In the Court of Appeal of Alberta

Citation: Dickson v. Poon Estate, 1982 ABCA 112

Date: 19820405
Docket: 14377
Registry: Edmonton

Between:

Matthew C. Dickson, Diana Davidson and the City of Edmonton

Appellants
(Defendants)

- and -

Johnny Poon, executor of the estate of Joseph Poon, deceased

Respondent
(Plaintiff)

The Court:

The Honourable Mr. Justice Moir
The Honourable Mr. Justice Haddad
The Honourable Mr. Justice Belzil

Reasons for Judgment of The Honourable Mr. Justice Moir
Concurred in by The Honourable Mr. Justice Haddad
And Concurred in by The Honourable Mr. Justice Belzil

COUNSEL:

R.C. Secord, Esq. and S.F. Goddard, Esq., for the Appellants

R.A. McLennan, Esq., Q.C. and G.J. Bigg, Esq., for the Respondent

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REASONS FOR JUDGMENT OF
THE HONOURABLE MR. JUSTICE MOIR

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[1] This is an action on a settlement arrived at in a personal injury case. The solicitor for the plaintiff in that action offered to settle his client's claim for $81,987.12 inclusive of costs. The claim was against the City of Edmonton and the driver of an Edmonton transit vehicle. The defendants were represented by a member of the City's own internal legal department, whom I will refer to as "City counsel". City counsel received the offer of settlement and then telephoned the solicitor for the plaintiff and said: "You've

got yourself a deal." The matter was then discussed as to the furnishing of releases and their execution.

[2] The appellant refused to pay the settlement. They attempted to prove that the settlement was made without the authority of Canadian Indemnity Company who apparently insure the City of Edmonton in respect of their transit system. The procedure the appellants attempted to prove was that in all claims over $20,000, before seeking authority from the Commission Board of the City of Edmonton and the department concerned the insurers had, to approve of the settlement. Thereafter the solicitor was to seek the approval of the department head and the Commission Board before making a settlement.

[3] In this case it was said that the offer to settle was accepted by the City counsel after obtaining authority to do so from the department head of the Commission Board but without seeking the same authority from the City's insurers. Two weeks after discovering this omission, the settlement was repudiated by the City. During the interval City counsel had advised the solicitor for the plaintiff of the difficulties but said she expected the approval as it was only the $58,079 claimed by the Alberta Hospitals Division that was causing the problem. In the intervening period the plaintiff Poon had died.

[4] Because of the statute law in this Province Poon's death would result in the general damages of $22,500 being reduced to $3,000. The effect of the repudiation, if it was valid, is to deprive the Poon Estate of $19,500.

[5] Mr. Johnson retained counsel and sued upon the settlement. The defence was that the settlement was made in error and without the clients' consent and therefor was not binding. The learned trial judge rejected the defence and gave judgment for $81,987.12 but denied the plaintiff's claim for interest. The defendants appeal this judgment and the plaintiff cross-appeals claiming interest and solicitor and client costs.

[6] The proposition of law relied upon by the appellant is that propounded in YANNOCOPOULAS v. MAPLE LEAF MILLING CO. LTD., (1962) 37 D.L.R. (2d) 562. That case relies upon HARVEY v. CROYDON UNION RURAL SANITARY AUTHORITY (1884) 26 Ch. D. 249; SHEPHERD v. ROBINSON [1919] 1 K.B. 474; HOLT v. JESSE (1876) 3 Ch. D. 177. To like effect is the House of Lords in NEALE v. GORDON LENNOX [1902] A.C. 465.

[7] The gist of these cases is that the Court will not lend its authority to 'enforce a settlement that was reached through misapprehension or mistake or contrary to the specific instructions of the client and not yet effective.

[8] Lord Justice Cotton in HARVEY v. CROYDON UNION (supra) said at p.255:

> "If a consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the order has not been drawn up. But the question is very different whether when counsel, being duly authorized, have given a consent, there being no mistake or surprise in the case, the party can arbitrarily withdraw that consent."

[9] The Earl of Halsbury in Neale v. Gordon Lennox (supra) said at pp.469 and 470:

> "My Lords, as I said, I will not go through the cases, because to my mind there is a higher and much more important principle involved. The Court is asked for its assistance - and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done - the Court is asked for its assistance when this order is asked to be made and enforced that the trial of the cause should not go on; and to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer - to take it from the jurisdiction of the ordinary tribunal - shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to." [emphasis added]

[10] As I understand the law parties can settle any matter in any manner they choose so long as it is a matter that does not require the intervention of the Court. The Court is simply not concerned. The contract is final and binding. Where the intervention of the Court is required the second principle comes into play as is so clearly shown in the facts of Neale v. Gordon Lennox (supra). Here the parties had the capacity and ability to settle the matter. Intervention of the Court was not required. Releases were required and indeed discussed. Perhaps the action would be discontinued as well. Clearly the transaction was within the first of the Earl of Halsbury's propositions. The Court regards the said settlement as final and conclusive.

[11] Insofar as the Yannacopoulos v. Maple Leaf Milling Co. Ltd. (supra) proceeds on that basis I am in agreement with it. However, if it purports to apply to all settlements of actions made by counsel, even though the intervention of the Court is not required, I do not agree with it.

[12] Further the original action was taken against the City of Edmonton and the driver of the Edmonton Transit vehicle. City counsel was the solicitor on the record. City counsel obtained the express consent of the Commission Board and of the department head to the precise settlement made. This is simply not a case of acting contrary to the clients' instructions. The City of Edmonton Legal Department, had for clients the City of Edmonton and its employees. The City was vicariously liable for the negligence of its employee. Those clients authorized settlement. In no way can the settlement be contrary to the clients' instructions. In this case Canadian Indemnity had a contract with the City of Edmonton. Their solicitors did not approve of the settlement, particularly in the light of Poon's death. Any arrangement they had with the City is purely indoor management with which we are not concerned in this case. The attempt to set aside the settlement, a valid and binding contract, must fail.

[13] This brings me to the cross-appeal. The settlement crystalized the damage claim into a claim for debt. The defendants refused to pay. The plaintiff claims interest on a just debt improperly withheld. The learned trial judge refused interest on the ground that there was a triable issue. However, one of the reasons for settling damage actions is to obtain the settlement moneys promptly. It is quite improper to fail to pay promptly a settlement. In my respectful opinion the failure to pay amounts to the improper withholding of a just debt.

[14] The pleadings of the respondent leave much to be desired. It would have been much better to plead the facts that establish an improper withholding. The appellant was no doubt alerted by the "prayer of the claim for interest under s.15 of the Judicature Act. If an amendment to the pleadings is necessary it should be allowed to shore up the defect in the pleadings. (See McDonald v. Royal Bank [1934] 1 W.W.R. 732).

[15] Further, the interest rate the judge thinks is proper may depend upon the facts. If the claimant is indebted to the Bank the rate he pays to the Bank may very well be the proper rate. If the claimant intended to invest the money the rate of interest he could obtain on a guaranteed investment certificate for one year may be the proper or just rate. It would be better if the facts were pled and evidence called to establish the rate.

[16] The principles to be followed are set out in Prince Albert Pulp Co. and Parson & Whittemore Pulpmills Inc. v. Foundation Company of Canada Limited [1976] 4 W.W.R. 586 (S.C.C.) and in the unreported judgment of this Court in Grandpac Limited v. American Home Assurance Co., 4 November, 1981, (as yet unreported). There is power in the Court

to allow interest at such rate as the Court thinks proper. Section 15 of the Judicature Act (R.S.A. 1980, Ch. J-1) reads as follows:

> "15. In addition to the cases in which interest is payable by law or may be allowed by law, when in the opinion of the Court the payment of a just debt has been improperly withheld and it seems to the Court fair and equitable that the party in default should make compensation by the payment of interest, the Court may allow interest for the time and at the rate the Court thinks proper."

Notwithstanding the pleadings the respondent was fully aware of the claim for interest. The respondent took no objection to the pleading or to the fact evidence was not called.

[17] The section provides that the Court "may allow interest for such time and at the rate the Court thinks proper". It is apparent that it is not a question of strict proof as was shown in the Prince Albert Pulp Co. case. In the situation that exists here it is apparent that the respondents could have invested the funds as could the solicitor and the Alberta Health Care Commission. They were deprived of this money for a period of one year. In my opinion it would be just and equitable that they pay interest at a conservative rate of 12% for the period of one year. I would allow interest at 12% on the whole of the judgment for $81,987.12 for a period of 1 year.

[18] Insofar as the claim for solicitor and client costs are concerned this is not a case for solicitor and client costs to be awarded. Party and party costs are the rule in Alberta. The appeal is dismissed with costs and the cross-appeal is allowed with costs on the same scale as allowed by the learned trial judge.

DATED at Edmonton, Alberta
this 5th day of April, 1982