2011 CarswellOnt 48, 2011 ONSC 76

Black v. McDonald

Black, Brown et. al and McDonald

Ontario Master

Master Joan M. Haberman

Heard: December 16, 2010
Judgment: January 7, 2011
Docket: 10-CV-400562

Counsel: A. Sulzenko, for Moving Party

J. McDonald, for Responding Party

Subject: Civil Practice and Procedure; Torts; Contracts; Corporate and Commercial

Civil practice and procedure --- Limitation of actions — Actions in tort — Specific actions — Actions against particular parties — Barristers and solicitors

Plaintiffs were represented by lawyer M in action for solicitor's negligence — Plaintiffs were completely unsuccessful and were ordered to pay costs in excess of $600,000 — Plaintiffs launched appeal — Plaintiffs retained new law firm and dropped appeal on its advice — Plaintiffs brought action against M for professional negligence in handling of litigation — Plaintiffs brought motion to amend statement of claim to add M's law partner R as defendant — Motion dismissed — Plaintiffs did not raise genuine issue that discoverability postponed running of limitation period against R such that it had not now expired — Plaintiffs were clearly aware of loss suffered with dismissal of action and costs order — Plaintiffs suggested they were not aware that loss was allegedly caused by M's acts or omissions and that legal proceeding would be appropriate remedy for losses so as to postpone running of limitation period — Given that action flowed from what occurred in another solicitor's negligence claim, plaintiffs were clearly not unaware of practice of or shy about suing legal advisors — It was surprising that plaintiff B would not have jumped on M's odd submissions at cost hearing, of which he would have been aware when costs reasons were released and which should have raised concerns — Totality of plaintiffs' evidence on critical issues was sparse, vague and glosses over what really mattered — There was essentially no evidence on several necessary points, so plaintiffs failed to meet their modest evidentiary burden of showing there was genuine issue as to discoverability meriting further inquiry.

Cases considered by *Master Joan M. Haberman*:

Peixeiro v. Haberman (1997), 30 M.V.R. (3d) 41, 151 D.L.R. (4th) 429, 103 O.A.C. 161, 217 N.R. 371, 1997 CarswellOnt 2928, 1997 CarswellOnt 2929, [1997] 3 S.C.R. 549, 46 C.C.L.I. (2d) 147, 12 C.P.C. (4th) 255 (S.C.C.) — distinguished

Wakelin v. Gourley (2005), 76 O.R. (3d) 272, 2005 CarswellOnt 2808, 19 C.P.C. (6th) 13 (Ont. Master) — followed

Statutes considered:

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 5.04 — considered

R. 26.01 — considered

MOTION by plaintiffs to amend statement of claim to add lawyer M's law partner R as defendant in action for professional negligence.

***Master Joan M. Haberman*:**

1 In 2005, PCF Acquisition Corp ("PCF"), Peter Black ("Black") and Geordie Brown ("Brown") commenced suit against Gowling LaFleur Henderson for professional negligence, breach of contract and breach of fiduciary duty in the context of a corporate acquisition. They were completely unsuccessful at trial before Mesbur J. in 2008 and were ultimately ordered to pay costs in excess of $600,000.

2 An appeal was launched, and in July 2009, the firm of Adair Morse (AM firm) was retained to assume its handling. On their advice, the plaintiffs opted not to proceed with the appeal. It was dismissed in October 2009.

3 On April 7, 2010 AM firm commenced this suit on behalf of the plaintiffs, alleging, once again, professional negligence. This action was launched against John McDonald as a result of his alleged mishandling of the Gowlings litigation. Only John McDonald was named as a defendant when the statement of claim in this action was issued. The motion before me now is to amend the claim to add MacDonald's law partner, Dale Ross, as a defendant.

4 Ross is represented in this action by MacDonald. She opposes the motion on the basis that the limitation period within which to commence suit against her has expired. She submits that Mesbur J's reasons for judgment were released in April 2008 and her cost endorsement, in June 2008. Accordingly, Ross asserts that the latest date for the commencement of the two year limitation period was June 2008, such that the time - frame within which to sue expired in June 2010. As an action against her would now be time-barred and is therefore untenable at law, Ross asks that the motion be dismissed.

5 The plaintiffs rely on discoverability, maintaining that they only knew about their claim after retaining the AM firm in July 2009, so the time frame within which to sue only started to run at that time and has yet to ex-

pire. The real questions on this motion are:

1) did they exercise reasonable diligence to assess the situation; and

2) if the answer to this question is "no", could they have been alerted to their potential rights earlier had they done so?

The facts

6 The motion to add Ross was initially supported by the affidavit of Michael Jordan, dated September 2, 2010 and was returnable on September 16. I adjourned the motion at that time as Black's counsel arrived with a new affidavit in hand, sworn by his client, Black, as well as a pile of cases. While Mr. McDonald was prepared to proceed, he opposed the introduction of these new materials, but indicated that if I did accept them, he had a supplementary factum to hand up, as well. In the circumstances, I thought it best to allow all of the new materials in and to adjourn the hearing so that we would all have an opportunity to read everything before oral submissions were made.

7 The Jordan affidavit is woefully inadequate for the purpose for which it was intended. It runs for less than 3 pages, the first two providing background information, only. The issue of discoverablity is addressed in one paragraph only, and says little that assists:

I have recently discovered that the Defendant John McDonald and the proposed Defendant to be added to the action, Dale M. Ross, are practicing as partners in the law firm of McDonald Ross.

8 Jordan fails to say when, other than "recently" or how he reached this conclusion. It is a conclusion that is difficult to accept, in view of what the AM firm had already pleaded in their statement of claim against McDonald, issued five months earlier. For example:

• in paragraph 4 of the claim, McDonald is described as "*a partner in the law firm of McDonald Ross*"; and

• in paragraph 5, thereof, Black states that the *plaintiffs retained "McDonald and his firm, McDonald Ross*" to commence suit against Gowling LaFleur Henderson LLP.

9 This rather perfunctory approach to the motion suggests that Jordan's focus was on when he learned about Ross, not on when the limitation period started to run.

10 McDonald picked up on the incongruity between the Jordan affidavit and the pleading in his first factum. Presumably, this is what alerted Jordan to the problem he faced, leading to the Black affidavit, dated, September 14, 2010. Black maintains that it was McDonald who told him the appeal had merit and it was on that basis that he agreed to proceed with and fund it. The Notice of Appeal was served and filed in May 2008.

11 It appears that, by January 2009, Black had already begun to have doubts about McDonald and about the appeal. He states that at that time, he contacted Geoffrey Adair of the AM firm to enquire if he would be interested in handling the appeal. Black states that he advised Adair that "I believed we had a very strong case on appeal." Black does not say why he had formed this view, which is considerably more optimistic than what he claims McDonald had advised him ("the appeal had merit"). Adair agreed to review the file and to provide his legal opinion.

12 The fact that a legal opinion was sought at this time suggests that, despite what Black claims he told Adair, he already had doubts as to the potential success of the appeal. Why else would he seek a second opinion?

13 Black also says that the solicitor-client relationship with McDonald broke down in June 2009 - five months after he had already consulted Adair regarding a second opinion. On July 14, 2009, Adair advised him that, in his view, there was no merit to the appeal and that he had a claim for negligence against McDonald. Three days later, he delivered a notice of change of lawyers. Black claims this was the first time he ever considered suing McDonald.

14 The claim was not issued until April 2010, despite the views expressed by Adair nine months earlier. Black's affidavit jumps from the July 2009 discussion with Adair to July 2010, saying nothing about why Ross was not sued at the outset. Instead, Black says he met with his lawyer, Michael Jordan, on July 5, 2010, well after the claim was issued, and at that time, Jordan asked him if McDonald and Ross were partners.

15 This is an odd statement, indeed, as the AM firm had drafted the statement of claim three months earlier in which they had expressly alleged that McDonald practiced with the firm of McDonald Ross. Presumably, they gleaned this information from having spoken with Black earlier and from the file, which likely contained correspondence from the McDonald Ross law firm. Clearly, the AM firm appears to have believed that McDonald practiced in partnership with Ross, as this is what they asserted in their pleading. There is no follow-up affidavit from Jordan to explain any of this and no indication at all as to why Ross was not named from the outset.

16 The focus of discoverability, however shifted between the Jordan and Black affidavits, the issue now being when the limitation period started to run.

17 Ross filed a supplementary affidavit in reply, dated October 19, 2010, to which she appends various e-mails between Black and McDonald. Based on these e-mails, it appears the plaintiffs were actually looking for a second opinion immediately after Mesbur J. released her decision. On May 12, 2008, Michael J. Walsh, barrister and solicitor, wrote to the plaintiff, Brown, to say that most of the decision involved findings of fact, "which are hard to deal with in the Court of Appeal". He also concluded that Mesbur J. was "right about Black not being a client", in large part what the appeal was going to be about. Walsh offered to contact McDonald.

18 By e-mail of May 13, 2008, McDonald wrote to Ross Nicholson, stating:

> Ross: I have recommended that Mr. Black and Mr. Brown consider getting a second opinion regarding any appeal.

19 This suggests that McDonald was not pressing the idea, but rather, wanted his clients to see what others thought about it.

20 Black, however, clearly wanted to proceed. By e-mail of May 20, 2008, Black advised McDonald that "there is no doubt we want to appeal."

21 Black so instructed McDonald, but still continued to seek other legal opinion. By e-mail of July 10, 2008, Paul Pape advised him of his fee in order to provide a view on the merits of the appeal.

22 Ross's second affidavit also provides some insight as to why Black was intent on proceeding with an appeal. According to his e-mail of February 9, 2008 to McDonald, he had "little or no liquid assets and am almost judgement proof." In essence, Black had nothing to lose.

23 It is also interesting to note the closing words of Mesbur J's judgment. She states:

> **This is a case of clients who were both naive and arrogant, and steadfastly refused to seek legal advice when they should have, and failed to follow it when they got it.** The failure of PCF Acquisition Corp. And the Price Check stores is the result of that naivete and arrogance, and is not the result of any negligence or breach of fiduciary duty on the part of Gowlings.

24 Of perhaps more relevance in the current context are Mebusr J's comments regarding the plaintiffs' approach to costs. As she states:

> The plaintiffs' response to the defendant's submission on costs (they were seeking in excess of $10 million) can only be described as unusual. It takes no issue with any of the figures claimed. Indeed, it makes no mention of the defendant's submissions at all. Instead, it focuses on what the plaintiffs' counsel describe as Mr. Black's and Mr. Brown's status as "unrepresented parties" and comments that "a simple caution to seek independent legal advice would have warned Mr. Black and Mr. Brown...that Gowlings would not represent their legal interests....
>
> **As a result, I have no idea what position, if any, the plaintiffs take on the defendant's entitlement to costs, or to the quantum claimed.**

25 In the end, costs were awarded in excess of $630,000. One would have thought that anyone looking at Mesbur's introductory comments would have been hard pressed to understand what it was McDonald was doing at the outset of the cost hearing. Instead of addressing entitlement to and quantum of costs, he raised an issue already disposed of on the trial of the merits of the action, choosing to say nothing about costs. It would not take a sophisticated litigant to question whether this approach could be viewed as solicitor's negligence.

26 Black, it seems, was not totally without some level of sophistication when it came to the law. Mesbur J's reasons for judgment set out repeated incidents of Black choosing to go his own way, entering into deals and amending agreements without seeking the input of counsel. He certainly felt able to handle many of these matters on his own, waiving counsel away when their assistance was offered and, at times, recommended.

27 Similarly, the second Ross affidavit appends various e-mails from Black to McDonald, in which he provides input regarding strategy for the appeal, including precedent to be relied on. All of this suggests that Black is very confident when it comes to assessing legal situations.

The law

28 Pursuant to Rule 26.01, the general rule dealing with pleading amendments, the court shall amend a pleading on such terms as are just unless to do so would cause prejudice that could not be compensated for by costs. The Rule is a mandatory one, so the court has no discretion as to whether or not to grant the order, unless, as per the case law, the amendment proposed is either untenable at law or constitutes an abuse.

29 In contrast, Rule 5.04, which deals with adding or deleting parties, speaks in terms of what the court *may* do, therefore adding an element of discretion when changing the very constitution of an action is involved.

30 A motion to add a party falls under Rule 5.04, so it is discretionary. Where the applicable limitation period has expired, a party should not be added to the action, as that would be tantamount to commencing suit after the expiry of a limitation period.

31 The applicable period is two years, pursuant to the *Limitations Act, 2002*. The issue that the plaintiffs raise in this case is from when that two year period runs.

32 The law is clear that for a claim to be "discovered" and for the limitation period to commence, four factors must be present:

> 1) the plaintiff must know that a loss or damage occurred;
>
> 2) he must know that it was caused or contributed by an act or omission;
>
> 3) he must know the identity of person whose act or omission caused the loss of damage; and
>
> 4) he must appreciate that, in the context of his loss or damage, a legal proceeding would be an appropriate remedy.

33 The plaintiffs here rely on the Supreme Court of Canada's decision of *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), where the court grappled with whether the time frame within which to commence suit for personal injuries sustained in a motor vehicle accident had expired. It was determined in that case that the cause of action was not reasonably discovered until the plaintiff learned of the severity of the injury. The basis for that conclusion was that it was only at that time, three years post-accident, that the plaintiff was able to say that he could meet the applicable statutory threshold in order to successfully sue.

34 *Peixeiro* is of limited assistance, as claims for personal injuries arising from motor vehicle accidents involve a statutory threshold that must be met. They therefore have an added dimension which is not applicable here.

35 Master Dash's decision in *Wakelin v. Gourley*, [2005] O.J. No. 2746 (Ont. Master) provides more guidance in the context of this case. There, a plaintiff involved in a motor vehicle accident sought to amend his claim to add two others who had been involved in the same accident and who had been named by the sole defendant as third parties. He was met with an expired limitation period and tried to argue discoverability as a basis for extending the commencement date of the period.

36 Master Dash began his consideration of the issue by pointing out how difficult it is to successfully resist a motion of this kind:

> While motions to add defendants can rarely be defeated at this stage on the basis of absence of due diligence (rather than proof of actual knowledge), these third parties argue that this is that rare case.

37 In the end, the master concluded that this was, indeed, the rare case and, as a result, that aspect of the motion was dismissed.

38 In *Wakelin*, the missing element was the identity of the other drivers. Though the plaintiff was always aware that three vehicles had been involved in the accident, few, if any inquiries as to the identity of the other two drivers were made until very late in the day, and those efforts were not successful.

39 The question then became whether sufficient due diligence had been exercised to justify extending the commencement of the limitation period, as discoverability is not based only on what the plaintiff knew but rather, on what he ought to have known during the relevant period.

40 The master spent some time considering the approach that should be taken in these circumstances, concluding that the court had to review the evidentiary record regarding due diligence as a starting point. He concluded that if the record disclosed an issue of fact or credibility regarding discoverability, the amendment should be permitted with leave to plead a limitations defence. The motion should only be refused where the court was satisfied that the evidence submitted clearly did not amount to due diligence. Any doubt must be resolved on the basis of a full evidentiary record obtained at trial or by way of motion for summary judgment. Accordingly, it was held that:

> The burden is not a high one at the amendment stage to establish that there is at least a triable issue on due diligence.

41 Some evidence as to the steps taken to ascertain the identity of these individuals and a reasonable explanation on proper evidence as to why the information could not be obtained with the exercise of due diligence was all that the master required to enable him to grant the relief sought.

42 The master therefore examined the record tendered, to see if the plaintiff had met his modest evidentiary burden regarding the use of diligence to access the identity of the other two drivers, concluding that he had not.

43 Thus, as is so often the case, whether or not a motion of this type should be granted will turn on the evidence, though only a low threshold must be met to avoid dismissal of the motion at this stage. If there is doubt it must be dealt with by way of a full hearing.

Analysis and conclusion

44 In their factum, the plaintiffs concede that:

> if McDonald can establish that the applicable limitation period has expired and that they clearly failed to exercise due diligence towards discovering their claim against him and his firm, the court should not grant leave to amend, as this would result in non-compensable prejudice.

45 The plaintiffs were clearly aware of the loss they suffered - their action against Gowlings was dismissed, and they were ordered to pay costs in excess of $600,000. They were also aware that McDonald was their counsel during the proceedings that led to this sad end. Although they did not articulate it in quite this way, it seems the elements of the cause of action they claim not to have been aware of are items 2 and 4: that their loss was allegedly caused by McDonald's acts or omissions and that a legal proceeding would be an appropriate remedy for their losses.

46 What does the evidentiary record say about these two items? Is there evidence of steps taken to ascertain if their losses could be attributed to McDonald and evidence of why this information could not be obtained with the exercise of reasonable diligence?

47 As already noted, in his affidavit initially submitted with this motion, Jordan appeared to have been oblivious to the limitation issue, saying only that he had "only recently discovered" that Ross practiced in partnership with McDonald. This in no way addresses the plaintiffs' current efforts to have the commencement date of the limitation period extended on the basis of discoverability.

48 The only evidence that speaks to extending the start date is found in Black's later affidavit, where he claims that he did not "discover the possibility of a claim against Mr. McDonald" until he received Adair's opin-

ion of July 14, 2009. He states, further, that he believed the action had merit and the appeal was likely to succeed, neither of which have anything to do with his views regarding McDonald's competence in having handled the action.

49 Black tried to fortify his belief in McDonald by adding that he would not have retained him to proceed with the appeal, had he "known" that he had a solicitor's negligence claim against him. This statement is suspect as Black's instructions to McDonald to proceed with the appeal came on May 20, 2008, in response to McDonald's e-mail to him of the same date to advise that he needed to know if the plan was to appeal "asap in order that I can prepare."

50 I note that McDonald's e-mail is entitled "the account." I note as well that, by this time, Black had already consulted Walsh and McDonald had advised Nicholson that the clients were thinking of an appeal. Even the former Justice Farley appears to have been consulted but advised that he was unable to assist. The "re" line in McDonald's fax to him was "PCF Ac question Appeal Period Expires May 30, 2008." The record therefore suggests that while McDonald was uncertain, Black was adamant that they proceed and that they file the paperwork as time was running out. Having McDonald take this step was simply a matter of expedience, not faith.

51 There is no evidence at all that Black or the other plaintiffs took any steps to assess McDonald's role in the demise of their claim, despite the very odd way in which he represented them at the cost hearing. This is something they were aware of when the cost reasons were released in June 2008, and something that ought to have concerned them.

52 It is important to bear in mind that this action flows from what occurred in the context of another solicitor's negligence claim - Black is clearly not unaware of the practice of or shy about suing legal advisors. It is therefore surprising that he would not have jumped on McDonald's submissions at the cost hearing early on, yet there is no evidence that he asked any of the lawyers consulted to opine regarding the McDonald's handling of the action.

53 There is no explanation as to why, having first consulted the AM firm in January 2009, Black did not obtain Adair's views until July of that year. There is no evidence of follow up attempts, or efforts to expedite the opinion. Further, Black fails to state that he had no cause to question McDonald's efforts on his behalf and no basis for making inquiries in that direction within the limitation period. He simply says he did not know he had a basis for suit until receipt of Adair's opinion.

54 The totality of the evidence that is tendered on the critical issues is sparse, vague and glosses over what really matters. I cannot say there is a credibility issue when there are significant gaps in the plaintiffs' evidence. I am also unable to say that they raise a genuine issue that merits further exploration at a full blown hearing on the issue of discoverability when there is essentially no evidence on several of the essential points.

55 I am of the view that, as in *Wakelin*, this is one of those rare cases where the plaintiff has failed to meet its modest evidentiary burden of showing there is a credibility issue or a genuine issue meriting further inquiry. The evidence here falls short of setting up a basis for the plaintiffs to make a discoverability argument. Black consulted various counsel but did nothing about any of this until the AM firm came on board and though he may have commenced suit against McDonald just under the wire, no consideration was given to suing the firm or McDonald's partner.

56 The fact that the statement of claim in this action was issued on April 7, 2010 and the Reasons for Judg-

ment released on April 30, 2008, suggests that the AM firm may well have been of the view they had to issue within two years of that date. That, and the affidavit and factum suggest that discoverability may well have been an after the fact attempt to remedy the failure to include Ross in first instance, a fact never explained.

57 One can only speculate that all of this is only coming up now as a result of McDonald's refusal to engage Law Pro to handle this claim on his behalf. The plaintiffs were no doubt hopeful that adding a defendant might engage the insurer and hasten a favourable result for them.

58 That is not to be. The motion is dismissed.

59 I note that McDonald raised various issues in evidence and in his factum regarding the status of the plaintiffs to proceed with this matter. He did not press these issues at the oral hearing and all appears to be in order now.

60 If the parties are unable to agree as to costs, I can be spoken to within 30 days of the release of these Reasons.

Motion dismissed.

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