

COURT OF APPEAL FOR ONTARIO

CITATION: Carfrae Estates Limited v. 2108790 Ontario Inc., 2012 ONCA 489

DATE: 20120709

DOCKET: C54235

O'Connor A.C.J.O., MacPherson and Rouleau JJ.A.

BETWEEN

Carfrae Estates Limited and Cornerstone Properties Inc.

Plaintiffs (Appellants)

and

2108790 Ontario Inc. and 1510232 Ontario Inc.

Defendants (Respondent)

F. Scott Turton, for the appellants

David R. Rothwell, for the respondent

Heard and released orally: July 6, 2012

On appeal from the judgment of Justice Gregory M. Mulligan of the Superior Court of Justice, dated July 22, 2011.

ENDORSEMENT

[1] The appellants Carfrae Estates Limited and Cornerstone Properties Inc. appeal from the Judgment of Mulligan J. of the Superior Court of Justice dated July 22, 2011. In the Judgment, the trial judge dismissed the appellants' action in which they sought an order discharging a debenture now owned by the respondent 2108790 Ontario Inc. on the basis that the debenture is

unenforceable because any enforcement action is now outside the relevant limitation period.

[2] Carfrae is a successor corporation to the company that granted a debenture to the Canadian Imperial Bank of Commerce on October 9, 1979. CIBC demanded payment of the debenture from Carfrae on November 15, 1984. However, CIBC never brought an action to enforce the debenture and never took possession of the land. Twenty-two years later, on October 31, 2006, CIBC assigned the debenture to the respondent.

[3] The appellants brought an action seeking an order discharging the debenture from the land registry on the basis of ss. 4 and 15 of the *Limitations Act*, R.S.O. 1990, c. L.15, which provide:

4. No person shall make an entry or distress, or bring an action to recover any land or rent, but *within ten years* next after the time at which the right to make such entry or distress, or to bring such action, first accrued....

. . .

15. *At the determination of the period limited by this Act to any person for making an entry or distress or bringing any action, the right and title of such person to the land or rent, for the recovery whereof such entry, distress or action, respectively, might have been made or brought with such period, is extinguished.* [Emphasis added.]

[4] The trial judge held that these provisions *prima facie* applied to this case.

He said:

The debenture between Carfrae and the CIBC was a floating debenture which did not require any payments until demand. The demand was issued on November 15, 1984.

This issue was canvassed in *McVan supra*. As Cronk J.A. stated at para. 19:

This court determined in *King v. Flannigan*, [1944] O.R. 537 (C.A.) and *Andre v. Valade*, [1944] O.R. 257 (C.A.), that a mortgagee's right to claim possession of mortgaged land accrues upon the first default in payment of interest and that the ten-year limitation period established by s. 4 of the *Act* runs from that time.

The debenture having been demanded on November 15, 1984 I am satisfied that the limitation period would have expired on November 16, 1994 ten years after the demand subject to my ruling which follows with respect to Carfrae's conduct.

[5] Turning to Carfrae's conduct, the trial judge discussed three factors – Carfrae's long delay in seeking the relief claimed in its action, Carfrae's lengthy dissolution and the circumstances surrounding its revival, and Carfrae's previous (1985) fraudulent conduct with respect to the debenture. Following this discussion, he concluded:

When all of these circumstances are weighed I am satisfied that it would be an injustice to allow the plaintiff to succeed on its argument that the *Limitations Act* ought to defeat the registered debenture. The plaintiff's claim is therefore dismissed.

[6] The appellants contend that the trial judge erred in reaching this conclusion. We agree with the appellants' position, essentially for two reasons.

[7] First, the trial judge erred in determining the case on issues not pleaded or argued. The respondent defended the action on at least four different bases; an argument advancing equitable considerations as a ground for refusing to apply a statutory limitation period was not one of these grounds. Indeed, during closing submissions in response to a question from the trial judge, the respondent's counsel explicitly disclaimed reliance on equitable arguments.

[8] In a series of decisions in the last decade, this court has made it clear that a trial judge should not step outside the pleadings and the case as developed by the parties: see, for example, *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74; *A-C-H International Inc. v. Royal Bank of Canada* (2005), 254 D.L.R. (4th) 327; and *TSP-INTL Limited v. Mills* (2006) 212 OAC 66. The trial judge's decision in this case did not comply with these authorities.

[9] Second, we do not think that equitable considerations can trump the clear language of the *Limitations Act*. Section 4 of the *Act* establishes a ten-year limitation period; s. 15 states a clear effect – if, after ten years, an action has not been commenced, “the right and title of such person to the land ... is extinguished”.

[10] An example of the application of these sections is *McVan General Contracting Ltd. v. Arthur* (2002), 61 O.R. (3d) 240 (C.A.). In that case, on a motion by the chargee under Rule 21, the motion judge held that the chargee's

action for payment and possession, and power of sale, were barred by ss. 4 and 15. The motion judge discharged the charge and directed that it be deleted from title. This court affirmed the motion judge's decision. Cronk J.A. stated, at para. 29, that the *Limitations Act* "evidences an intention to establish a uniform ten-year limitation period for remedies under charges or mortgages." The relief requested by the appellants in their action in this case is the same as that awarded in *McVan*, namely, an order discharging the debenture and deleting it from title.

[11] The appeal is allowed. Judgment is granted in favour of the plaintiffs. It is ordered that the debenture is discharged and that it be deleted from the land registry. The defendants' counterclaim is dismissed.

[12] The appellants are entitled to their costs of the appeal and the action below, fixed at \$15,000 and \$33,000, respectively, inclusive of disbursements and applicable taxes.

"D. O'Connor A.C.J.O."

"J.C. MacPherson J.A."

"Paul Rouleau J.A."