Campbell J. in Riveria Farms Ltd. v. Paegus Financial Corp. Ltd. (1988), 29 C.P.C. (2d) 217 at 221 (High H.C.), he concluded that this was the job of the trial judge. The commencement of the limitation period, as in this appeal, constituted a genuine issue for trial.

37 There is another feature of the Ontario New Home Warranty Program case which is relevant to this appeal. In that case, s. 47(2) of the Professional Engineers Act, 1984, S.O. 1984, c. 13 allowed the court to extend a one-year limitation period under that Act where it was "satisfied that there are apparent grounds for the proceedings and that there are reasonable grounds for applying the extension." This provision is similar to s. 2(8) of the FLA. In the view of Philp J., this was an appropriate issue to be resolved by the trial judge. At pp. 546 - 7 he stated:

> For the trial judge to be so satisfied it is necessary that he or she hear the evidence at trial. This determination cannot be made on this motion. The trial judge, after hearing the viva voce evidence, will be in a much better position to decide whether or not he or she should exercise his or her discretion to extend the limitation period: see Victoria County Board of Education v. Bradstock, Reicher & Partners Ltd. (1984), 46 O.R. (2d) 674, 44 C.P.C. 314 (Div. Ct.).

38 In the Victoria County Board of Education case, s. 28(2) of the Professional Engineers Act, R.S.O. 1980, c. 394 permitted the court to extend the one-year limitation period "if the court is satisfied that to do so is just." That case also involved the application of the discoverability rule to the determination of when the cause of action arose. At p. 679, Southey J. made the following observations which are relevant to the circumstances of this appeal:

> Another reason for not granting leave under Rule 124 in this case is that the trial judge will probably be in a better position to determine whether it is just to extend the limitation period under s. 28(2) than would a judge hearing the matter in motions court on affidavit evidence. There is nothing in s-s. (2) itself to suggest that a plaintiff may not have the benefit of a decision by the trial judge on the question of whether it is just to extend the limitation period.
>
> ... But the importance of a professional person knowing at the earliest possible time where he stands in a lawsuit, and whether he "has been deprived of a statutory defence by the Court" must be weighed

against the possible injustice to a plaintiff in refusing to extend the relatively short limitation period in a case where it ought to be apparent on all the facts that it would be just to do so.

As Southey J. observed, in this appeal there is nothing in s. 2(8) of the FLA to suggest that the appellants may not have the benefit of a decision by the trial judge on the question of whether the limitation period in s. 61(4) should be extended.

DISPOSITION

39 In the result, the appeal is allowed with costs, the order of the motions judge dismissing the appellants' action is set aside, and an order dismissing the respondents' motions for summary judgment is substituted. In light of this result, the cross-appeal of R.J. Trucks is without merit and is dismissed with costs.

BORINS J. (ad hoc)
ABELLA J.A. -- I agree.
CARTHY J.A. -- I agree.

cp/d/mop DRS/qlgxc

TAB 4

Indexed as:

Mensah v. Robinson

Between
Theresa Mensah, Michel Mensah and Julius Dogbe, Plaintiffs,
and
Donald Robinson, Robert Roy, Hamilton Civic Hospitals and Henderson General Hospital, Defendants

[1989] O.J. No. 239

Action No. 1867/85

Supreme Court of Ontario - High Court of Justice
Toronto, Ontario

Watt J.

Heard: July 27, 1988
Judgment: February 22, 1989

Susan E. Opler, for the Defendants, Robinson and Roy.
Ian P. Newcombe, for the Defendants, Hamilton Civic Hospitals and Henderson General Hospital.
Grant R. Dow, for the Plaintiffs/Respondents.

WATT J.:-- The defendants move, under sub Rules 20.01(3) and 20.04(2) of the Rules of Civil Procedure, for an Order granting summary judgment in favour of some or all of them and, to such extent, dismissing part or all of the plaintiffs' claim, upon the ground that there is no genuine issue for trial.

A. THE FACTUAL BACKGROUND

1. Introduction: The Principals

The plaintiff, Theresa Mensah, a 35-year-old woman, at all material times was married to the plaintiff, Michel Mensah, and a patient of the defendant doctors, Donald Robinson and Robert Roy.

The defendant, Donald Robinson, is a duly qualified medical practitioner who, at all material times, practised the specialty of obstetrics and gynaecology in Hamilton, Ontario.

The defendant, Robert Roy, is a duly qualified medical practitioner who, at all times here material, carried on a practice of family medicine in Hamilton.

The defendant, Henderson General Hospital, is a public hospital within the provisions of the Public Hospitals Act, R.S.O. 1980, c. 410, located in Hamilton, and is a unit of the defendant, Hamilton Civic Hospitals.

2. The Consultation with Dr. Roy

C. THE GRANTING OF SUMMARY JUDGMENT

1. Introduction

A determination of the present motions does not attract any elaborate rehearsal of the principles nor reconciliation of the precedents which govern motions for summary judgment. It will be helpful, however, briefly to record certain observations concerning the basis upon which such motions may be brought, thereafter the considerations which govern their determination.

2. The Evidentiary Basis

Sub-rule 20.01(3) authorizes a defendant, after delivering a Statement of Defence, to move, with supporting affidavit material or other evidence, for summary judgment dismissing all or part of the claim in the Statement of Claim. The evidence upon which reliance may be placed upon the motion may include affidavits (rules 39.01 and 20.02), cross-examination upon affidavits (rule 39.02), examination of witnesses before the hearing of the motion (rule 39.03), examinations for discovery (rule 39.04) and, with leave, examination of witnesses viva voce at the hearing of the motion (sub-rule 39.03(3)).

Rule 20.02 provides:

> 20.02 An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but on the hearing of the motion an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having knowledge of contested facts.

In the case at bar the affidavit of the plaintiffs' solicitor exhibits the report of Dr. Munkley which contains comments concerning, inter alia, the propriety of the procedure followed by the defendants, Roy and Robinson. It is the only material filed by the respondent, although the respondent places some reliance on the material filed on behalf of the moving party. It would have been much more helpful to have received the affidavit of Dr. Munkley, wherein his qualifications to proffer such an opinion as he asserts might have been made to appear and, further, cross-examination thereon might have disclosed more adequately the basis and extent of any difference of opinion with what was done or said by the defendant doctors. Tactical considerations may favour the present approach. In appropriate circumstances, however, they may give rise to an adverse inference under rule 20.02, supra, and fall short of the "specific facts" requirement of sub-rule 20.04(1), which provides:

> 20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial. [emphasis added]

3. The Governing Principles

The general dispositive authority by which motions for summary judgment fall to be determined is described in sub-rule 20.04(2):

> 20.04(2) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

Specific provision is also made in sub-rule 20.04(4) where the only genuine issue for trial is a question of law:

> 20.04 (4) where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by judge.

Specific provision is also made in sub-rule 20.04(3) where the only genuine issue is the amount to which the moving party is entitled and, further, in sub-rule 20.04(5), where the claim is for an accounting. Neither provision has any application to the circumstances of the present case.

It is a commonplace that, at any trial, issues may arise concerning matters of fact, of law and or of mixed law and fact.

Some of the issues may be genuine. Others may be spurious. The determination of these issues will involve, however, preliminarily at least, the ascertainment of the facts upon which the dispute is based. The facts, of course, are determined by and upon the basis of the introduction of evidence which is relevant to the issues framed by the pleadings and which the adjectival law declares receivable. The Rules of Civil Procedure endeavour and are to be construed so as to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. The parties, in accordance with the rules and the applicable substantive and adjectival law, are entitled to have their dispute resolved at and by a trial.

Rule 20 constitutes, in one sense, an exception to the general rule that a trial is required to determine a civil proceeding on its merits and, further, that the parties are entitled to such a method of determination. It plainly recognizes that it is not every case in which a trial is necessary to render a just determination of the dispute. The rule, at least implicitly, reserves the trial for the determination of controverted issues of claim and/or defence. It does so by its specific authorization of pre-trial motions for summary judgment by either a plaintiff or defendant and its mandate of the basis upon which summary judgments shall or may be given.

It has been earlier observed that issues at trial may involve questions of fact, of law, or of mixed fact and law. Sub-rule 20.04(2) itself draws no distinction based upon the nature of the issue. The standard or test applied remains a constant though its origins may differ. The onus rests upon the moving party. The standard to be met is to satisfy the judge that there is no genuine issue for trial. Once this necessary standard has been met, "the court shall grant summary judgment accordingly". The language of sub-rule 20.04(2) is imperative rather than permissive. In contrast, the specific dispositive authority of sub-rules 20.04(3)-(5), inclusive, is permissive. Their relationship to sub-rule 20.04(2) is not here at issue and, accordingly, need not be here explored. It cannot, however, be too strongly emphasized that the mandatory authority of sub-rule 20.04(2) only becomes engaged upon satisfaction of the necessary condition precedent, viz., "...there is no genuine issue for trial with respect to a claim or defence".

The language of sub-rule 20.04(2) is explicit in its specification of the standard which must be met in order to engage the mandatory authority to grant summary judgment. The test or standard is not whether an issue is raised for trial in respect of a claim or defence but, rather, whether a genuine issue is raised. In general terms, an issue may be said to be genuine where it is real and actual, authentic and not spurious. In the context of legal proceedings, a genuine issue is one which is founded upon the evidence adduced, not the product of impermissible speculation or conjecture, and one which has about it an air of reality. The use of "genuine" as descriptive of the nature of the issue that is determinative of whether summary judgment shall be given under sub-rule 20.04 (2), would appear to contemplate at least some qualitative assessment or measuring of the merits of the claim or defence based upon the [then] evidentiary record. Any other interpretation would, in effect, read the sub-rule as if it had said "no issue", rather than its present formulation. At the same time, it should be recalled that a motion for summary judgment neither is nor should become a trial on the merits.

It is the position of the defendants, Roy and Robinson, the moving parties on one of the motions, that

> ...a court should not and must not refrain from granting summary judgment simply because an action contains serious factual disputes and complicated legal issues.

Reliance is placed upon the decisions in Vaughan v. Warner Communications Inc. et al. (1986), 56 O.R. (2d) 242 (H.C.J.); and, Greenbaum v. 619908 Ontario Ltd. c.o.b. as Green Valley Homes et al. (1986), 11 C.P.C. (2d) 26 (O.H.C.). In Vaughan v. Warner Communications, supra, Boland J. observed, at p. 247 O.R. (2d):

> The specific changes to the summary judgment rule and the spirit in which other rules are changed indicates in my respectful view that Rule 20 should not be eviscerated by the practice of deferring actions for trial at the mere suggestion that further evidence maybe made available or that the law is in a state of confusion. The responding party has a positive responsibility to go beyond mere supposition and the court now has the duty to take a hard look at the merits of an action at this preliminary stage.

In Greenbaum, supra, Sutherland J. held, at p. 48 C.P.C. (2d):

> ...In my view, although the area calls for judicial caution, where a Judge on a motion under R. 20 is clearly satisfied, on agreed facts or facts as to which he is satisfied, that he would not in the circumstances exercise his discretion to grant specific performance, and where in his opinion a Judge who exercised his discretion to grant specific performance would be likely to be overturned on appeal, the Judge may deal with the issue as a question of law under r. 20.04(4) and dismiss the application for specific performance.

Upon a motion for summary judgment by a defendant under sub-rule 20.04(2), it is my respectful view that the standard to be applied is whether the claim in respect of which summary judgment is sought has about it an air of reality in light of the evidence upon which reliance is placed on the motion. The requirement that there be a "genuine issue" or, put in the negative, "no genuine issue" for trial, involves more, however, than simply a determination of whether there is some evidence to support the claim. To be certain, the question of whether there is some evidence to support the claim in respect of which summary judgment is sought is an integral part of the test to be applied. The critical issue, however, is whether, assuming the evidence in support of the claim to be true, it is sufficient to justify the consideration of the claim by the trier of fact. The evidence will be sufficient for such purpose where there is at least some evidence upon the basis of which a reasonable trier of fact, properly instructed, could find in favour of the responding party upon the issue at trial.

In practical terms, the sufficiency of proof upon a particular issue by a party bearing the onus in respect of that issue can be but rarely adjudged on the basis of controverted affidavit material even with cross-examination. Indeed, it has been elsewhere said that when there are controverted facts relating to matters essential to a decision, such facts cannot be found by an assessment of the credibility of deponents who have been neither seen nor heard by the trier of fact. See, R. v. Jetco Manufacturing Ltd. and Alexander (1987), 31 C.C.C. (3d) 171 at 176 (O.C.A.). It is nonetheless so where what is being determined is whether summary judgment should issue where the facts which underlie the claim or defence are controverted. As it would appear to me, it will be a comparatively rare case where controverted factual issues may be resolved upon a motion for summary judgment. If indeed they could be so as a matter of routine, one might be forgiven for wondering as to the purpose of a trial. It may be, for example, that even accepting a view of the facts most favourable to the responding party, the claim or defence cannot be sustained as a matter of law. Such cases aside, it would appear generally more appropriate to leave such controverted issues to the trial forum where the trier of fact has a fuller evidentiary record, as well as the opportunity of being an ear and eye witness to the testimony given, the better to assess credibility and weight. To the extent that the earlier excerpted passages from the decision of Boland J. in Vaughan v. Warner Communications, supra, invites a weighing of competing affidavit material, I am, with respect, unable to agree. I do not disagree that the matter must be closely examined. The examination, however, in my respectful view, cannot involve findings of credibility based on controverted affidavit material or an assessment of evidentiary sufficiency as against the burden of persuasion applicable at trial. To so hold would render trials the exception, rather than the rule by which such matters are determined.

Further, it is my respectful view that, notwithstanding the change in language from former rule 58 to the present sub-rule 20.04(2) and the mandatory language of the latter, caution ought nonetheless to continue to be the rule where there are controverted matters of fact on issues material to the determination of the action. In this respect it will be convenient to recall the words of Evans J.A. in Arnoldson y Serpa v. Confederation Life Association (1974), 3 O.R. (2d) 721 at 722, where he said:

> We are all of the view that on an application of this nature the power to direct that judgment be summarily signed should be exercised with great caution and with the most scrupulous discretion. The plaintiff must make out a case which is so clear that there is no reason for doubt as to what the judgment of the Court should be if the matter proceeded to trial. Upon such a motion it is not the function of the Judge in Weekly Court or of the Master to determine matters either of law or of fact which are in serious controversy. That function should be reserved to the trial tribunal. The authorities are clear that where there exists any real difficulty as to a matter of law or any serious conflict as to a matter of fact then summary judgment should not be granted: Berlin v. Berlin, [1957] O.W.N. 87, 7 D.L.R. (2d) 627, and Bank of Toronto v. Stillman (1930), 65 O.L.R. 375, [1930] 3 D.L.R. 838.

It is an incontrovertible that rule 20.04(2) is more expansive than was its predecessor. It is available to plaintiff and defendant alike and may be brought with respect to all or part of a claim or defence. Further, the evidentiary record before the court is much more substantial thereby placing the court in a better position to adjudge whether there is a genuine issue for trial in respect of a claim or defence. It does not, however, follow that summary judgment ought routinely to be granted or matters of factual controversy presumptively pre-determined on affidavit rather than viva voce testimony, the traditional means of assessing credibility and the weight to be given to evidence. It is only where no genuine issue arises for trial in respect of a claim or defence that summary judgment shall be given.

It is against that background of general principle that the present motions fall to be determined.

D. THE CASE AT BAR

1. Introduction

It will be recalled that each of the defendants takes the position that summary judgment ought to be given in their favour

TAB 5

Davis v. Sawkiw

(1983), 38 O.R. (2d) 466

ONTARIO
HIGH COURT OF JUSTICE

POTTS J.

30th JULY 1982.

Trusts and trustees -- Reference to uses in description of mortgagor in mortgage instrument -- No limitation on liability of mortgagor.

Practice -- Procedure -- Power to direct summary judgment on specially endorsed writ -- Circumstances under which power to be exercised.

The plaintiff had moved for summary judgment on a specially endorsed writ in a mortgage action. The trial judge dismissed the application on the grounds that the defendant had raised a triable issue, viz., that the reference to uses in the description of the defendant mortgagor contained in the mortgage instrument limited the latter's liability. The plaintiff appealed.

Held: the appeal should be allowed.

Although the power to enter summary judgment should be exercised with great caution, there was no serious legal issue in this case. The authorities relating to trustees and personal representatives clearly indicated that a covenant by a trustee "as trustee" did not limit the trustee's personal liability, only the description "as trustee and not otherwise" being sufficient to achieve that result. There was no reason to extend the reasoning of the latter category of cases to a case like the present.

[Arnoldson y Serpa v. Confederation Life Ass'n, 3 O.R. (2d) 721, 46 D.L.R. (3d) 641, [1974] I.L.R. 1-606; Adelchi Bortolussi et al. v. Jiulia Construction Ltd., unreported (July 4, 1977); Watling v. Lewis, [1911] 1 Ch. 414; Shaver v. Young (1919), 16 O.W.N. 16, Schell v. Trusts and Guarantee Co. Ltd., [1939] O.W.N. 434, refd to]

APPEAL from an order dismissing an application for judgment on a specially endorsed writ.

R. McDonald, for plaintiff.

S. LeMesurier, for defendant.

POTTS J. (orally): This is an appeal from the order of His Honour Judge Logan, the learned local judge of the County of Simcoe dated June 3, 1982, wherein he dismissed an application for judgment in accordance with the special endorsement on the writ of summons, upon the grounds that the learned judge erred in finding that the affidavit of merits filed by the defendant raised a triable issue.

I was referred to the case of Arnoldson y Serpa v. Confederation Life Ass'n, 3 O.R. (2d) 721, 46 D.L.R. (3d) 641, [1974] I.L.R. 1-606, a Court of Appeal decision where Evans J.A., said at p. 722 O.R.:

> We are all of the view that on an application of this nature the power to direct that judgment be summarily

> signed should be exercised with great caution and with the most scrupulous discretion. The plaintiff must make out a case which is so clear that there is no reason for doubt as to what the judgment of the Court should be if the matter proceeded to trial. Upon such a motion it is not the function of the Judge in Weekly Court or of the Master to determine matters either of law or of fact which are in serious controversy. That function should be reserved to the trial tribunal. The authorities are clear that where there exists any real difficulty as to a matter of law or any serious conflict as to a matter of fact then summary judgment should not be granted: Berlin and Berlin, [1957] O.W.N. 87, 7 D.L.R. (2d) 627, and Bank of Toronto v. Stillman (1930), 65 O.L.R. 375, [1930] 3 D.L.R. 838.

That particular case was commented upon in an unreported case before the Divisional Court, Adelchi Bortolussi et al. v. Jiulia Construction Ltd. dated July 4, 1977, where Hughes J. stated:

> Emphasis is laid by us upon those words "real difficulty", and "serious conflict" which the learned justice in appeal used in that case, because there are other cases which indicate that any controversy, any difficulty is sufficient to raise a triable issue which would preclude the judicial officer giving judgment upon a summary application. We do not think that the law, properly viewed, goes that far, and we are conscious of a rising tide of appeals and applications which upon technical grounds seek to delay what a plaintiff is entitled to upon the face of the instrument which he proffers in court. No doubt there are reasons for the delay. It has been candidly said here by Mr. Adams that his client has not got the money to redeem, even though he has indicated his intention to do so.

That is the settled law. The only issue that was argued is that on the face of the mortgage itself because there is a reference to uses in the description of the mortgagor and in the recital that this indicated that there was some limitation on the liability of the defendant by virtue of the fact that he was a trustee.

I am reluctant to give judgment without a full trial but it has not been shown to me that there is any real serious issue in law. Counsel for the plaintiff referred me to the case of Watling v. Lewis, [1911] 1 Ch. 414 where Warrington J. said at p. 423:

> A covenant by a person "as trustee" does not render his trust estate liable, it is a covenant by himself. It is exactly as if an executor entering into an obligation not merely in respect of some debt of his testator, but in respect of some obligation which he in his capacity as executor has himself undertaken since the death of the testator, covenants "as executor" to pay. That is a covenant by himself.

He also referred me to the case of Shaver v. Young (1919), 16 O.W.N. 16 where Sutherland J. said:

> The defendant was described therein as "physician, trustee," and he denied personal liability; but the learned Judge held that, having regard to the terms of the mortgage, and to the fact that no provision was made therein to protect the defendant from the personal covenant for payment therein contained, the word "trustee" must be regarded as merely descriptive, and not as limiting the personal liability of the defendant.

He also referred me to the case of Schell v. Trusts and Guarantee Co. Ltd., [1939] O.W.N. 434, where the master said at p. 435:

> There is in the mortgage no limitation as to the liability of the trustee, and it is well settled law that, unless the liability on a covenant is expressly limited to the assets of the trust estate, a personal liability attaches. See Falconbridge on Law of Mortgages, 2nd edition, pages 364 and 365; Watling v. Lewis, [1911] 1 Ch. 414, which is a case directly in point.

Reference was made to Falconbridge on Mortgages, 4th ed. (1977), at pp. 428-49.

> If the trustee or personal representative covenants to pay, he will be personally liable on his covenant, even though he covenants as trustee or as personal representative, and even though he adds a proviso that he shall not be personally liable, such proviso being repugnant to the covenant to pay and therefore void. He may, however, validly limit his liability without destroying it, as, for example, if the covenant is to pay out of a certain fund, with a proviso that the covenantor shall not be liable after he ceases to be entitled to administer the fund. So, if a trustee covenants "as trustee and not otherwise", or "qua trustee only", or if an executor covenants "as executor, and as executor only", the covenantor is personally liable to pay, but only to pay out of the assets of the estate or to the extent that he has assets.

Counsel for the defendant argued that the provisos, where a trustee covenants "as trustee and not otherwise" or "qua trustee only" or where an executor covenants "as executor, and as executor only", should be extended to a case such as this where the deed makes reference "to uses". He was unable to quote any authority to support that proposition. I am not surprised that he cannot because I do not think those words would meet the test in the authorities which I have already quoted.

Accordingly, I have come to the conclusion that the appeal should be allowed and judgment will be entered in accordance with the special endorsement on the writ of summons. Costs to the plaintiff.

Appeal allowed.

TAB 6

Indexed as:

Smyth v. Waterfall

Between
Bernice Smyth, plaintiff/appellant, and
Dr. William E. Waterfall and Chedoke McMaster Hospitals, defendants/respondents

[2000] O.J. No. 3494

50 O.R. (3d) 481

136 O.A.C. 348

4 C.P.C. (5th) 58

99 A.C.W.S. (3d) 877

Docket No. C33402

Ontario Court of Appeal
Toronto, Ontario

McMurtry C.J.O., Borins and Feldman JJ.A.

Heard: August 17, 2000.
Judgment: September 22, 2000.

(24 paras.)

On appeal from the order of The Honourable Mr. Justice Eugene B. Fedak dated November 23, 1999.

Counsel:

Thomas Basciano, for the plaintiff/appellant.
Sally P. Bryant, for the defendants/respondents.

The judgment of the Court was delivered by

1 **BORINS J.A.**:-- This is an appeal by Bernice Smyth from the summary judgment granted by Fedak J. dismissing her claim against Dr. William E. Waterfall based on his alleged negligence and assault and battery in performing a medical procedure, an oesophageal dilation, at the McMaster University Medical Centre on October 12, 1993 which resulted in the rupture of her esophagus.

Background

2 The respondent moved under rule 20.01(3) of the Rules of Civil Procedure for summary judgment dismissing the appellant's claim on the ground that it was commenced subsequent to the expiry of the limitation periods in s. 17 of the Health Disciplines Act, R.S.O. 1990, c. H.4 and s. 89 of the Regulated Health Professions Code, which is Schedule 2 to the Regulated Health Professions Act, S.O. 1991, c. 18. Each section precludes the commencement of an action arising out of negligence or malpractice in respect of professional services rendered "unless the action is commenced within one year after the date when the person commencing the action knew or ought to have known the fact or facts" upon which the negligence or malpractice is alleged. Although the procedure took place on October 12, 1993, the appellant's action was not commenced until October 11, 1995.

3 The respondent's motion was supported by three affidavits sworn by Audley Trevor Evans, a senior law clerk employed by his solicitors. The respondent did not provide an affidavit, although the transcript of his examination for discovery formed part of the motion record. It would appear from this evidence that it was the position of the respondent before Fedak J. that the appellant knew of the facts upon which her claim was based immediately following the procedure of October 12, 1993, or at the latest, on November 9, 1993 when she was released from her hospitalization that resulted from the procedure.

4 In response to the motion the appellant relied on her own affidavit, an affidavit sworn by her daughter, her examination for discovery and that of the respondent. The salient information contained in the respondent's evidence indicates that she is now 80 years of age, and was age 72 when the procedure was performed. While performing the procedure, the respondent perforated the appellant's esophagus. The resulting complications required the appellant's hospitalization for 27 days during which she experienced periods of unconsciousness and heavy pain. Following her release from hospital she returned to her daughter's home, where she lived. She required homecare assistance for three months, followed by nursing assistance for another three months. In addition, she required medical attention on a regular basis. Her diet was restricted to liquids and soft foods. In general, her physical and mental health remained poor throughout the summer of 1994.

5 The appellant consulted a lawyer on September 27, 1994. Although the lawyer was not retained until after the appellant obtained a legal aid certification on October 27, 1994, on September 24, 1994 he wrote to the McMaster University Medical Centre requesting a copy of the appellant's medical file. It was not sent to the lawyer until December 15, 1994. The 272 page file contained a report prepared by Dr. Waterfall on October 14, 1993 in which he described the procedure he had performed on October 12, 1993. This was the first time that the appellant, or her medical and legal advisors, had received a detailed account of the procedure. Although the appellant's lawyer was unable to obtain an expert medical opinion supporting the appellant's negligence claim until May, 1998, he nevertheless issued a statement of claim on her behalf on October 15, 1995, less than one year from the receipt of her medical file from the hospital. The opinion of the appellant's medical expert, which was before the motions judge, was unrefuted.

6 In granting the respondent's motion dismissing the appellant's claim, Fedak J. gave no reasons. He was content to endorse the motion record: "Motion granted. Costs set at $500.00 for the defendant if asked."

Analysis

7 Although he gave no reasons, I would assume that the motions judge accepted the respondent's position that the appellant knew of the facts upon which her claim is based immediately following the procedure of October 12, 1993, or at the latest, on November 9, 1993. In accepting this position, the motions judge necessarily would have had to conclude that the evidence contained in the motion record did not disclose a genuine issue for trial concerning when the appellant "knew or ought to have known the fact or facts" upon which her claim for negligence was based. In my view, he erred in concluding that the evidence in the record did not disclose a genuine issue for trial in respect to the commencement of the limitation period.

8 As in every motion for summary judgment, the onus rested on the respondent to establish that there was no genuine issue for trial. In this case, the issue was in respect to whether the appellant had commenced her claim within one year from when she knew or ought to have known the fact or facts upon which her claim for negligence was based, as provided by the two statutory provisions which establish the limitation period, and which incorporate the discoverability rule. The discoverability rule is a rule of fairness which provides that a limitation period does not begin to run against a plaintiff until he or she knows, or ought reasonably to know by the exercise of due diligence, the fact, or facts, upon which his or her claim is based: Peixeiro v. Haberman (1997), 151 D.L.R. (4th) 429 at 442 (S.C.C.) The determination of when the limitation period begins to run is one of fact.

9 In Novak v. Bond (1999), 172 D.L.R. (4th) 385 (S.C.C.) the Supreme Court considered s. 6 of the Limitation Act, R.S.B.C. 1996, c. 266, which is a codification and enlargement of the discoverability rule. McLachlin J. observed at p. 410 that statutory provisions intended to extend limitation periods are aimed at treating plaintiffs fairly. In Bisoukis v. Brampton (City) (1999), 180 D.L.R. (4th) 577, leave to appeal to the Supreme Court of Canada refused, [2000] S.C.C.A. No. 52, August 17, 2000, at pp. 591-592, this court extracted, and applied, the following approach of McLachlin J. as a guide to the

court in the interpretation of statutory provisions intended to extend limitation periods:

> * The cardinal principle of statutory interpretation is that a legislative provision should be construed in a way that best furthers its objects.
>
> * A provision extending a limitation period should be interpreted in a way that best furthers its goals.
>
> * Although the traditional interpretation of limitation statutes has reflected the interests of potential defendants, modern interpretation has become more balanced, to take into account the plaintiff's interests, by favouring a more contextual view of the parties' actual circumstances.
>
> * Thus, the contemporary approach is that when construing a limitation statute the plaintiff's concerns must be considered together with the defendant's need to be protected from stale claims brought by dilatory plaintiffs.

10 Central to the application of the discoverability rule is when the plaintiff acquired, or ought reasonably to have acquired, knowledge of the facts on which her claim is based. As such, in the context of this appeal, the application of the rule requires the resolution of the factual issue of when Ms. Smyth "knew or ought to have known the fact or facts" upon which she based her negligence claim against Dr. Waterfall so that it can be determined whether her action was commenced within the one-year limitation period: Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161 at 170 and 172 (C.A.). As in Aguonie, the evidence before the motions judge required the resolution of the factual issue central to the application of the discoverability rule. In apparently resolving the factual issue in the respondent's favour, the motions judge assumed the role of a trial judge. Moreover, as this court pointed out in Aguonie at p. 174, "generally speaking, it is not appropriate for a motions judge, hearing a motion for summary judgment where the application of the discoverability rule is central to its resolution, to resolve this issue".

11 Because Fedak J. failed to provide reasons for his decision, it is not known why the respondent's motion succeeded. It is not known what approach the motions judge took in his interpretation and application of the statutory provisions intended to enlarge the limitation period. Either he assumed the role of a trial judge and resolved the discoverability rule issue by making a finding of fact when Ms. Smyth knew, or through the exercise of reasonable diligence ought to have known, the facts in support of her claim against Dr. Waterfall. Or, he failed to recognize that the evidence relied on by Ms. Smyth in satisfaction of her evidentiary burden to provide evidence which raises a genuine issue for trial, as I believe it does, raised a genuine issue for trial. Whether the motions judge followed either, or both of these routes, he erred. In reaching this conclusion I am mindful of rule 39.04(2) and its application to motions for summary judgment as discussed by this court in Lana International v. Menasco Aerospace, [2000] O.J. No. 3261, released on September 7, 2000.

12 As there will be a trial, it would be inappropriate for me to comment further on the evidence relied on by the appellant in support of her position that there is a genuine issue for trial about whether she commenced her action within the one-year limitation period stipulated by the two statutes. It is sufficient to say that the evidence relied on by the appellant, particularly the evidence which I have summarized, raises a genuine issue as to when she acquired the requisite facts and entitles the plaintiff to proceed to trial where the issue will be decided. It is also helpful to bear in mind, as Sopinka J. observed in Snell v. Farrell (1990), 72 D.L.R. (4th) 289 at 300 (S.C.C.): "In many malpractice cases, the facts lie particularly within the knowledge of the defendant." I am satisfied that, in response to the respondent's motion for summary judgment, the appellant has met her evidentiary burden to support the position that her action is not statute barred is adequately supported by evidence. I would, therefore, allow the appeal.

Failure of motions judge to give reasons

13 It is unfortunate that the motions judge failed to provide any reasons for dismissing the appellant's claim. On many occasions this court has emphasized the desirability of trial judges giving meaningful reasons, however brief, for their decisions. See, e.g., DeJussel v. Hajzar, [1948] O.W.N. 468 (C.A.), Wright & Wright v. Ruckstuhl, [1955] 2 D.L.R. 77 (Ont. C.A.) and Koschman v. Hay (1977), 17 O.R. (2d) 557 (C.A.). This is a principle that applies, as well, to decisions rendered by motions and applications judges. The parties are entitled to know why the court reached its decision. Indeed, a failure to provide a reasoned decision tends to undermine confidence in the administration of justice as the absence of reasons may give the appearance of an arbitrary decision, particularly in the eyes of the unsuccessful party. As well, as this appeal illustrates, the absence of reasons makes appellate review difficult and, in some circumstances, may require a new trial or the rehearing of a motion or an application.

Costs

14 Counsel for the appellant, relying on rule 20.06(1), asked the court to award the appellant her costs of the motion and the appeal on a solicitor and client basis if the appeal succeeded. Rule 20.06(1) states:

> 20.06(1) Where, on a motion for summary judgment, the moving party obtains no relief, the court shall fix the opposite party's costs of the motion on a solicitor and client basis and order the moving party to pay them forthwith unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable.

It was the position of counsel that it was unreasonable for the respondent to bring the motion because it should have been obvious to him that there was a genuine issue for trial concerning the application for the discoverability rule.

15 It would appear that this is the first occasion on which this court has been asked to apply rule 20.06(1). However, there are several decisions of motions court judges interpreting rule 20.06(1) and awarding the responding party costs on a solicitor and client basis when the moving party, on a motion for summary judgment, has obtained no relief. The purpose of rule 20.06 (1) was considered in Thomas v. Transit Insurance Co. (1993), 12 O.R. (3d) 721 (Gen. Div.) and in Innovative Automation Inc. v. Candea Inc. (1995), 24 O.R. (3d) 639 (Gen. Div.).

16 In Thomas the issue was under what circumstances the making of an unsuccessful motion for summary judgment was "nevertheless reasonable" within the meaning of rule 20.06(1).

In resolving the issue the court found it helpful to consider the purpose of the rule. At p. 724, the court stated:

> As for rule 20.06(1), like rule 20.06(2), its purpose is to discourage the bringing of unnecessary motions. It imposes severe cost sanctions against the moving party where a motion for summary judgment fails, but contains a discretion to relieve against the sanctions.

The court declined to award solicitor and client costs being of the opinion that it was reasonable to make the motion as s. 258 (1) of the Insurance Act, R.S.O. 1990, c. I.8, which was central to the success or failure of the plaintiff's claim, had never been judicially interpreted.

17 In Innovative Automation, at p. 639, Belleghem J. stated: "Rule 20.06 was enacted to provide severe cost sanctions for the bringing of unreasonable motions for summary judgment." After referring to Thomas, he continued at p. 640:

> In 759418 Ontario Inc. v. 690352 Ontario Ltd., [1992] O.J. No. 1367, June 3, 1992, Ontario Court (General Division), Kovacs J. stated that it was "intended to discourage vexatious motions".

In Shelter Canadian Properties Ltd. v. Steppe Two Inc., [1994] O.J. No. 2204, September 30, 1994, Ontario Court (General Division), Epstein J. found that:

> The intention of the cost provisions of rule 20.06 is to provide a deterrence to bringing summary judgment motions that are "long shots".
>
> While very useful in filtering out unmeritorious positions, these motions are usually expensive and time consuming. Accordingly, they should only be brought where there is some reasonable likelihood that something will be accomplished by the moving party.

18 Belleghem J. also addressed how the court should determine whether it is "satisfied" that the making of the unsuccessful motion "was nevertheless reasonable". At p. 641 he stated:

> While the purpose of the moving party in bringing the application [sic] is, thus, of some relevance in determining the issue of reasonableness, the threshold test of whether or not the bringing of the motion was reasonable is whether, at the time the application [sic] was launched, there appeared to be a "genuine issue" for trial. In Zimmerman v. Banack (1993), 15 C.P.C. (3d) 293 (Ont. Gen. Div.), Ground J., dealing with a similar application to permit abandonment without costs of a summary application [sic] for judgment, looked at the evidence available to the parties as at the time the motion was made. ....

> In CIBC Mortgage Corp. v. Tarpos Holdings Inc., [1995] O.J. No. 1075, Ontario Court (General Division), April 7, 1995, Philp J. found that to determine whether the bringing of the motion was reasonable or not, one had to look at the situation when the motion was first made.

19 In a recent decision, Chippewas of Sarnia Band v. Canada (Attorney General), [2000] O.J. No. 1875 (S.C.J.) in considering the application of rule 20.06(1), A. Campbell J. stated in paragraphs 24 and 25:

> The question is not whether the arguments advanced in support of the unsuccessful motion are unreasonable in the sense that they would, if made at trial, be untenable or frivolous. *The question is whether at the time the application was launched it was reasonable in all the circumstances to bring it.*
>
> The successful party does not need to show that the motion was unreasonable. *The onus is on the unsuccessful party to show that the motion was reasonable.* [Emphasis added.]

20 I agree with the interpretation of rule 20.06(1) discussed in these cases. Given that the object of the rule 20.06(1) is to discourage unmeritorious motions, the onus rests on the unsuccessful moving party to establish that its motion was reasonably brought. The inquiry that the court is to make must focus on the time when the motion was brought and whether it would be clear to the moving party, acting reasonably, on the basis of the information that it knew, or reasonably ought to have known, and the authorities which have interpreted Rule 20, such as Aguonie, Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.) and Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.), that there existed a genuine issue for trial. If it reasonably appeared to the moving party that there was no genuine issue for trial, then the motion was reasonably brought. This inquiry applies to summary judgment motions which, like the motion in this appeal, are fact based. As cases such as Thomas illustrate, where the motion is based on a legal proposition, different considerations may apply as to whether the bringing of the motion "was nevertheless reasonable". See, also, Rosedale Motors Inc. v. Petro-Canada Inc., [2000] O.J. No. 938 (S.C.J.).

21 In this appeal, the issue raised by the respondent's motion was the factual issue of whether the appellant's claim had been commenced within the time mandated by the legislation. The resolution of the issue was dependent on the application of the fact based discoverability rule. The motion was brought on November 16, 1998. The inquiry, therefore, is whether on that date it was clear to the respondent, acting reasonably, on the basis of the information that he knew, or reasonably ought to have known, and on the basis of the authorities that there was a genuine issue for trial respecting when the appellant knew, or ought to have known, the facts on which she had based her negligence claim. In my view, it should have been abundantly clear that a genuine issue for trial existed and that a motions judge, in the proper exercise of his or her role, would be required to dismiss the motion. It follows that as the respondent should have known that his motion stood a real risk of not succeeding because of the presence of a genuine factual issue, the bringing of the motion was unreasonable.

22 It is not difficult to assess what was known to the respondent when he made the motion. By then, as the parties had been examined for discovery, the respondent was aware of virtually all of the appellant's evidence that she ultimately included in the affidavits filed in response to the motion. Indeed, it is clear from Mr. Evans' affidavit of November 16, 1998, filed in support of the motion, that the respondent was aware of the salient evidence which, in my view, clearly raised a genuine issue for trial in respect to the application of the discoverability rule. Moreover, in paragraph 11 of his affidavit Mr. Evans quoted the following from the appellant's examination for discovery which had been conducted on May 27, 1996:

> Question 267 Ms. MacAskill: What is your response to the limitations defence?
>
> Mr. Basciano: The plaintiff was not really that healthy until, I believe around August '94 I believe, before she actually got to my office. She was basically immobile. And we ordered the Hospital records in September of '94 and received them sometime around December of 1994. It wasn't until that time that we really knew what had happened on October 12th, 1993. As you recall, she was, she indicated she was heavily sedated, heavily medicated after the event occurred and wasn't feeling up to getting out and seeing anyone until the summer of '94. It's our position that she really didn't know the facts that formed the basis of the allegation until December 1994 and that the claim was issued nine or ten months later. It was in the one year limitation period.

23 As it should have been obvious to the respondent when he brought the motion that it stood virtually no chance of success, it was unreasonable for him within the meaning of rule 20.06(1) to have brought the motion. The appellant, therefore, is entitled to her costs of the motion on a solicitor and client basis.

Conclusion

24 For all of the above reasons, the appeal is allowed and the judgment of Fedak J. dismissing the appellant's claim is set aside. The appellant is entitled to her costs of the motion on a solicitor and client basis. As this appeal was necessitated by a motion which it was unreasonable for the respondent to bring, the respondent should bear the full costs of indemnifying the appellant for the expense to which she has been put by the appeal. Therefore, the appellant will have her costs of the appeal on a solicitor and client basis. Unfortunately, this court is not in a position to fix the costs. If the parties are unable to agree on the amount, the costs of the motion and the appeal are to be assessed and are to be paid forthwith.

BORINS J.A.
McMURTRY C.J.O. -- I agree.
FELDMAN J.A. -- I agree.

cp/e/nc/qlfwb/qldah/qlbxm

TAB 7

** Unedited **

Indexed as:

Horton v. Joyce

Between
Delores Rose Horton, Plaintiff/Responding Party, and
Ronald V. Joyce, James W. Blaney and Tim Donut Limited and
315822 Ontario Limited, Defendants/Moving Parties

[1990] O.J. No. 1641
Action No. 24555/87

Also reported at:
45 C.P.C. (2d) 69

Ontario Supreme Court - High Court of Justice
Toronto Weekly Court
McKeown J.

Heard: August 10, 1990
Judgment: September 11, 1990

Practice — Judgments and orders — Summary judgment.

The defendants brought a motion for summary judgment pursuant to Rule 20 of the Rules of Civil Procedure. In her action the plaintiff sought to set aside the sale of 50 per cent of her interest in Tim Donut in 1975, as she claimed that she was mentally incompetent during that time and that the defendant J knew of her incompetency.

HELD: The motion was dismissed. Based on the evidence adduced, the court found that there was a genuine issue for trial with respect to the plaintiff's mental incompetence and the J's knowledge thereof.

STATUTES, REGULATIONS AND RULES CITED:

Rules of Civil Procedure, Rule 20.

J.C.L. Ritchie, for the Plaintiff.
E.A. Cherniak, Q.C., and P.J. Bates, for the Defendants except James W. Blaney.
G.W. Hately, Q.C., for the Defendant, James W. Blaney.

McKEOWN J. (orally):— This is a motion for summary judgment pursuant to Rule 20 dismissing the action against the Defendants Ronald V. Joyce, Tim Donut Limited ("TDL") and 315822 Ontario Limited. Alternatively, the Defendants request security for costs of the action.

TDL previously moved for a summary judgment before a master to dismiss the action against it. This

motion was dismissed by Master Peppiatt.

Master Peppiatt made order March 7 dismissing the motion. However, in his endorsement he stated that TDL is in the circumstances, a proper party although possibly not a necessary party. I do not view TDL's motion as res judicata because it was not dealt with pursuant to the provisions of Rule 20.

The Plaintiff, Mrs. Horton, seeks to set aside the transaction by which she sold her 50% interest in TDL for $1.000,000.00 in 1975. There are three essential allegations which form the basis of her claim:

(a) The allegation by Mrs. Horton that she was mentally incompetent during the 10 year period 1974 to 1984 and, in particular, when she sold her shares in TDL to Joyce on December 23, 1985;

(b) The allegation that the Defendant Joyce knew that she was mentally incompetent at the time of the transaction; and

(c) The allegation that the transaction was not honest and fair, in that she was not paid adequate consideration.

On this motion the Defendants marshalled all of their evidence with respect to these allegations and submitted that it is incumbent on Mrs. Horton to do the same.

Under Rule 20.04 the onus is on the moving parties to show that the plaintiff has not set out in the affidavit material or other evidence, specific facts showing there is a genuine issue for trial.

A motion for summary judgment pursuant to Rule 20 is not designed to require a review of all the evidence which will be presented at trial. A Rule 20 proceeding is not a satisfactory substitute for a trial. Credibility cannot be tested on a motion.

On the evidence presented at the motion, the plaintiff is going to have an uphill battle in order to prove on the balance of probabilities the allegations with respect to Mrs. Horton's mental incompetency, and the knowledge of Joyce with respect to mental incompetency. However, the question on this motion is whether there are specific facts which show there is a genuine issue for trial.

The Moving Parties submitted that in order to succeed at trial on the mental incompetency issue, Mrs. Horton must demonstrate that (1) she was mentally competent and (2) Joyce knew her to be so. Authority for that is Fyckes v. Chisholm, [1911] O.W.N. 21 per Mulock C.J. at p. 22 stated:

> "The principles applicable to the present case, which is between the parties to the contract only, may, I think, be thus stated: The contract of a lunatic or person mentally incapable of managing his affairs is not per se void, but only voidable on its being shown that the other party had knowledge, actual constructive of such lunacy or mental incompetency; failing which, such contract, if fair and bona fide, is binding: Molton v. Camroux, 4 Ex. 17; Elliot v. Ince, 3 Jur. N.S. 597, 600; Imperial Loan Co. v. Stone, [1892] 1 Q.B. 601; Beaven v. McDonnell, 9 Ex. 309. ..."

I agree that is the test at trial but on a motion for summary judgment the moving party must satisfy the court that the Responding Party has not presented sufficient evidence to show there is a genuine issue for trial. See Watt J. in Mensah v. Robinson et al., [1989] O.J. No. 239, February 22, 1989 at p. 30.

Dr. Fenn, Mrs. Horton's doctor, set out in his affidavit sworn July 26, 1990 at paragraph 10:

> "That the physiological and psychological dependency upon drugs and alcohol in the period 1974 to 1977 made her (Mrs. Horton) incapable of any rational business judgment. Specifically, she would have been incapable of understanding the terms of any agreement to settle shares in Tim Donut Limited in 1975, and she would have been incapable of forming any rational judgment of such transaction's affect upon her interest".

In cross-examination Dr. Fenn admitted that he only saw or spoke to Mrs. Horton six times during the 1974 to 1977 period. Other than one reference to an alcohol problem, there was nothing in his notes related to the statement in paragraph 10. However, it would be a grave injustice to an expert witness to rely strictly on matters brought out in cross-examination and ignore the opinion given in an affidavit. This is not a trial where a witness could be asked on examination in chief upon what basis he gave his opinion.

All of the persons who gave affidavit evidence and who were examined for discovery, or were cross-examined by the Defendants, stated that they believed Mrs. Horton was competent. There was much evidence in the 10 year period between 1974 and 1984 which seem to indicate that her competence was not affected. There is evidence of alcohol and drug abuse, but the medical notes indicate that her memory was unimpaired and judgment was appropriate, lacking only insight. Only a trial judge can test the credibility of this evidence and compare it to the credibility of the Plaintiff's evidence.

Although Mrs. Horton alleged that Joyce knew of her incompetence, she testified that she kept the matter private and did not discuss it with anyone, except for a few very close friends which did not include Mr. Joyce. Again, this will be a matter of credibility at trial.

Since there is a genuine issue with respect to Mrs. Horton's mental incompetence and Joyce's knowledge thereof, the absence of specific facts as to whether the transaction was fair and reasonable is not fatal to Mrs. Horton's position on this motion. If one accepts the Plaintiff's case, it shows, at best, that their expert witness in 1990 believe that $1,225,000.00 was the minimum price that should have been accepted by Mrs. Horton. It is well established that a court should not question the adequacy of consideration in the absence of undue influence. Estey J. set out the principle in Calmusky v. Karaloff, [1947] S.C.R. 110 at p. 119:

> "Under such circumstances, while the courts will inquire as to whether advantage is taken or influence exerted, yet when it is found that neither of these exist and that the parties were equally in possession of all the facts, mere inadequacy of consideration is not a ground for disturbing the contract".

In Lloyd's Bank v. Bundy, [1974] 3 All E.R. 757 (C.A.) at p. 765 the general principles are set out:

> "Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on 'inequality of bargaining power'. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or

> pressures brought to bear on him by or for the benefit of the other. When I use the word 'undue' I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being 'dominated' or 'overcome' by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal".

The Plaintiff may bring more cogent evidence before the trial court and should not be deprived of the further opportunity.

I must now decide what is the test as to the existence of a genuine issue for trial within the meaning of Rule 20.04. In response to a summary judgment motion, Rule 20 provides that where a court is satisfied there is no genuine issue for trial, the court shall grant summary judgment. The responding party must set out specific facts showing there is a genuine issue, the court must take a hard look at the record.

Watt J. in (Mensah v. Robinson, supra), reviewed many of the considerations. At p. 29 he states:

> "The facts, of course, are determined by and upon the basis of the introduction of evidence which is relevant to the issues framed by the pleadings and which the adjectival law declares receivable. The Rules of Civil Procedure endeavour and are to be construed so as to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. The parties, in accordance with the rules and the applicable substantive and adjectival law, are entitled to have their dispute resolved at and by a trial.
>
> Rule 20 constitutes, in one sense, an exception to the general rule that a trial is required to determine a civil proceeding on its merits and, further, that the parties are entitled to such a method of determination. It plainly recognizes that it is not every case in which a trial is necessary to render a just determination of the dispute. The rule, at least, implicitly reserves the trial for the determination of controverted issues of claim and/or defence".

He continued at p. 31:

> "In general terms, an issue may be said to be genuine where it is real and actual, authentic and not spurious. In the context of legal proceedings, a genuine issue is one which is founded upon the evidence adduced, not the product of impermissible speculation or conjecture, and one which has about it an air or reality.
>
> At the same time, it should be recalled that a motion for summary judgment neither is nor should become a trial on the merits".

And at p. 33:

> "The critical issue, however, is whether, assuming the evidence in support of a claim to be true, it is sufficient to justify the consideration of the claim by the trier of fact. The

> evidence will be sufficient for such purpose where there is at least some evidence upon the basis of which a reasonable trier of fact, properly instructed, could find in favour of the responding party upon the issue at trial.
>
> In practical terms, the sufficiency of proof upon a particular issue by a party bearing the onus in respect of that issue can be but rarely adjudged on the basis of controverted affidavit material even with cross-examination. Indeed, it has been elsewhere said that when there are controverted facts relating to matters essential to a decision, such facts cannot be found by an assessment of the credibility of deponents who have been neither seen nor heard by the trier of fact".

The Defendants submitted that Vaughan v. Warner Communications Inc. (1986), 56 O.R. (2d) 242 (H.C.J.) is the proper test in Ontario. Boland J. stated at p. 247:

> "The specific changes to the summary judgment rule and the spirit in which other rules are changed indicates in my respectful view that Rule 20 should not be eviscerated by the practice of deferring actions for trial at the mere suggestion that further evidence may be made available or that the law is in a state of confusion. The responding party has a positive responsibility to go beyond mere supposition and the court now has the duty to take a hard look at the merits of an action at this preliminary stage".

Watt J. questioned this test in Mensah v. Robinson at p. 35 where he stated:

> "To the extent that the earlier excerpted passages from the decision of Boland J. in Vaughan v. Warner Communications, invites a weighing of competing affidavit material, I am, with respect, unable to agree. I do not disagree that the matter must be closely examined. The examination, however, in my respectful view, cannot involve findings of credibility based on controverted affidavit material or an assessment of evidentiary sufficiency as against the burden of persuasion applicable at trial. To so hold would render trials the exception, rather than the rule by which such matters are determined".

Chadwick J. quoted, with approval, the excerpts of Boland J. in Alexis Holmes v. Bissinger (1989), 68 O.R. (2d) 796, when he granted an appeal from a master's ruling refusing summary judgment. The Court of Appeal overruled Chadwick J. and held:

> "With reference to the learned weekly court judge, we are all of the opinion that there are facts and dispute in this case which can only be determined at a trial. Accordingly there is a genuine issue for trial and summary judgment ought not to have been granted".

The Court of Appeal did not specifically refer to the Vaughan v. Warner Communications case, but the endorsement appears to require a lesser test than the Rule 20 test propounded by Boland J. 'when facts are in dispute'. The Court of Appeal again reiterated their concern about deciding facts in a summary matter in Temilini v. Commissioner of the Ontario Provincial Police et al., an unreported case released May 29, 1990. In Temilini, a motion was brought under Rule 21.01(1b) and Rule 21.01(3d) to strike out the claim as disclosing no reasonable cause of action, and to dismiss the action as frivolous and vexatious. Grange J. stated at p. 7:

> "In cases depending on the facts however, the court should be very loath to determine those issues in a summary fashion. When the case appears only to lack evidence, so long as the gaps may be filled, either by discovery or a revelation of evidence at trial, the case should be allowed to proceed. Trials are notoriously unpredictable. Many a case apparently hopeless on the facts has been transformed into a winner by an unexpected turn of events in the form of either a surprise witness or a witness giving surprising evidence".

In my view, the Court of Appeal test in Temilini can also be followed in motions under Rule 20 where facts are in dispute.

Since there are facts in issue with respect to Mrs. Horton's competency and as to whether Mr. Joyce knew of her incompetence, there are genuine issues for trial. The motion for summary judgment is dismissed.

McKEOWN J.

/DRS/qlmjb

TAB 8

Indexed as:

Hi-Tech Group Inc. v. Sears Canada Inc.

Between
The Hi-Tech Group Inc. (Formerly MC Club Services, Inc.), plaintiff (appellant), and
Sears Canada Inc., defendant (respondent)

[2001] O.J. No. 33

Docket No. C34440

Also reported at:
52 O.R. (3d) 97

Ontario Court of Appeal
Toronto, Ontario

Morden, Goudge and Feldman JJ.A.

Heard: November 8, 2000.
Judgment: January 11, 2001.

(32 paras.)

On appeal from a judgment of John A.B. Macdonald J. dated May 29, 2000.

Counsel:

Robert Rueter and Young Park, for the appellant.
Jerome R. Morse and Susan B. Wortzman, for the respondent.

The judgment of the Court was delivered by

1 **MORDEN J.A.**:-- This is an appeal by the plaintiff from a summary judgment granted by John A.B. Macdonald J. dismissing one of the plaintiff's claims in this action.

2 The grounds of the appeal are that the motions judge erred: (1) in interpreting the termination provision in an agreement between the plaintiff and the defendant: (2) in holding that extrinsic evidence relating to the agreement was inadmissible: and (3) in granting partial summary judgment, on part only of a larger claim, in the circumstances of this case.

3 The facts, in so far as they are relevant to the issues that must be addressed on this appeal, are as follows. The plaintiff is in the business of organizing and managing consumer clubs on behalf of retailers, such as the defendant, to offer benefits and costs savings to consumer members as well as increase retail sales for the retailer.

4 The plaintiff entered into an agreement with the defendant dated May 1, 1994 which established the "Mature Outlook Program" that was designed for the defendant's customers who were over 50 years of age. Customers purchased membership

in the program for $9.99. Out of this membership fee, the plaintiff received $8.99 and the defendant kept $1.00. The plaintiff provided various benefits to members and administered the program. The defendant provided other benefits, notably discount coupons on purchases by members.

5 The term of the agreement is set forth in section 4.1 as follows:

> The term of this Agreement will commence as of the date first above written [May 1, 1994] and will end at midnight on May 31, 1995 ("Initial Term") subject to termination as hereinafter provided. *Thereafter, it will automatically renew for successive terms of one year, subject to termination by either party upon 120 days prior written notice.* Upon any such termination, if the Program is to continue in operation under the management of SEARS or a third party, SEARS and MANAGER [the plaintiff] will agree on procedures for the orderly transfer of MANAGER's functions to SEARS or SEARS designee, and MANAGER will be compensated for its reasonable costs incurred therein. [Emphasis added.]

6 The program was established in May, 1994. The defendant delivered a notice of termination to the plaintiff on February 21, 1996, to be effective no later than June 30, 1996. The plaintiff's position was that under section 4.1 of the agreement, the notice was ineffective to terminate the agreement before May 31, 1997. Put shortly, it submitted that the 120 days notice was to precede the commencement of the renewal term beginning on May 31, 1996 and, if it did not, the agreement would renew automatically for a further year from that date.

7 The plaintiff commenced this action in November 1996. In its statement of claim, it claimed damages in the amount of $12,000,000 based on various alleged breaches of the agreement by the defendant. One of the breaches, the one in question in the motion and in this appeal, is the alleged breach of the termination provision described in the preceding paragraph.

8 The defendant, after delivering its statement of defence, brought a motion for "partial summary judgment" dismissing the claim against it relating to the termination of the agreement. This was a claim for damages for the period July 1, 1996 to May 31, 1997. The motions judge granted the relief sought. The formal judgment provided that "partial summary judgment be granted to the defendant, dismissing the plaintiff's claim for damages for breach or repudiation of the agreement dated May 1, 1994, on the basis that the defendant did not validly terminate the Agreement effective June 30, 1996".

9 Both the plaintiff and the defendant filed extrinsic evidence on the motion for summary judgment and, indeed, in the statement of claim the plaintiff pleaded as material facts what it considered to be the general effect of part of this evidence. This related to its "significant start-up costs for the Program" and the expectation that the program would not become profitable until it had been established for some time. The plaintiff also alleged that it relied on the automatic renewal clause to reduce the risk it was assuming. It submitted that this clause would provide a reasonable opportunity for it to obtain a return on its initial investment in establishing the program under the agreement.

10 In its evidence filed on the motion the plaintiff furnished details to support the allegation. It is the plaintiff's position that this evidence, which it submits relates to the genesis and one of the aims of the transaction, supports the interpretation that the agreement was to renew automatically for one year periods subject to 120 days notice of termination before a renewal date.

11 The defendant challenges this evidence and, in fact, relies on evidence that the plaintiff was prepared to accept the risk of the contract running not longer than its initial term.

12 Both parties filed and relied upon evidence of earlier drafts of the agreement and on the parties' conduct under the agreement, submitting that this evidence casts light on its meaning.

13 In his reasons, the motions judge referred to several decisions respecting the correct test to apply on a motion for summary judgment under Rule 20. He then said:

> In Guarantee Company of North America v. Gordon Capital Corporation, [1999] 3 S.C.R. 423, Iacobucci and Bastarache JJ. for the Court determined at pp. 434-5 the proper test for a summary judgment motion by reference to both Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.) and Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) among the cases, and concluded that the appropriate test is to determine whether the Applicant has shown that there is no genuine issue of material fact requiring trial. If the Applicant establishes that, the Respondent must then "establish his claim as being one with a real chance of success": Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 at para. 15. In determining whether the test

> (in two parts) has been met. I must recognize my limited role as determined or described in Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank (1999), 44 O.R. (3d) 97 at 110 d-e.

14 The motions judge then reviewed the basic submissions of the parties and examined "the law which determines how to ascertain the meaning of a written agreement". In doing so, he made several references to the reasons of Iacobucci J. for the Supreme Court of Canada in Eli Lilly & Co. v. Novopharm Ltd., [1998] 2 S.C.R. 129 particularly, passages in paragraphs 52, 54, 55, 57, 58 and 59.

15 A major issue considered by the court in Eli Lilly was the admissibility of extrinsic evidence to aid in the interpretation of the agreement in question in that case. Iacobucci J. concluded that the agreement did not contain any ambiguity that could not be resolved by reference to the text itself and "[n]o further interpretive aids are necessary" (para. 57). He then said at paragraph 58:

> More specifically, there is no need to resort to any of the evidence tendered by either Apotex or Novopharm as to the subjective intentions of their principals at the time of drafting. Consequently, I find this evidence to be inadmissible by virtue of the parol evidence rule: see Indian Molybdenum Ltd. v. The King, [1951] 3 D.L.R. 497 (S.C.C.) at pp. 502-503.

16 The motions judge in his reasons said: If it were open to the parties to lead evidence of "surrounding circumstances", that evidence could not properly include evidence of the subjective intention of either one party (per Iacobucci J. in Lilly para. 54) or of all parties to the agreement (per Iacobucci J. in Lilly at para. 59). The surrounding circumstances, if admissible in evidence, will encompass factors which assist the Court "to search for an interpretation which, from the whole of the contract would appear to promote or advance the true intent of the parties at the time of entry into the contract". See Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insce. Co., [1980] 1 S.C.R. 888, at p. 901, Kentucky Fried Chicken v. Scotts Food Services Ltd. (1988), 41 B.L.R. (2d) 42 (O.C.A.) at p. 51.

> However, I conclude that, as a question of law, it is not open to the Respondent in the circumstances here to lead such evidence, based on the authority of Eli Lilly v. Novopharm (supra).
>
> ...
>
> Where, as here, the agreement is a negotiated commercial agreement, it should be interpreted objectively, rather than from the perspective of one or the other of the parties: see Kentucky Fried Chicken at p. 51 (supra).
>
> In my opinion, based on these legal principles, the Applicant has established that there is no genuine issue of material fact which requires a trial to determine what the parties intend by their termination language in para. 4.1, interpreted in the light of all of the contractual language. The Respondent has failed, in my opinion, to establish that its claim has a real chance of success, whether it is its claim that it has the right to lead evidence in aid of interpretation of the contract, or its claim of breach of para. 4.1 of the agreement.

17 The motions judge then dealt with the interpretation of s. 4.1 in the agreement: In my opinion, the Respondent's argument that termination rights may be exercised only on a May 31st renewal date, and only on 120 days written notice given prior to the renewal date is inconsistent with and incompatible with the usual and ordinary meaning of the language which the contracting parties used. That language is clear and unambiguous in its meaning, and it determines clearly the rights of the parties to terminate the agreement: either party may terminate the agreement by written notice delivered on the other party 120 days prior to the date of termination.

> In my opinion, the case is like Lilly (supra.) The language used in the agreement, in its relevant provisions is so clear and unambiguous that the meaning the parties intended to give to that language may be determined simply by having reference to the agreement itself. In the result, no further interpretive aids are necessary (per Iacobucci J. in Lilly at para. [57]) and it is "unnecessary to consider any extrinsic evidence at all" (per Iacobucci J. in Lilly at para. [55]). Given the applicability of these conclusions of Iacobucci J., I conclude that evidence of "surrounding circumstances" is not admissible herein. In para. [55] of Lilly, after he had mentioned that there is some jurisdiction to read contractual language in the light of "surrounding circumstances", Iacobucci J. held that "it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face."

Surrounding circumstances are before the Court only if established by extrinsic evidence; that is, evidence of matters extrinsic to the contractual document.

18 According to Eli Lilly, the first step in the process of determining the admissibility of extrinsic evidence in this case is to determine whether the text of s. 4.1 of the agreement is clear and unambiguous. On this question I disagree, with respect, with the views of the motions judge. I think that the provision is ambiguous in the sense that it is reasonably susceptible of more than one meaning. One of them supports the plaintiff's position.

19 For convenience, I repeat the most relevant part of s. 4.1: The term of this Agreement will commence as of the date first above written [May 1, 1994] and will end at midnight on May 31, 1995 ("Initial Term") subject to termination as hereinafter provided. *Thereafter, it will automatically renew for successive terms of one year, subject to termination by either party upon 120 days prior written notice* ... [Emphasis added.]

20 The plaintiff's submission, which I think is reasonably open to it to make, is that the statement "it will automatically renew for successive terms of one year" is the dominant part of the sentence that is "subject to" the phrase providing for termination on 120 days prior notice. The court should read the renewal term and the notice provision together and not in opposition to each other. This is done by reading the notice provision as qualifying the automatic renewal. In other words, there will be an automatic renewal unless appropriate notice is given. There is no ability under s. 4.1 to abridge the renewal term; there is only the right to prevent further renewal by giving appropriate notice.

21 The plaintiff's submission continues along the following lines. To read s. 4.1 otherwise is to give no meaning to the provision for an initial term and for subsequent automatic one year terms. If it had been intended that the parties could terminate the agreement at any time on 120 days notice, there would be no point to the stipulation of an initial term and of successive renewal terms of one year. If the contract could be terminated at any time, the provision of the successive terms serves no purpose. Support is also found in the use of "prior" in the phrase "prior written notice". Prior to what? The plaintiff answers that the 120 days notice must be read as being "prior" to the end of the annual term then in effect. If it is not, the word "prior" is mere surplusage.

22 The defendant has not responded to the submission that the "subject to" clause relates to the automatic renewal feature in the preceding clause but does respond to the submission relating to treating as redundant the provision of an initial term and successive renewal terms. The defendant submits that it bears upon merely a question of the "efficiency" of the language used and has no bearing on the meaning of the term. Against this response the plaintiff relies upon the principle of interpretation that effect must, if possible, be given to every word and every clause in an agreement: Brown Bros v. Popham, [1939] 4 D.L.R. 662 (Ont. C.A.) at 670; and 13 Halsbury's Laws of England, 4th ed. Reissue, at para. 174.

23 What is said in Eli Lilly respecting the admissibility of extrinsic evidence has no application in this case if I am right that s. 4.1 is ambiguous. Indeed, because words always take their meaning from their context, evidence of the circumstances surrounding the making of a contract has been regarded as admissible in every case: Prenn v. Simmonds, [1971] 1 W.L.R. 1381 (H.L.) at 1383-1384; Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, [1976] 1 W.L.R 989 (H.L.) at 995-996; Hill v. Nova Scotia (A.G.), [1997] 1 S.C.R. 69 at 78-79; Waddams, The Law of Contracts, 4th ed. (1999), at p. 232.

24 A frequently quoted and useful statement respecting surrounding circumstances is that of Lord Wilberforce in Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, supra, at pp. 995-996. After indicating that particular evidence in that case "would exceed what is permissible" in construing the contract in question, he went on to say: But it does not follow that, renouncing this evidence, one must be confined within the four corners of the document. No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

25 The contract in this case must be interpreted in the context of properly admissible evidence. This process cannot be fully carried out until findings of fact have been made on the evidence. From at least the first part of the 19th century it was the function of the jury to find the surrounding circumstances as part of the process of interpreting documents: 13 Halsbury's, supra, at para. 166.

26 This court is clearly not in a position to make the proper findings because the evidence is open to differing interpretations and inferences, and differing views on what weight should be given to it. In short, it gives rise to a genuine issue for trial. It will be the responsibility of the trial judge, in the context of the issues arising at the trial and the submissions made on them, to determine the extent of the admissibility of the evidence and to make the proper findings on it.

27 In view of my conclusion on the first two grounds of appeal it is not necessary to deal with the ground of appeal relating to the impropriety of granting a partial summary judgment in the circumstances of this case.

28 There is one further matter on which I shall comment and I do so with respect. It may be seen from the reasons of the motions judge that he applied the test governing a motion for summary judgment set forth in Guarantee Co. of North America v. Gordon Capital Corporation, [1999] 3 S.C.R. 423 at 434-5. This test, which is framed as a two-part test, involves, the moving party (1) "show[ing] that there is no genuine issue of material fact requiring trial" and "therefore summary judgment is a proper question for consideration" and then (2), if this showing is made, the responding party must then "establish his claim as being one with the real chance of success".

29 In support of the first part of the test the Supreme Court cites, in addition to its own recent decision in Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, two decisions of this court: Dawson v. Rexcraft Storage and Warehouse Inc. (1998), 164 D.L.R. (4th) 257 at 267-268 and Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 at 550-51. It may be inferred from this that the court approved these decisions and considered them to be consistent with its approach.

30 These two Ontario decisions, Dawson more fully than Irving Ungerman, make it clear that: (1) the legal or persuasive burden is on the moving party to satisfy the court that there is no genuine issue for trial before summary judgment can be granted (this is what rule 20.04(2) says); and (2), by reason of rule 20.04(1), there is an evidential burden, or something akin to an evidential burden (because the motions judge does not find facts), on the responding party to respond with evidence setting out "specific facts showing that there is a genuine issue for trial". Failure of the responding party to tender evidence does not automatically result in summary judgment. The "evidential burden" is described by this court (Catzman, Austin, and Borins JJ.A.) in Lang v. Kligerman, [1998] O.J. No. 3708 in paras. 8 and 9[1] and by the High Court (Griffiths J.) in Kaighin Capital Inc. v. Canadian National Sportsmen's Shows (1987), 58 O.R (2d) 790 at p. 792[2].

31 The short point is that the motions judge, having considered all of the evidence and the parties' submissions on it, must be satisfied that there is no genuine issue for trial before he or she may grant summary judgment. This is the legal burden resting on the moving party and it never shifts. I do not think that Guarantee Co. of North America intended to detract from this.

32 For the foregoing reasons, I would allow this appeal, with costs on a solicitor and client basis, set aside the judgment of the motions judge, and make an order dismissing the defendant's motion, with costs on a solicitor and client basis.

MORDEN J.A.
GOUDGE J.A. -- I agree.
FELDMAN J.A. -- I agree.

cp/e/nc/qlrme/qldah/qlhjk

1 "[8] As well, in considering the evidence these issues, the motions judge held incorrectly, that the plaintiffs, as responding parties were:

> required to bring to the court a coherent set of facts constituting evidence conflicting with evidence presented by the moving party and establishing that there is a genuine issues for trial on a material fact. [emphasis added]

[9] The authorities are clear that the onus is on the moving party to establish that there is no genuine issue for trial with respect to a claim or defence. There is no onus on the responding party. However, where the evidence presented by the moving party prima facie establishes that there is no genuine issue for trial, and the moving party is entitled to summary judgment as a matter of law, to preclude the granting of summary judgment the responding party assumes the evidentiary burden of presenting evidence which is capable of supporting the position advanced by the responding party in its pleading. On the basis of this evidence, when considered with all the evidence before the motions judge, it will then be for the motions judge to determine whether the evidentiary record raises a genuine issue for trial."

2 "In my view, the rule does not displace the normal burden resting on the party moving for judgment to satisfy the court that there is no genuine issue for trial. The burden placed on the responding party under the rule is an evidentiary burden only to present affidavit material or other evidence to support the allegations or denial in his or her pleadings. The onus never shifts from the moving party to satisfy the court that there is no genuine

issue for trial. Thus, for example, where the court, on reviewing the pleadings, affidavit evidence and other material, concludes that the question of whether there is a genuine issue for trial, is in balance, the application of the moving party must fail. Although the responding party may not rest his defence on unsupported defence allegations or denials, it may still be open to the responding party who files no affidavit evidence, to successfully argue that the plaintiff's claim, as supported by affidavit, is so obviously deficient as to raise a triable issue, on the plaintiff's right to succeed."

TAB 9

Case Name:

Snopko v. Union Gas Ltd.

Between
Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight,
Plaintiffs (Appellants), and
Union Gas Ltd. and Ram Petroleums Ltd., Defendants
(Respondents)

[2010] O.J. No. 1335

2010 ONCA 248

317 D.L.R. (4th) 719

261 O.A.C. 1

100 O.R. (3d) 161

187 A.C.W.S. (3d) 110

100 L.C.R. 137

Docket: C49977

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, J.L. MacFarland and D. Watt JJ.A.

Heard: January 22, 2010.
Judgment: April 7, 2010.

(32 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Lack of jurisdiction -- Judgments and orders -- Summary judgments -- Availability -- To dismiss action -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as

to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Natural resources law -- Oil and gas -- Royalties and rents -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Appeal by Snopko and others from the summary judgment dismissal of their action against Union. The motion judge concluded that section 38 of the Ontario Energy Board Act conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation run by the respondent Union, and that the various claims by the appellants fell within that exclusive jurisdiction. On appeal, the appellants contended that as their claim attacked the validity of agreements relied upon by the respondent and alleged breach of contract, negligence, unjust enrichment and nuisance, it fell outside the ambit of section 38 or, at the very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

HELD: Appeal dismissed. In substance, all of the claims raised by the appellants fell within the language of section 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order". The position advanced by the appellants that the Board's jurisdiction could have been avoided by virtue of the legal characterization of the cause of action asserted would have defeated the intention of the legislature. As the issue of jurisdiction was an issue of pure law, the motion judge was correct in dealing with it by way of summary judgment.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, S.O. 1998, c. 15, Sched. B, s. 19(1), s. 36.1(1), s. 36.1(2), s. 37, s. 38(1), s. 38(2), s. 38(3), s. 38(4)

Appeal From:

On appeal from the judgment of Justice John A. Desotti of the Superior Court of Justice, dated January 6, 2009.

Counsel:

Donald R. Good, for the appellants.

Crawford Smith, for the respondents.

The judgment of the Court was delivered by

1 **R.J. SHARPE J.A.**:-- This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

2 The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd. ("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

3 In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

4 In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

5 In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement, Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

6 On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

7 Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

8 The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

9 Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

10 Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

11 Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the Compensation Order. Each of the appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

12 On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

13 The appellants advance the following claims against Union:

* *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);
* *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28(b));
* *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);
* *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and
* *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

14 The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

15 In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

16 Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

17 The Act provides as follows with respect to the regulation of gas storage areas:

> **Gas storage areas**
>
> 36.1(1) The Board may by order,
>
> (a) designate an area as a gas storage area for the purposes of this Act; or
> (b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2(2).
>
> **Transition**
>
> (2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1)(a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2(2).
>
> **Prohibition, gas storage in undesignated areas**
>
> 37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2(3).
>
> **Authority to store**
>
> 38.(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38(1).
>
> **Right to compensation**

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38(2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38(3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply.

18 In addition, s. 19 of the Act provides as follows:

Power to determine law and fact

19.(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

19 The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Re Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177 (H.C.J.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> ...
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

20 The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation and that

the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

21 While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

22 Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

23 The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

24 I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board."

25 The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

26 In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

27 Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear

and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

28 In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Re Wellington and Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

29 By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38(2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

30 In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

31 As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

32 For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

R.J. SHARPE J.A.
J.L. MacFARLAND J.A.:-- I agree.
D. WATT J.A.:-- I agree.

cp/e/qllxr/qljxr/qljyw/qlhcs/qlced/qlhcs

TAB 10

Re

Wellington and Imperial Oil Ltd.

[1970] 1 O.R. 177-184

ONTARIO
[HIGH COURT OF JUSTICE]

PENNELL, J.

25th JULY 1969.

Oil and gas -- Gas storage area -- Ontario Energy Board Act, 1964 -- Compensation to lessor -- Whether application lies to Supreme Court to determine right to compensation -- Whether provisions in s. 21 for board of arbitration privative.

Administrative law -- Privative clause -- Ontario Energy Board Acts -- Right of compensation in lessor of natural gas after producing capacity curtailed by administrative order --Ontario Energy Board Act, 1964, s. 21, providing arbitration procedures -- Whether recourse to Courts barred.

After orders of the Ontario Energy Board have been made under the authority of the Ontario Energy Board Acts, R.S.O. 1960, c. 271, and 1964, c. 74, designating a certain area a gas storage area and authorizing the assignee of the lessee of a certain oil and natural gas lease included in the designated area to inject, store and remove gas from the gas storage area, a question of whether payments made by the lessee to the lessor purportedly in compliance with the gas royalty clauses of the lease are in law to be treated as part payment of the compensation due to the lessor upon the loss of the producing capacity of his gas reserves is solely within the jurisdiction and competence of a board of arbitration to be appointed under s. 21(3) of the Act of 1964. The language of that section (" ... no action or other proceeding lies in respect of such compensation for ...") is effective to bar the normal recourse of the lessor to the Courts.

APPLICATION for declaration of rights arising under a certain lease of oil and natural gas.

E.B. Jolliffe, Q.C., for applicants.

J.J. Robinette, Q.C., for respondent.

PENNELL, J.:-- This is an application made by Margaret Wellington, Henry E. Wellington and Joseph W. Wellington executors of the estate of Harry Brock Wellington deceased (hereinafter referred to as the "applicants") for an order declaring the rights of the parties under certain agreements entered into between the said Harry Brock Wellington (hereinafter referred to as "the deceased") and the respondent Imperial Oil Limited, and in particular declaring that payments made to the applicants by Imperial Oil or its assignee since June, 1964, were payments on account of compensation and not payments of royalties pursuant to the said agreements.

Exhuming the past slightly, I find that on or about April 30, 1946, the deceased leased to Imperial Oil Ltd. the right to produce oil and natural gas from his property in Concession 10 in consideration for royalties of one-eighth of all crude oil produced and a sliding scale of payments with respect ot gas production.

This was followed by a second lease on or about June 30, 1950, granting to Imperial Oil Ltd. the right to produce oil and natural gas from the deceased's property in Concession 11 in consideration for royalties of one-eighth of all crude oil produced and a sliding scale of payments with respect to gas production.

The next material date is October 15, 1953. On that day the deceased entered into a unit operation agreement to which I will refer more particularly in a moment, with Imperial Oil Ltd. whereby the deceased's property in Concessions 10 and 11 was made part of a production unit or pool designated as the "Corunna Pool" in which the deceased was entitled to participate in royalties with respect to oil and gas produced from the pool proportionate to his acreage in the participating area.

Before proceeding further, I must draw attention to the Ontario Energy Board Act, R.S.O. 1960, c. 271, which provided in s. 28(d) that the Lieutenant-Governor in Council may make regulations, interalia, "designating gas storage areas".

The next important date is December 22, 1960. On that day Imperial Oil Ltd. applied to The Lieutenant-Governor in Council for a regulation under s. 28(d) of the Ontario Energy Board Act, to designate as gas storage areas certain oil and gas producing areas, including the "Corunna Pool".

In consequence of that application the Lieutenant-Governor in Council by O. Reg 330/62, made on December 13, 1962, as amended by O. Reg. 7/63, made on January 17, 1963, designated the "Corunna Pool" which included, of course, the lands owned by the deceased, as a gas storage area.

What happened then when this Regulation became operative? On October 11, 1963, Tecumseh Gas Storage Limited applied to the Ontario Energy Board for authority under s. 19(1) of the Ontario Energy Board Act, to inject gas into, store gas in and remove gas from the designated gas storage area known as the "Corunna Pool" and to enter in and upon the said land and use such land for such purpose.

I turn for a moment to examine the material clauses of the application. They run as follows:

> Clause 4. Tecumseh has arranged with Imperial to require all the gas storage leases held by Imperial in respect of the said pools. By virtue of such arrangement and terms of the said gas leases, Tecumseh will hold the exclusive right to inject, store and withdraw natural and artificial gas in and from those parts of the pool covered by such gas storage leases. I ought not to pass from this clause without putting on record that Mr. Jol-

liffe for the applicants stressed that none of the leases or unit operation agreements entered into by the deceased Harry Brock Wellington with Imperial Oil Ltd. contained a clause giving the lessee the right to store gas.

> Clause 8. Tecumseh states that Imperial, by means of oil and gas leases and unitization agreements, hold and will retain the exclusive right to produce from the pools all crude petroleum, natural gas and related hydrocarbons therein. Under its arrangement with Imperial the latter will not produce natural gas from any of the said pools if such production would result in the reservoir pressure in the said pools being reduced below 235 psia (per square inch absolute). Nothing in this arrangement will prohibit Imperial from continuing to produce crude petroleum from the said pools, and it is Tecumseh's understanding that Imperial will continue to produce such crude petroleum as is economically recoverable.

The meaning of this clause, as I believe it to be, is that Tecumseh acquired storage rights with respect to natural gas.

On December 2, 1963, by order of the Ontario Energy Board, and upon certain terms and conditions stated therein, Tecumseh Gas Storage Ltd. was granted the authority to inject gas into, store gas in and remove gas from the "Corunna Pool". One of the terms and conditions stated by the Ontario Energy Board is to be found in cl. 2(b) of the order which is expressed thus:

> Before the exercise by the applican of the authority granted and given it under clause 1 hereof, it shall file with this Board in form satisfactory to it, the undertaking of Imperial Oil Limited, addressed to this Board, that Imperial Oil Limited shall not discontinue the production of crude oil from the said Pools save with the leave of the Board which may be granted on such terms as this Board may see fit to impose.

Clause 3 of the order also contains terms and conditions worthy of consideration. It runs as follows:

> ... the authority granted and given ... is subject to the terms and conditions that before the exercise by the applicant of the authority granted and given ... it shall have received from Imperial Oil Limited assignments of all gas storage lease agreements held by the Company in respect of lands in the three pools.

It is convenient at this stage to point out the scientific and mechanical forces here evolved, a method by which the oil production has been kept active coincidental with the use of the area for gas storage.

On June 1, 1964, Imperial Oil Ltd. informed the deceased by letter that its assignee Tecumseh Gas Storage Ltd. proposed to commence injection of gas into the Corunna gas storage area early in June, 1964. The letter contained the following passage:

> In accordance with the requirements of the Ontario Energy Board Act we are accordingly offering to purchase all your interest in the above gas in respect of the lands held by you in the designated gas storage area.

Imperial Oil Ltd. estimated the gas remaining in the storage area down to a pressure of 50 lbs. per square inch absolute and offered to pay the deceased at the rate of two cents per 1,000 cu. ft. for his share thereof which would have amounted to $17,341.56. The offer was open for acceptance until July 7, 1964. On July 6th the deceased rejected the said offer.

To complete the story, I should say that in the month of June, 1964, Tecumseh Gas Storage Ltd. commenced to inject gas into the Corunna gas storage area and has since continued to inject gas into, store gas in and remove gas from this gas storage area.

On June 11, 1964, and month by month thereafter, Imperial Oil Ltd. has forwarded to the deceased and since his death on June 11, 1967, to the applicants, cheques in payment of "royalties" together with statements showing the amounts payable as royalties on the production of crude oil. In its statement from June, 1964, until and including April, 1965, there were also shown amounts purporting to be royalties in respect of gas sales, but apparently no such amounts appear in subsequent statements.

It is conceded that the payments made on account of royalties in respect of the production of crude oil were royalties in the true sense. Accordingly, the issue which has arisen is limited to whether payments made by Imperial Oil Ltd. from and after June, 1964, should be deemed to by payments on account of gas production royalties, or payments on account of the amount, as yet undetermined, due and payable to the applicants as compensation for residual virgin gas. The issue raised is both curious and unusual.

Mr. Jolliffe on behalf of the applicants very persuasively developed the contention that the intervention of the Ontario Energy Board amounted to an expropriation of the applicants' gas rights; he says it became impossible by virtue of the two orders granted by the Ontario Engery Board to continue to produce gas down to the point of depletion. Mr. Jolliffe contends that the question has arisen from supervening action by the Board which has given the applicants a right to make a claim for compensation from the date of the first injection of gas in June, 1964. He avers that the payments between July, 1964, and April, 1965, purporting to be gas production royalties were made by Imperial Oil Ltd. on the fictitious basis that it was still producing gas after the order of the Ontario Energy Board granting authority to inject gas into the Corunna Pool. It was argued that Imperial Oil Ltd. clearly implied that the gas leases and unit operation agreements were no longer in force by making an offer under the obligation of the provisions of s. 19 of the Ontario Energy Board Act for gas that was not going to be produced since it was being held as a "cushion" under the arrangement with the Tecumseh Gas Storage Ltd. Mr. Jolliffe says that Imperial Oil Ltd. did not retain the right to produce gas to a level below 235 lbs. per square inch absolute. He makes the submission that the two orders of the Ontario Energy Board make it necessary, in order to determine the rights of the parties, to decide what is essentially a question of law, namely, the question of the construction of the gas leases and unit operation agreements.

I should certainly not be content with so perfunctory a treatment of Mr. Jolliffe's clear and concise argument, if I did not feel that, whatever view I may hold on this matter, I am bound by the language of s. 21 of the Ontario Energy Board Act, 1964 (Ont.), c. 74, to which I will refer more particularly in a moment.

It is argued on behalf of the respondent that the Court has no jurisdiction to grant the motion. If I understand Mr. Robinette aright what he says is this: the language of s. 21 shows that the Legisla-

ture intended a board of arbitration to be appointed in the manner prescribed by the Regulation made under the Ontario Energy Board Act to be the arbiter in a dispute of this nature.

It becomes, therefore, necessary to attempt some examination of the Act in question. The provision for the board of arbitration was contained in s. 19 of the Ontario Energy Board Act, R.S.O. 1960, c. 271. That statute was replaced by the Ontario Energy Board Act, 1964 (Ont.), c. 74. Having regard to the dates in the present case, it would appear that the relevant statutory provisions are those of the Act of 1964.

It is, to my mind, worthwhile to notice the change which was made by the Act of 1964. The language in s. 21 of the 1964 Act is the same as the language in s. 19 of the 1960 Act, but there are added provisions in s. 21 giving a right of appeal. The language of s. 21 requires very careful consideration for the matter raised on this important preliminary point depends upon its true construction. The section is as follows:

> 21(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for such purposes.
>
> (2) Subject to any agreement with respect thereto, the person authorized by an order under subsection 1,
>
> (a) shall make to the owners of any gas or oil rights or of any right to store gas in the area fair, just and equitable compensation in respect of such gas or oil rights or such right to store gas; and
> (b) shall make to the owner of any land in the area fair, just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by such order.
>
> (3) No action or other proceeding lies in respect of such compensation, and, failing agreement, the amount thereof shall be determined by a board of arbitration in the manner prescribed in the regulations, and The Aribtrations Act does not apply.
>
> (4) An appeal lies to the Ontario Municipal Board from an award of the board of arbitration.
>
> (5) Notice of an appeal under subsection 4 shall set forth the grounds of appeal and shall be sent by registered mail by the party appealing to the secretary of the Ontario Municipal Board and to the other party within fourteen days after the making of the award or within such further time as the Ontario Municipal Board, under the special circumstances of the case, allows.
>
> (6) The hearing of an appeal under subsection 4 shall be a hearing de novo, and The Ontario Municipal Board Act applies thereto.

(7) An appeal within the meaning of section 95 of The Ontario Municipal Board Act lies from the Ontario Municipal Board to the Court of Appeal, in which case that section applies.

(8) For the purposes of subsection 3 of section 10 of The Expropriation Procedures Act, 1962-63, this section shall be deemed to be section 19 of The Ontario Engery Board Act referred to therein.

It is also worthwhile to draw attention to section 57(1)(f) of the Ontario Energy Board Act, 1964 which enacts as follows:

57(1) Every order and decision made under,

(f)The Ontario Energy Board Act, being Chapter 271 of the Revised Statutes of Ontario, 1960, that were in force on the day this Act came into force shall be deemed to have made by the Board under this Act.

Now, it is true that the issue between the parties may require the consideration and construction of the gas leases and unit operation agreement. But whatever may be the form of the issue presented to me, it seems to me it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board.

It is to be observed that the Legislature imposed upon a board of arbitration, in the evnet of a dispute, the duty of deciding the amount of compensation. It may well be that in the discharge of its duty, the board of arbitration may become involved in a matter of law as well as a matter of fact. In such cases it seems to me, having regard to s. 21, the board of arbitration will have to ascertain the law and also ascertain the facts. I do not say that a board of arbitration has jurisdiction to determine an abstract point of law. But it seems to me that in many cases where a dispute arises as to the amount of compensation, the first thing the board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.

I am of the opinion, with great respect, that the consideration and construction of oil and gas leases and unit operation agreements must have been within the contemplation of the Legislature when it enacted s. 21 of the Ontario Energy Board Act, 1964. If I am right to this, nevertheless the larger question remains. It is a familiar and fundamental rule that a subject has a prima facie right of recourse to the Courts for determination of his rights. The question is whether the language of s. 21(3) precludes the applicant from obtaining a declaration that "payments were on account of compensation".

It seems to me that the language of s. 21(3) is the language of obligation and not of alternative remedy. The right to compensation and the remedy exist toghether in s. 21. Subsection (3) of s. 21 of the Act provides in the widest and unqualified terms, that "no action or other proceeding lies in

respect of such compensation, and, failing agreement, the amount thereof shall be determined by a board of arbitration ...".

There also are other circumstances to be examined. Section 19 of the Act of 1960 was reconsidered by the Legislature in 1964. It was re-enacted as s. 21 with added provisions for a right of appeal. It is to be observed that an appeal lies to the Ontario Municipal Board from an award of the board of arbitration, with a right to a further appeal, by leave, on a point of law to the Court of Appeal.

I should add a short word. I do not wish to be understood as saying that in all instances where the Legislature has provided a right of appeal that a party is precluded from coming to the Court for a declaration. Far from it. I am only attempting to say that in the present case, in my respectful opinion, the jurisdiction to determine the question has been exclusively conferred on a board of arbitration.

It is with reluctance that I conclude that the Legislature has taken away the prima facie right of a party to have a dispute determined by declaration of the Court. If there has been an error in the principle which guided this judgment, it is a consolation to know that the parties affected have the right to put their claim to the test before another and higher tribunal. As this is the first occasion upon which the provision of the Ontario Energy Board Act has been before the Court, I would dismiss the application without costs.

Application dismissed.

n

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 (Schedule B);

AND IN THE MATTER OF an application by Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight under section 19 of the Ontario Energy Board Act, 1998, S.O. 1998, for an Order of the Board determining that the contracts, filed with the Application, between the Applicants and Union Gas Limited /Ram Petroleums Limited have been terminated;

AND IN THE MATTER OF an application by Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight under section 38(2) of the Ontario Energy Board Act, 1998, S.O. 1998, for an Order of the Board determining the quantum of compensation the Applicants are entitled to have received from Union Gas Limited and Ram Petroleums Limited.

RESPONDENTS' BOOK OF AUTHORITIES

(Re: Union Gas Limited's Notice of Motion
dated June 22, 2011)

DONALD R. GOOD A PROFESSIONAL CORPORATION
Barristers and Solicitors
43 Roydon Place, Suite 207
Ottawa, ON, K2E 1A3

Donald R. Good, P.Ag.,
LSUC No. 21253J

Tel: 613-228-9676
Fax: 613-228-7404

Solicitor for Applicants