

Court of King's Bench of Alberta

Citation: Walczak v Canadian Imperial Bank of Commerce, 2024 ABKB 373

Date: 20240621
Docket: 2201 13423
Registry: Calgary

Between:

Sylwester Walczak and Regal Homes Inc.

Appellant

- and -

**Canadian Imperial Bank of Commerce - Toronto, Ontario and Canadian Imperial Bank
of Commerce - Calgary, Alberta**

Respondents

**Reasons for Decision
of the
Honourable Justice Lisa A. Silver**

Appeal from the Decision by
J. T. Prowse, The Honourable Applications Judge
Dated the 19th day of April 2023

I. Introduction

[1] Sylwester Walczak was a victim of fraud on July 26, 2012, when his then business partner altered the payee of the cheque Mr. Walczak wrote on behalf of Regal Homes Inc. for the purchase of a GIC. The altered payee was for a non-existent numbered company. Somehow, the partner was able to deposit the cheque into a different numbered company's account at CIBC, which the partner solely controlled. Mr. Walczak was unaware of these events at the time. The

Canadian Imperial Bank of Commerce [“CIBC”] negotiated that altered cheque. Mr. Walczak brought a claim on November 17, 2022, against CIBC for repayment of the monies plus other damages. Mr. Walczak maintained that he was unaware of the alteration of the cheque until 2021.

[2] On April 19, 2023, Applications Judge Prowse [“AJ Prowse”] granted Summary Judgment to the Defendants CIBC against Mr. Walczak and Regal Homes Inc., the Plaintiffs, under rule 7.3 of the *Alberta Rules of Court* [“ARC”]. AJ Prowse found there was no merit to the claim because it was statute barred under section 3(1)(b) of the *Limitations Act* [“Act”]. Mr. Walczak and Regal Homes Inc. appealed this decision.

[3] For ease of reference, I will be referring to Mr. Walczak only throughout this decision even though Regal Homes Inc. is also a Plaintiff in this action.

[4] For reasons to follow, I dismiss the appeal.

II. Standard of Review

[5] The applicable standard on review of an appeal of an Application Judge’s decision is correctness: *Jacobs v McElhanney Land Surveys Ltd*, 2019 ABCA 220 at para 153, leave to appeal to SCC refused. The appeal is heard *de novo*, meaning no deference is owed: *Club Industrial Trailers v Paramount Structures*, 2022 ABQB 34 at para 16; *Love v Parmar*, 2023 ABKB 30 at para 24.

III. Issue

[6] The main issue before me is whether section 3(1)(b) of the *Act* applies to defeat the claim, and whether there are any applicable exceptions.

IV. Analysis

A. Is the Action Statute Barred by Section 3(1)(b) of the *LA*?

[7] Section 3(1)(b) of the *Act* prohibits the bringing of a claim ten years after the claim arose. In 2020, the Alberta government issued a Ministerial Order suspending the operation of the ten-year limitations period by 75 days.

[8] Mr. Walczak’s claim was brought on November 18, 2022. According to the Respondents, Mr. Walczak’s action was brought too late, being filed after the limitation period expired. The Respondents argue the claim was brought after the expiry of the ten-year limitation period because the claim arose when the altered cheque was deposited on July 27, 2012. The ten-year limitation period, including the 75-days when the period was suspended, expired on October 10, 2022, which is before the November 18, 2022 filing date.

[9] Mr. Walczak argues the claim did not arise until he was aware of the altered cheque, which was not until his accounting documents were returned after the Canada Revenue Agency audit in 2021. Mr. Walczak further argues that the injury arose in 2021 when he brought the altered cheque to CIBC’s attention and CIBC failed to act on that information as they were obliged to do under banking law requirements. This would bring the claim within the ten-year limitation period.

[10] Mr. Walczak’s argument is attractive, but it is contrary to the law. The limitation period of ten years is not dependent on when Mr. Walczak discovered or found out about the altered cheque: *James H. Meek, Jr. Trust v San Juan Resources Inc.*, 2005 ABCA 448, [*James H. Meek*] at para 36. Neither is it dependent on when CIBC was made aware of the altered cheque or failed to take action on it. The ten-year period starts when the wrongful or harmful conduct happened, which in this case was July 27, 2012, when the altered cheque was deposited: *Ardmore Properties Inc v Sturgeon School Division No 24*, 2022 ABKB 674 at para 46 [*Ardmore*]; *Stuffco v Stuffco*, 2006 ABCA 317 at para 40 [*Stuffco*].

[11] To explain this, I will first turn to the definition of “claim” found under section 1(a) of the *Act*. According to that section, the word “claim” means “a matter giving rise to a civil proceeding in which a claimant seeks a remedial order.” The Court of Appeal of Alberta, in the *Stuffco* decision, interpreted this phrase. In the Court’s view, the phrase refers to “**facts** giving rise to the injury or offence for which a remedial order is sought” (emphasis added): *Stuffco* at para 25. The facts and circumstances giving rise to the injury is the event triggering the limitation clock to run: *Gouthro v Kibicki*, 2020 ABQB 46 at para 54.

[12] Justice Nielsen in *Ardmore* applied *Stuffco* to the ten-year limitation period. He found that the period starts from when the wrongful act happened and not from when the person who suffered the injury discovered the wrongful act, which is the case for the two-year limitation period. In this way, the ten-year limitation period “operates independently of the Plaintiff’s state of knowledge”: *Atlanta Industrial Sales Ltd v Emerald Management & Realty Ltd.*, 2006 ABQB 255 at paras 186, 196.

[13] It is worthwhile to pause for a deeper look at what the purpose is of the ten-year limitation period, which is also called the “ultimate” limitation period. The Court of Appeal of Alberta had occasion to do this in the *James H. Meek* decision, which also confirmed that discoverability principles do not apply to the ten-year limitation period under section 3(1)(b).

[14] According to the Court in the *James H. Meek* case, the ultimate limitation period is a matter of public policy. These policy reasons were discussed in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para 34 [*Peixeiro*]. The ultimate limitation period recognizes the “balance of fairness” between plaintiffs, who are unaware of their claim during the limitation period, and defendants, who, at some point, need to be “secure in their expectation” that they will not need to account for “ancient obligations”: *James H. Meek* at para 37.

[15] This policy is also based on the difficulties of defending oneself years later when evidentiary proof may no longer be available or accessible. It recognizes that plaintiffs are expected to act diligently and “not sleep on their rights.” This absolute cut off date provides a sense of finality and “repose” or peace to the law: *Peixeiro* at para 34.

[16] This limitation period applies to all claims in Alberta without exception. The limitation period applies even if the claim has merit. A judge does not have the authority to waive the application of the *Act* or extend the ultimate limitation period. This mandated limitation period applies absolutely. For instance, even if the claim arose a mere one day after the ten-year period expired, I am required by law to dismiss the claim.

[17] There is no doubt that the operation of the limitation period is unforgiving and harsh. It does not allow for situations, like Mr. Walczak’s where he did not realize the cheque was altered for many years. Nor does it account for situations like Mr. Walczak’s where, quite reasonably, he

tried to deal with the bank on the issue before filing a claim in hopes the bank would address his concerns. If Mr. Walczak had immediately filed a claim when he realized the money was fraudulently taken, there would be no limitation period problem. But he didn't. By not doing so, Mr. Walczak allowed the limitation clock to run.

[18] Although I sympathize with Mr. Walczak's position, the law does not treat self-represented individual's differently than represented ones. Legal principles and procedural rules apply equally to a self-represented person: *Goldstick Estates (Re)*, 2019 ABCA 508 at para 55; *PEK v BWK*, 2004 ABCA 135 at para 7; see also rule 1.1(2) of the *ARC*.

[19] I make one further comment. In my view, the failure to act under the banking laws by notifying officials of the alleged fraud or the failure to produce documents to assist in an investigation are not, in my view, actionable claims. In any event, the inaction by the Respondents in 2021 and the continuing inaction to date, as suggested by Mr. Walczak, does not retrigger the ultimate limitations period. I find that the failure to act is directly connected and flows from the injury in 2012 when the altered cheque was deposited.

[20] There is, however, a statutory exception to the operation of the ten-year limitation period found under section 4(1) of the *Act*. I will now turn to that section to determine if it applies in this case.

B. Does the Exception Under Section 4(1) of the *Limitations Act* Apply?

[21] According to section 4(1) of the *Act*, the ten-year limitation period may be suspended "during any period of time that the defendant fraudulently conceals the fact that the injury ... has occurred." I asked counsel for the Respondents to provide a supplemental factum on this issue in consideration of the fact Mr. Walczak is not represented by a lawyer. I thank Respondents' counsel for doing so.

[22] Historically, fraudulent concealment was an equitable doctrine postponing the limitation period: *KM v HM*, 1992 CanLII 31 (SCC), [1992] 3 SCR 6 at 51-54 [*KM*]. In the context of this exception, the word "fraud" is not confined to its "traditional" meaning but given a "broad" one: *KM* at 52-55. Fraudulent concealment can arise between two parties with some "special relationship" where the conduct is "an unconscionable thing for the one to do towards the other": *KM* at 56.

[23] For example, in *Guerin v The Queen*, 1984 CanLII 25 (SCC), [1984] 2 SCR 335 [*Guerin*], Justice Dickson, as he then was, found fraudulent concealment even though the Federal Government's Indigenous Affairs Branch (as it is now called) did not act dishonestly or for improper motives in concealing the terms of a lease from the First Nations Band: *Guerin* at 390. The Branch's behaviour was unconscionable because it breached the fiduciary duty of the Crown: *Guerin* at 388.

[24] Fraudulent concealment does not necessarily require "active" concealment but involves "some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts": *Ambrozic v Burcevski*, 2008 ABCA 194 at para 23 [*Ambrozic*]; *KM* at 57. Unconscionable conduct could also arise from the defendant's "passive failure to inform the plaintiff of some wrongdoing" the defendant "knowingly or recklessly committed": *Huet v Lynch*, 2000 ABCA 97 at para 35. Notably, the defendant must be aware of the wrongdoing, otherwise the defendant can rely on the statutory limitation: *Ambrozic* at para 23.

[25] The Respondents argue the exception does not apply. CIBC was the conduit of the cheque but did not alter it. According to the Respondents, fraudulent concealment may apply to the partner, who deliberately concealed the alteration of the cheque and the subsequent conversion of the monies, but not to CIBC who negotiated the cheque. In other words, CIBC did not commit the wrongdoing. Rather, it was the partner’s wrongdoing by deliberately concealing the alteration of Mr. Walczak’s cheque and then secretly using the monies for his own purposes.

[26] Mr. Walczak sees it differently. In his view, the fraudulent conduct arises from CIBC’s failure to catch the altered cheque, which, he argues, they have a fiduciary duty to do. Moreover, CIBC cleared the cheque for deposit into another bank account entirely.

[27] The Court of Appeal of Alberta’s decision in *WP v Alberta*, 2014 ABCA 404 [WP] is instructive on this point. In *WP*, the chambers judge granted summary judgment in favour of the Alberta government [“Alberta”] because the Appellants’ claims were out of time in accordance with the ultimate limitations period: *WP* at para 1. The claims were for sexual and emotional abuse by the teachers, staff, and other students at the school where the Appellants attended. According to the Appellants, the abuse was caused by Alberta’s negligence or that of its “servants” (Alberta teachers and staff) based on vicarious liability: *WP* at para 4. The Appellants pleaded fraudulent concealment under section 4(1) of the *Act*.

[28] The Appellants submitted that Alberta’s unconscionable conduct was based on Alberta teachers and staff directing students to hide the abuse, Alberta not taking adequate action when they learned of the abuse, and for failing to provide sufficient education to the students who were abused so that they could recognize and identify the conduct as abuse: *WP* at para 8. The chambers judge dismissed this as fraudulent concealment as Alberta did not conceal from the plaintiffs the “material facts of injury”: *WP* at paras 8-9. Notably, fraudulent concealment under the *Act* no longer involves concealment of the right to claim for the injury: *WP* at para 33.

[29] The Court in *WP* upheld the chambers judge’s decision, as fraudulent concealment required that Alberta or its agents or servants committed a fraud, which concealed the fact of the Appellants’ injury, and that the Appellants exercised due diligence to discover the fraud: *WP* in para 34. Leaving aside the issue of due diligence, the Court in *WP* found Alberta did not deliberately conceal the fact and effects of the abuse.

[30] In the case before me, CIBC did not alter the cheque, nor did CIBC deliberately conceal the fact and effects of the altered cheque. Neither was CIBC, the business partner’s agent or servant. Even if it is assumed that CIBC failed in their duty to catch the visibly altered cheque and failed to question the deposit of the cheque into a different account, this failure would not amount to fraudulent concealment.

[31] The “wrongdoing” on the part of CIBC was not catching the alteration and the subsequent deposit. CIBC did not deliberately conceal this failure to catch the alteration. CIBC was not even aware of the issue until Mr. Walczak brought it to their attention in 2021. Indeed, it was Mr. Walczak who had a copy of the altered cheque. It is CIBC’s failure to advise of their own wrongdoing in 2012, not the partner’s wrongdoing, which engages section 4(1) of the *Act*. In that respect, CIBC did not deliberately or intentionally conceal those facts. CIBC’s conduct was not unconscionable.

[32] I therefore find that section 4(1) of the *Act* does not apply to suspend the ultimate limitation period.

V. Conclusion

[33] Mr. Walczak has spent much time and money pursuing the bank. Despite his efforts, he remains frustrated by the law because his claim against the bank is statute barred. But Mr. Walczak is not without recourse. He has brought a claim against his former business partner, who committed the wrongdoing in 2012. He can also engage the criminal law process in that respect. Hopefully, Mr. Walczak will be compensated for his loss through those actions.

[34] The Supreme Court of Canada in *Grand Trunk Pacific Railway Co v Earl*, 1923 CanLII 21 (SCC), [1923] SCR 397, said “the courts are obliged to apply the law however harsh it may seem”: *Earl* at 408. In this appeal, I am obliged to apply the law and uphold AJ Prowse’s Order granting Summary Judgment in this case.

[35] The appeal is dismissed.

VI. Costs

[36] The Respondents request costs be awarded in the amount of \$16,700, which applies a 1.5 times multiplier of their costs of \$10,800, based on the Schedule C tariff. After making that submission, the Respondents advised that one of the matters for which they were seeking costs, namely an appearance for an application by Mr. Walczak for production of records, could not reasonably be connected to the appeal. That would reduce the costs request by about \$2000.

[37] The Respondents’ request is based on four appearances. The first appearance was in civil chambers. At that time Justice Woolley permitted Mr. Walczak time to properly perfect the appeal by ordering the transcript of the hearing and decision before AJ Prowse. The second appearance was again in Chambers before Justice Marion, who quite properly adjourned it for hearing as a Special Chambers matter. The third appearance was before me. Mr. Walczak asked for an adjournment for health reasons. I also asked the Respondents to file a supplemental factum on other issues not specifically raised by Mr. Walczak. The final appearance was to hear the appeal.

[38] I find that the three appearances before the hearing of the appeal were adjournments at best and were not applications heard pursuant to the tariff. It is difficult to even call those appearances contested applications. I find that in determining reasonable costs, the tariff under Schedule C would allot \$400 per appearance as uncontested adjournments, totalling \$1200. The hearing before me with written submissions, under paragraphs 7(1) and 8(1) of Schedule C would amount to \$1350. I will also add an additional \$675 for the preparation of the brief supplemental factum. The total is \$3225. Applying a 1.5 multiplier to that amount arrives at \$4837.50.

[39] I decline to award the amount requested. There are many reasons why the costs award in this case should be a modest one, having regard to rules 10.31 and 10.33 of the ARC. I appreciate Mr. Walczak lost the appeal and that CIBC has made two reasonable offers to settle. Nevertheless, Mr. Walczak lost his appeal due to a mandatory provision in the law. It was not a dismissal based on the merits.

[40] In fact, if Mr. Walczak would have brought his claim in time, it was arguable that CIBC acted negligently or at least carelessly in not catching the altered cheque and in permitting the cheque to be deposited in a different account than what was indicated on the cheque even after

the payee's name was altered. Still, in my view, there is no evidence CIBC acted fraudulently or otherwise criminally as Mr. Walczak has claimed.

[41] In determining costs, I also take into account CIBC's delay in responding to Mr. Walczak when he first brought the altered cheque to their attention. The passage of time was inordinate, starting from April 28, 2021, when Mr. Walczak first complained about the altered cheque, to September 28, 2022, when CIBC finally declined to recompense Mr. Walczak for that cheque. During this eighteen-month period, the ultimate limitations period expired.

[42] Accordingly, the costs awarded against the Appellant, Mr. Walczak, is in the amount of \$1600.00, to be paid by October 1, 2024.

[43] I thank Mr. Walczak and counsel for the Respondents for their helpful submissions.

Heard on the 18th day of June 2024.

Dated at the City of Calgary, Alberta this 21st day of June 2024.

Lisa A. Silver
J.C.K.B.A.

Appearances:

Sylwester Walczak
for the Self-Represented Litigant

Denise Brundson
for the Respondents