Court of Appeal for Saskatchewan
Docket: CACV4287

Citation: *Fiesta Barbeques Limited v Vomar Industries Inc.*, 2024 SKCA 108
Date: 2024-11-21

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Between:

Fiesta Barbeques Limited and Wolfedale Engineering Limited

Appellants
(Defendants/Plaintiffs by Third Party Claim/Respondents)

And

Vomar Industries Inc.

Respondent
(Non-Party/Defendant by Third Party Claim/Applicant)

And

Andros Enterprises Ltd., Astir Investments Ltd. and Diane Handley

Non-Parties
(Plaintiffs/Non-Parties/Non-Parties)

And

Benjamin Bennett

Non-Party
(Defendant/Non-Party/Non-Party)

Before:	Caldwell, Drennan and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by: In concurrence:	The Honourable Justice Keith D. Kilback The Honourable Justice Neal W. Caldwell The Honourable Justice Jillyne M. Drennan
On appeal from: Appeal heard:	2023 SKKB 228, Regina October 16, 2024
Counsel:	Jennifer Pereira, K.C. for the Appellants Angela Stolz and Mackinley Sim for the Respondent

Kilback J.A.

I. INTRODUCTION

[1] The respondent, Vomar Industries Inc., was a third party in an action concerning a fire in an apartment building. Vomar applied to dismiss the third party claim against it on the basis that the limitation period for commencing the claim had expired. A judge of the Court of King's Bench sitting in Chambers granted the application and summarily dismissed the third party claim pursuant to Rule 7-2 of *The King's Bench Rules*: *Andros Enterprises Ltd. v Bennett*, 2023 SKKB 228 [*Decision*].

[2] The appellants, Fiesta Barbeques Limited and Wolfedale Engineering Limited, appeal the *Decision*. They argue the Chambers judge erred in interpreting s. 6(1)(d) of *The Limitations Act*, SS 2004, c L-16.1 [*Act*], and when considering evidence relevant to whether the limitation period had expired before the third party claim was commenced.

[3] Substantially for the reasons of the Chambers judge and for the additional reasons set out below, I would dismiss the appeal.

II. BACKGROUND

[4] To provide context for the analysis that follows, it is helpful to briefly review relevant aspects of the procedural history of this action.

[5] On July 8, 2012, Benjamin Bennett was using a barbeque on the balcony of his apartment. The barbeque was manufactured by Fiesta and distributed by Wolfedale. The barbeque caught fire, and the fire spread to an adjacent apartment occupied by Diane Handley. The fire caused significant damage to the apartment building, which was owned by Andros Enterprises Ltd. and Astir Investments Ltd.

[6] On July 4, 2014, Andros, Astir and Ms. Handley commenced an action against Fiesta, Wolfedale and Mr. Bennett seeking compensation for the damage caused by the fire.

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[7] On August 20, 2015, the plaintiffs advised Fiesta and Wolfedale that the propane tank on Mr. Bennett's barbeque was a potential cause of the fire, and that they intended to apply to add Vomar as a defendant. Vomar had allegedly certified and re-qualified the propane tank for use with the barbeque sometime before the fire.

[8] The plaintiffs applied to add Vomar as a defendant on October 20, 2015. The application was dismissed approximately 22 months later, on August 11, 2017: *Andros Enterprises Ltd. v Fiesta Barbeques Limited*, 2017 SKQB 234. In that decision, a Chambers judge found the limitation period for adding Vomar as a defendant had expired.

[9] On November 22, 2017, the defendants then applied under s. 7 of *The Contributory Negligence Act*, RSS 1978, c C-31, for leave to add Vomar as a third party so they could advance a claim for contribution and indemnity. This application was dismissed, but the order denying leave was later set aside on appeal: *Andros Enterprises Ltd. v Fiesta Barbeques Limited*, 2018 SKQB 67, rev'd 2019 SKCA 114, 443 DLR (4th) 158. Vomar was added as a third party on November 22, 2019.

[10] On January 21, 2020, Vomar applied to strike the third party claim or have it summarily dismissed on the basis that the limitation period for commencing a claim for contribution and indemnity had expired before the defendants filed their application to add it as a third party.

[11] On October 31, 2023, the Chambers judge dismissed the third party claim. The Chambers judge found that the criteria for determining when a claim is discovered set out in s. 6(1) of the *Act* apply to third party claims. Based on the evidence before him, he also found that the third party claim against Vomar was commenced more than two years after it was discovered and was therefore barred by the limitation period set out in s. 5 of the *Act*. Fiesta and Wolfedale appeal from this decision.

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III. ANALYSIS

[12] As a starting point, Fiesta and Wolfedale do not take issue with the Chambers judge's conclusion that the principles set out in s. 6 of the *Act* apply when determining whether a third party claim has been discovered for limitations purposes. Section 6 reads as follows:

> **Discovery of claim**
>
> **6**(1) Unless otherwise provided in this Act and subject to subsection (2), a claim is discovered on the day on which the claimant first knew or in the circumstances ought to have known:
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> (a) that the injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage appeared to have been caused by or contributed to by an act or omission that is the subject of the claim;
>
> (c) that the act or omission that is the subject of the claim appeared to be that of the person against whom the claim is made; and
>
> (d) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.
>
> (2) A claimant is presumed to have known of the matters mentioned in clauses (1)(a) to (d) on the day on which the act or omission on which the claim is based took place, unless the contrary is proved.

[13] Unless the contrary is proven, a limitation period does not begin to run until a claimant knows, or ought to have known, all the facts in s. 6(1). See: *Olkowski v Nano-Green Biorefineries Inc.*, 2024 SKCA 11 at para 26; and *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc*, 2020 SKCA 39 at para 55, 447 DLR (4th) 316 [*Venture Construction*].

[14] Fiesta and Wolfedale concede they had knowledge of each of the facts in s. 6(1)(a) to (c) more than two years before the application to add Vomar as a third party was filed. For purposes of this appeal, the main issue before the Chambers judge concerned s. 6(1)(d) – whether Fiesta and Wolfedale knew or ought to have known that, "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy" their claim against Vomar.

[15] The Chambers judge concluded Fiesta and Wolfedale knew this by August 20, 2015, and that the limitation period therefore expired on August 20, 2017, more than three months before they applied for leave to issue the third party claim:

> [90] Turning to the facts of this case, Fiesta and Wolfedale should have identified Vomar as contributing to the damage suffered by the plaintiffs on May 12, 2015 – the date on which the plaintiffs, at mediation, advised them that the tank was the cause of the fire –

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> or August 20, 2015, at the latest. Yet, Fiesta and Wolfedale did not file their application for leave to file a third-party claim until November 22, 2017, more than two years later.
>
> [91] As of August 20, 2015, Fiesta and Wolfedale had to know a legal proceeding would be the appropriate means to attempt to mitigate their loss. They knew they were defending a claim predicated on the theory that the barbeque they manufactured and distributed, had malfunctioned causing the fire in question. Given the absence of any appropriate alternative resolution mechanisms, if Fiesta and Wolfedale wanted to avail themselves of their right to have a third party contribute to a potential adverse judgment, a "proceeding" would not only be legally appropriate, but necessary.
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> …
>
> [94] … Given that Fiesta and Wolfedale knew, or ought to have known, that a proceeding would have been an appropriate means to remedy their loss and that Vomar appeared to be responsible for the act or omission claimed, the relevant limitation period began to run on August 20, 2015, at the very latest. It expired on August 20, 2017, more than three months prior to the date that Fiesta and Wolfedale formally applied for leave to issue a third-party claim against Vomar.

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[16] Fiesta and Wolfedale argue the Chambers judge erred in two main ways in reaching this conclusion: (i) by misinterpreting s. 6(1)(d) and concluding they knew or ought to have known that it was legally appropriate for them to seek leave to commence third party proceedings on August 20, 2015; and (ii) by overlooking or disregarding certain evidence and concluding they had sufficient information about Vomar's involvement to bring the application. Each of these arguments will be addressed in turn.

A. Did the Chambers judge err in interpreting s. 6(1)(d)?

[17] First, Fiesta and Wolfedale argue that the Chambers judge misinterpreted s. 6(1)(d) of the *Act*. This is a question of statutory interpretation reviewable on a standard of correctness. See: *MFI Ag Services Ltd. v Farm Credit Canada*, 2023 SKCA 30 at para 24; *Altus Group Limited v Estevan (City)*, 2021 SKCA 101 at para 34, 23 MPLR (6th) 9; and *Charles v Saskatchewan Government Insurance*, 2021 SKCA 11 at paras 13–14, 456 DLR (4th) 132.

[18] Fiesta and Wolfedale say the Chambers judge erred in concluding they knew or ought to have known that a proceeding was an appropriate means to seek to remedy their claim against Vomar within the meaning of s. 6(1)(d) of the *Act* on August 20, 2015, because it was not legally appropriate for them to seek leave to commence third party proceedings at that time.

[19] As observed by the Chambers judge, s. 6(1)(d) of the *Act* is a legislative recognition that, in some cases, there may be "compelling and appropriate reasons" for a plaintiff to hold off on bringing an action (*Venture Construction* at para 63). The effect of this provision is that, even where the other three elements of discoverability in s. 6(1)(a) to (c) are fulfilled, the start date of a limitation period may be postponed where there is a legally appropriate reason for delaying bringing a claim. See: *GHC Swift Current Realty Inc. v BACZ Engineering (2004) Ltd.*, 2022 SKCA 38 at para 32, 29 CLR (5th) 294 [*GHC*].

[20] Two circumstances are most often recognized as legally appropriate reasons to delay bringing a claim: (i) where the plaintiff relies on ameliorative efforts by a defendant with superior knowledge or expertise; and (ii) where the plaintiff is pursuing an alternative dispute resolution process that offers an adequate remedy and that process has not yet concluded. See: *GHC* at para 33; and *Venture Construction* at paras 65–67.

[21] Fiesta and Wolfedale contend it was not legally appropriate to seek leave to commence a third party claim against Vomar on August 20, 2015, because at that time they knew the plaintiffs planned to apply to add Vomar as a defendant.

[22] Fiesta and Wolfedale say that, under Rule 3-31 of *The King's Bench Rules*, a defendant can only file a third party claim against "another person not already a party to the action", and Vomar's status as a party was in limbo until a decision on the plaintiffs' proposed application to add it as a defendant was rendered. They also say that, if the plaintiffs' application was successful and Vomar was added as a defendant, they would have had to frame their claim against Vomar as a cross-claim, not a third party claim. Consequently, they say they could not know how to proceed until after a decision on the plaintiffs' application was rendered, which did not occur until August 11, 2017.

[23] Fiesta and Wolfedale argue the Chambers judge erred in law by interpreting s. 6(1)(d) too narrowly and concluding they knew or ought to have known that a proceeding was a legally appropriate means to seek to remedy their claim against Vomar in these circumstances.

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[24] Respectfully, I am not persuaded by this argument. Substantially for the reasons of the Chambers judge, I agree that the plaintiffs' proposed application to add Vomar as a defendant did not constitute a legally appropriate reason for Fiesta and Wolfedale to delay seeking leave to commence their third party claim.

[25] As observed by the Chambers judge, the plaintiffs' application to add Vomar as a defendant was not analogous to an alternative dispute resolution process that could constitute a legally appropriate reason to delay bringing a third party claim because the outcome of that application could not provide Fiesta and Wolfedale with any remedy for their loss.

[26] In addition, since Fiesta and Wolfedale sought to advance a claim against Vomar for contribution and indemnity, leave under *The Contributory Negligence Act* was required regardless of whether their claim was advanced as a cross-claim or a third party claim. As found by the Chambers judge, a proceeding was not only an appropriate means to seek to remedy Fiesta and Wolfedale's claim, but it was also necessary in these circumstances.

[27] For these reasons, I find the Chambers judge did not err in interpreting s. 6(1)(d) of the *Act* by concluding the plaintiffs' proposed application to add Vomar as a defendant was not a legally appropriate reason for Fiesta and Wolfedale to delay seeking leave to commence their third party claim against Vomar.

B. Did the Chambers judge overlook or disregard material evidence?

[28] Second, Fiesta and Wolfedale argue that the Chambers judge erred by overlooking or disregarding the affidavit of Shawn Minshall sworn March 27, 2020. Mr. Minshall is an officer and director of both Fiesta and Wolfedale.

[29] Since Fiesta and Wolfedale concede that they had knowledge of each of the facts in s. 6(1)(a) to (c) of the *Act* more than two years before their application to add Vomar as a third party was filed, I understand this argument to be that the Chambers judge overlooked or disregarded evidence in Mr. Minshall's affidavit relevant to the factual question of whether Fiesta and Wolfedale knew or ought to have known that a proceeding would be an appropriate means to seek to remedy their claim against Vomar in s. 6(1)(d).

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[30] Put another way, Fiesta and Wolfedale argue that when the facts in Mr. Minshall's affidavit are considered in the context of all of the evidence, the Chambers judge should have concluded they had insufficient knowledge of Vomar and its involvement to know that a third party proceeding would be an appropriate means to seek to remedy their claim.

[31] Respectfully, I am not persuaded by this argument. Fiesta and Wolfedale acknowledge they knew or ought to have known that:

(a) the injury, loss or damage had occurred by August 25, 2014;

(b) the injury, loss or damage appeared to have been caused or contributed to by an act or omission that is the subject of the claim on May 12, 2015, when Mr. Bennett advised that the fire was caused by the propane tank; and

(c) the act or omission that is the subject of the claim appeared to be that of Vomar on August 20, 2015, when the plaintiffs' counsel advised of Vomar's involvement.

[32] All of these facts were known by Fiesta and Wolfedale on or before August 20, 2015. The only additional evidence in Mr. Minshall's affidavit addressing whether Fiesta and Wolfedale knew or ought to have known that a proceeding would be an appropriate means to seek to remedy their claim at that time can be summarized as follows:

(a) based on emails exchanged on August 20, 2015, Fiesta and Wolfedale understood that the Plaintiffs would be bringing an application to add Vomar as a defendant;

(b) because of this, Fiesta and Wolfedale considered it unnecessary to commence a third party claim; and

(c) upon receiving the decision dismissing the plaintiffs' application to add Vomar as a defendant, Fiesta and Wolfedale determined for the first time that it would be necessary and appropriate to bring a third party claim against Vomar.

[33] It is apparent from Mr. Minshall's evidence that Fiesta and Wolfedale knew a third party claim against Vomar was a possible course of action on August 20, 2015, but considered it unnecessary to commence a third party claim at that time because the plaintiffs had told them they intended to apply to add Vomar as a defendant.

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[34] I am not persuaded the Chambers judge overlooked or disregarded this evidence. Beginning at paragraph 92 of the *Decision*, the Chambers judge expressly addressed the argument engaged by this evidence, which was that the plaintiffs' application to add Vomar as a defendant provided a juridical reason for Fiesta and Wolfedale to await the outcome of that application before applying to add Vomar as a third party.

[35] For these reasons, I find that the Chambers judge did not err by overlooking or disregarding evidence in the affidavit of Mr. Minshall sworn March 27, 2020.

IV. CONCLUSION

[36] Substantially for the reasons of the Chambers judge and for the additional reasons set out above, I would dismiss the appeal with costs to Vomar calculated under Column II.

"Kilback J.A."

Kilback J.A.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Drennan J.A."

Drennan J.A.

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