Court of King's Bench of Alberta

Citation: Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited, 2023 ABKB 733

Date: 20231221
Docket: 1203 06749
Registry: Edmonton

Between:

Brookfield Residential (Alberta) LP formerly known as Carma Developers LP

Plaintiff

- and -

Imperial Oil Limited, William Darling as litigation representative for the Estate of Larry C. M. Darling, Hoggan Engineering & Testing (1980) Ltd, and Ecomark Ltd

Defendants

Memorandum of Decision
of
Applications Judge W.S. Schlosser

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[1] This is a summary dismissal application by Hoggan Engineering & Testing (1980) Ltd (Hoggan), based primarily on a limitation argument. The respondent raises two main issues: the nature of the injury and the extent to which a cost-benefit analysis might figure into the question of when a proceeding is warranted.

[2] There is also an issue about whether subsequent acts by other parties nullified the applicant's responsibility for the loss.

Cases Cited

By the Parties

Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited, 2017 ABQB 218; ***De Shazo v Nations Energy Company Ltd,*** 2005 ABCA 241; *Limitations Act, RSA 2000, c L-12*; ***Grant Thornton LLP v New Brunswick,*** 2021 SCC 31; ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,*** 2019 ABCA 49; ***Vermillion Networks Inc v Vermilion Energy Inc,*** 2022 ABQB 287; ***Clark Builders and Stantec Consulting Ltd v GO Community Centre,*** 2019 ABQB 706; ***Condominium Plan 9421549 v Main Street Developments Ltd,*** 2004 ABQB 962; ***Condominium Plan No. 942 1549 v Edmonton (City),*** 2006 ABCA 194; ***Aseniwuche Winewak Nation of Canada v Ackroyd LLP***, 2023 ABCA 60; ***Salna v Awad,*** 2011 ABCA 20; ***Brandner v Alberta (Justice & Solicitor General),*** 2014 ABQB 211; ***Peixeiro v Haberman,*** [1997] 3 SCR 549; ***Queen v Cognos Inc,*** [1993] 1 SCR 87; ***Hogarth v Rocky Mountain Slate Inc,*** 2013 ABCA 57; ***Brenenstuhl v Caldwell,*** 2020 ABQB 315; ***Standard Trust Co (Liquidator of) v Metropolitan Trust Co of Canada,*** [2006] OJ No 109 aff'd in 2007 ONCA 897; *Alberta Rules of Court,* Alta Reg 124/2010 r 7.3; ***Hannam v Medicine Hat School District No 76,*** 2020 ABCA 343; ***Condominium Plan No 0125764 v Amber Equities Inc,*** 2015 ABQB 235; ***BDO Canada Limited v 1125629 Alberta Ltd,*** 2018 ABQB 402; ***Novak v Bond***, [1999] 1 SCR 808; ***HOOPP Realty Inc v Emery Jamieson LLP,*** 2018 ABQB 276; ***Capital Power PPA Management Inc v TransAlta Corporation,*** 2018 ABQB 1036; ***Gayton v Lacasse,*** 2010 ABCA 123; ***Points West Living Red Deer Inc v Rockliff Pierzchajlo Kroman Architects Ltd,*** 2021 ABQB 589; ***Condominium Corporation 0812755 v IBI Group Inc***, 2019 ABQB 75; ***Rainbow Industrial Caterers Ltd v Canadian National Railway Co,*** [1991] 3 SCR 3; ***Phillip v Bablitz,*** 2011 ABCA 383; ***MacKay v Farm Business Consultants Inc***, 2006 ABCA 316.

By the Court

Central Trust Co v Rafuse, [1986] 2 SCR 147 at page 206 (item 3) and page 244; ***Hedley Byrne & Co Ltd v Heller & Partners Ltd,*** [1963] 2 All ER 575 (HL); Institute of Law Research and Reform, *Limitations Report for Discussion #4*, September 1986 (at paragraph 2.178 page 144), The Alberta Law Reform Institute, *Report #55 Limitations*, December 1989 (page 33 *et seq*).

[3] Hoggan gave a clean environmental bill of health to the first of four parcels acquired by Brookfield Residential (Alberta) LP (Brookfield) for a residential subdivision. It was later discovered that this parcel required remediation, that now exceeds $13 million dollars. Hoggan says that this lawsuit was started too late and, in any event, that their negligence was eclipsed by intervening acts or omissions by others.

Facts

[4] The first parcel the (the Northeast 1/4) was acquired in January 2004 at a cost of roughly $4.170 million dollars. The second (the Northwest 1/4), was acquired in January 2006 for roughly $10 million dollars. There were two additional adjacent parcels acquired in 2005 and 2007. Total land acquisition costs approached $50 million dollars.

[5] The facts are somewhat opaque because there are nine environmental assessments by three outfits; two of which have been sued, and partly overlapping reports on all four parcels.

The central issue for this application is the first property, (the Northeast 1/4) acquired in January 2004.

[6] The timeline is as follows: Hoggan prepared a Phase I Environmental Assessment Report (ESA) on the Northeast 1/4, which disclosed no issues. This first parcel was purchased in 2004, partly on the strength of the report.

[7] Hoggan prepared a Phase I ESA on the Northwest 1/4 in October 2005. This report apparently found an abandoned water disposal well on the Northeast 1/4 but this was apparently not disclosed to Brookfield.

[8] Hoggan prepared a Phase II ESA on the Northwest 1/4 in November 2005. Ecomark Ltd (Ecomark) provided a report on the Northwest 1/4 in December 2005. The Northwest 1/4 was purchased in January 2006 for $10 million dollars.

[9] Stantec (not a party) next prepared a Phase I ESA on the Northeast 1/4, Northwest 1/4 and adjacent parcels. They discovered (and reported) the water disposal well on the Northeas1/4, contrary to what Hoggan had found or reported.

[10] In December 2007, Ecomark reviewed the Hoggan reports and recommended a Phase II ESA, which they completed for the Northeast 1/4 and adjacent parcels in January 2008. In April of that year, Ecomark conducted soil testing and reported no significant environmental issues.

[11] In about that time, Brookfield understood that there could be a cost to re-abandon the water disposal well. The cost could range from $1,250.00 to $250,000.00 but Stantec and Brookfield concluded that it was really a non-issue, because Brookfield could build a road over the well. This would not significantly affect their development plans and there was no suggestion of any other environmental issues that would interfere with development.

[12] At this point, and subject to what follows, Brookfield knew they may have suffered an injury(s (3)(1)(a)(i) *Limitations Act*) from Hoggan's failure to identify the disposal well and, if remediation expenses were required, this was attributable to the conduct of Hoggan (s (3)(1)(a)(ii) *Limitations Act*). However, they concluded that no proceeding was warranted. The potential expense amounted to nothing more than a hill of beans in this development, where land acquisition costs approached $50 million dollars, because the issue, and thus the expense, could be completely avoided in their design of the subdivision.

[13] Brookfield argues that a cost benefit analysis did not warrant bringing a proceeding (s 3(1)(a)(iii) *Limitations Act*). Brookfield’s argument is along the lines of the comments of the Institute of Law Research and Reform, *Limitations Report for Discussion #4*, September 1986 (at paragraph 2.178 page 144), and The Alberta Law Reform Institute, *Report #55 Limitations*, December 1989 (page 33 *et seq*).

[14] The picture changed in 2010. Brookfield argues:

> 41. On or about June 14, 2010, Carma received lab test data from Stantec regarding the samples taken in May/June 2010 that identified the samples were contaminated with hydrocarbons and that the levels detected indicated that the impacted area would require remediation before the Property could be developed into a residential subdivision.
>
> 42. Prior to this communication from Stantec in June 2010, Carma was not aware of any significant or material hydrocarbon or salt contamination of the Property.

> 43. Between June and September 2010, Carma's on-site consultant, Stantec, identified that in addition to extensive hydrocarbon contamination, the Property was also extensively impacted by salt contamination.
>
> 44. Alberta Environment would not authorize leaving the salt contamination on-site during the development of a residential neighbourhood. As such, in June 2010, Carma authorized remediation of the hydrocarbon and salt contamination surrounding the Well and adjacent sump area in order to ensure the Property could become a residential development as planned.
>
> 45. Brookfield commenced a claim against Hoggan and Ecomark on May 3, 2012, two years from the date that it first discovered that the Property was likely significantly contaminated with hydrocarbons and salt.
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> (Brookfield Response Brief, references omitted)

Discussion

[15] Overall, there are three issues: 1) What is the 'injury'; 2) When were proceedings warranted?; and 3) Was reliance on the Hoggan report obviated by subsequent environmental investigations?

Nature of the injury

[16] The Limitations Act defines injury as follows:

> 1(e) "injury" means
>
> (i) personal injury,
>
> (ii) property damage,
>
> (iii) economic loss,
>
> (iv) non-performance of an obligation, or
>
> (v) in the absence of any of the above, the breach of a duty;

[17] In this case, the injury could be one of three things:

> 'Economic loss', (subsection 1(e)(iii)); 'nonperformance of an obligation' (subsection 1(e)(iv)), or breach of a duty (subsection 1(e)(v)).

[18] 'Economic loss' is the result of the inacurate advice. 'Breach of an obligation' would be the contractual breach for failing to provide an accurate report in the first instance. 'Breach of a duty' would be the corresponding cause of action in tort. Of these three choices: 'economic loss' is a result; breach of an obligation, or breach of a duty, are more typically thought of as causes.

[19] All three arise at different times; the latter two when the first Phase I ESA was prepared and delivered, and the former, 'economic loss', when the damage was suffered, or at least discovered.

[20] When there are options for the choice of 'injury', the plaintiff is free to choose the injury that gives them the greatest advantage: ***Central Trust Co v Rafuse*** (at page 206 (item three). That case deals with concurrent liability in contract and tort. Although it predates our *Limitations*

Act and our *Act* is no longer cause of action based, that case was the source of the discovery principle, and laid the foundation for our *Act*. In my view the general principles in that case still apply.

[21] The injury is best described as a ***Hedley Byrne*** tort giving rise to economic loss, rather than a breach of contract, or the default, 'breach of a duty'.

[22] This alone may be dispositive of the application because the injury is not truly suffered, or (fully discovered) until two years before the lawsuit was commenced (and under 10 years from the date of the original report).

[23] In the limitations context, the plaintiff bears the burden of showing that its claim was started in time (s 3(5)(a)). The defendant applicant in this summary dismissal application, bears the burden of demonstrating, on a balance of probabilities, that there is no merit to the plaintiff's claim to the extent that the plaintiff would not be able to meet its burden under s 3(5)(a) of the *Limitations Act*. However, for the purposes of this application, I am satisfied that Brookfield has shown that their limitations case against Hoggan has arguable merit, at least to the extent that this lawsuit should not be dismissed summarily.

[24] This leaves one further issue.

Total eclipse?

[25] Hoggan argues that any fault on its part was obviated by the many assessments that followed their initial report. In my view, this is an attractive argument in terms of subsequent remediation costs, but it won't make the lawsuit go away. The problem is that the Northeast 1/4, the first parcel that Brookfield acquired to assemble the property for the subdivision, was purchased at least in part on reliance on Hoggans report. If they had known that it would cost roughly three times the purchase price to remediate it, they might not have bought it in the first place.

Disposition

[26] The application is dismissed.

[27] Costs are in the cause.

Heard on the 16th day of October, 2023.
Dated at the City of Edmonton, Alberta this 21st day of December, 2023.

W.S. Schlosser
A.J.C.K.B.A.

Appearances:

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