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**No.C904424**
**VANCOUVER REGISTRY**



**IN THE SUPREME COURT OF BRITISH COLUMBIA**

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| **BETWEEN:** | |
| WILFRED RAYMOND HEATH, EDITH MAUDE WELLS, ROWLAND HENRY HEATH and LORRAINE PLACE, Executrix of the Estate of DORIS ISABEL OSTOICH | **REASONS FOR JUDGMENT** |
| **PLAINTIFFS** | **OF THE HONOURABLE** |
| AND: | **MR. JUSTICE MACZKO** |
| IVENS, McGUIRE, SOUCH and OTTHO, a Law Firm and DONALD A. SOUCH, ULF K. OTTHO and JOHN DOE, Executor of the Estate of HERBERT A. IVENS | **(IN CHAMBERS)** |
| **DEFENDANTS** | |

Counsel for the Plaintiffs: F.G. Potts, Esq.

Counsel for the Defendants: P.A. Cote, Esq.

Dates and Place of Trial: December 14 & 17, 1990
Vancouver, British Columbia

This is an application pursuant to Rule 18A to determine whether the defendant solicitor Ulf Ottho was negligent in the

conduct of the plaintiff estate's affairs by negligently missing a limitation period.

In a previous action the plaintiffs sued Bernice and Jack Darcus claiming that they had held a piece of real property in trust for the beneficiaries of the plaintiff estate. In that action Mr. Justice Spencer found that the property was held in trust and that the defendants Bernice and Jack Darcus fraudulently denied the trust, but dismissed the action because it was not commenced within the ten year limitation period as prescribed by the Limitation Act, R.S.B.C. 1979, ch. 36.

The facts found in that action are set out in Action No. C890203 decided May 2, 1990.

The defendants raised two main arguments in response to this application,

1. That Mr. Justice Spencer was wrong in deciding that the limitation period had expired and that it is open to me to make a different finding because Mr. Ottho, the solicitor for the plaintiffs, was not a party to that action.
2. Mr. Ottho was not negligent even if the limitation period had expired because his interpretation of the statute was reasonable.

With regard to the first argument I believe it is not open to me to find that the limitation period had not expired. Such a finding would in effect reverse the decision of Mr. Justice Spencer and I believe that only the Court of Appeal has that jurisdiction. The defendants argued that s. 6(7) of the Limitation Act provides complete answer to the limitation problem and that Mr. Justice Spencer must not have considered that section because he did not refer to it in his reasons for judgment. However, after the evidence was heard argument was made by way of written submissions and s. 6(7) was brought to Mr. Justice Spencer's attention. I must presume that he considered the section and concluded that it did not have the effect of allowing the plaintiffs to commence their action more than ten years beyond the date at which the trust was denied.

At the hearing of this matter there was discussion about whether the reasons of Mr. Justice Spencer made the issue before me res judicata, whether the defendants were bound by issue estoppel, whether it is an abuse of process to attempt to relitigate a matter which had been decided, or whether I am bound by precedent. I believe it is not necessary for me to resolve under which of these categories my decision falls. At the very least Spencer J.'s decision is one which interprets a statute and I am bound by his decision unless it can be shown that some previous decision or statutory provision was not brought to his attention. See Re Hansard Spruce Mills Limited (1954), 13 W.W.R. (NS) 285, B.C.S.C.,

Wilson J. Having found that s. 6(7) of the Limitation Act was brought to his attention I conclude I should not reconsider whether the limitation period had expired. To decide otherwise would leave the plaintiff in the position of having two inconsistent decisions of the same court and no remedy.

Mr. Ottho argued that he should not be bound by Mr. Justice Spencer's decision because he was not a party to that action and did not have an opportunity to raise the defences he now raises.

In 1956 Muriel Heath died leaving a piece of property to her children. After her will was probated, the beneficiaries reached an agreement to convey the property to Bernice Darcus, one of the siblings. She was to hold the property in trust until she no longer had need of it, and then it was to be sold and the proceeds divided among the beneficiaries. One of the beneficiaries was Doris Ostoich who died in 1977 and Mr. Ottho was asked in November of 1977 to probate her estate. He was told about the trust arrangement by Lorraine Place, the executrix of Doris Ostoich's estate, and was instructed that two children, Roy and Shirley, would provide evidence that the trust existed. He was told about a property which was held in trust by Bernice Darcus for her siblings including the deceased Doris Ostoich. He was also instructed that Bernice Darcus had made a will which purported to leave the property to her siblings in accordance with the terms of the trust.

Mr. Ottho had one meeting with some of Bernice Darcus' siblings and concluded after that meeting that there was not sufficient evidence to prove the trust. He took no further steps to investigate the claim.

On June 15, 1978 Mr. Ottho wrote to Bernice Darcus and asserted that he acted for all the siblings, asserting that she held the property in trust, and would sue if the trust was not acknowledged. In fact, he acted only for the estate of Doris Ostoich and had received no instruction to threaten legal action.

On June 27, 1978 Mr. Specht, the solicitor for Bernice Darcus, wrote to Mr. Ottho denying the trust. No action was taken until early 1989 and a statement of defence was filed on April 4, 1989, in which the Statute of Limitations was pleaded. On August 10, 1989 the defendants applied for summary judgment on the basis that the limitation period had expired, but that application was not successful. Mr. Ottho acted at that hearing and remained as solicitor until approximately October 1st, 1989 at which time the plaintiffs became concerned that he had a conflict of interest and retained other counsel. Mr. Ottho knew that his conduct of the matter would be called into question. He chose not to and eventually became the main witness for the plaintiffs. He had an opportunity to participate fully in the action before Mr. Justice Spencer knowing that the limitation question would be argued. He gave evidence and fully explained his position with regard to the

matter of the limitation period. I do not believe it is appropriate for him to sit idly by, watch the proceeding, and now say he is not bound by the decision in that action.



NEGLIGENCE

In 1978 Mr. Specht, the solicitor for Bernice Darcus wrote a letter to Mr. Ottho informing him in essence that Bernice Darcus was denying the trust. When giving evidence before Mr. Justice Spencer, Mr. Ottho said he did not read the letter as a denial of trust. Spencer J. found that Mr. Specht's letter was a "clear statement that the existence of the trust is denied". He has in essence found that Mr. Ottho had misread the letter. In his judgment Spencer J. went on to make the following findings at p. 13 and 14:

> "The Limitation Act defence centres upon the fact that in 1978 Mr. Ottho wrote to Mrs. Darcus, claiming to be acting as solicitor for all the other siblings or their estates and asking that she agree to execute a deed setting out the interests of each beneficiary under the original will, subject to a life estate to her or alternatively a declaration of trust in the terms of the original will to correct the state of the title. Mrs. Darcus instructed Mr. Specht to reply. His letter, dated 27 June 1978, in my opinion is a clear statement that the existence of any trust is denied. Mr. Ottho testified that he did not understand that from the letter. He referred to background information that he had from the other siblings about a will Bernice was said to have drawn restoring the various interests. That may well be the 1969 will I have already mentioned. But no reasonable solicitor could have thought that a will, which he had never seen, and which might be revoked or challenged

> under the then Testators Family Maintenance Act, could be relied upon as a reasonable means of resolving a claim to correct a land title to record the existence of a verbal trust. Mr. Specht's letter, fairly read in the context of Mr. Ottho's, was in my opinion a rejection of the existence of any trust obligation."

The essence of these findings is that Mr. Ottho did not act as a reasonable solicitor.

Before reaching a different conclusion I would have to be convinced that some essential piece of evidence or legal argument was not brought to Mr. Justice Spencer's attention and I have no such evidence before me. While giving evidence Mr. Ottho had an opportunity to fully present his side of the case. He had an opportunity and indeed was invited to add himself as a party and I have been presented with no new information on which to reconsider Spencer J.'s decision.

In Saskatoon Credit Union Limited. v. Central Park Enterprises Ltd. et al (1988) 22 B.C.L.R. (2d) 89 at p. 95 Chief Justice McEachern stated the following:

> "More recently, however, a number of English authorities, particularly Lord Denning, have suggested that the principle of abuse of process prevents a party from relitigating a question which has been fairly decided against him. "

At p. 96 he states:

> "Abuse of process has also been used in Ontario, to prevent a retrial of issues previously decided even though the parties or issues were not precisely the same in both actions. ... "

At p. 97 he states:

> "Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing. "
>
> (Emphasis added)

Mr. Ottho's situation is covered by the words of Chief Justice McEachern in that he seeks to relitigate issues that have been decided by Mr. Justice Spencer in an action in which he could have participated and was invited to do so.

I find the defendants cannot now raise a defence which they could have raised in the earlier action.

Although he did not use the word "negligence" in his judgment it is clear that Spencer J. concluded that Mr. Ottho was responsible for the limitation period being missed. He has made findings of fact from which I can only conclude that Mr. Ottho was negligent.

ADJOURNMENT OF ACTION

The defendants have argued that I should adjourn this action until the plaintiffs have completed an appeal of Mr. Justice Spencer's decision that the limitation period had expired. I believe the plaintiffs are under no obligation to prosecute an appeal of the previous action and adjourning this matter would have the effect of compelling the plaintiffs to continue with an appeal. I have been directed to no case which would compel such a course of action. I believe it is my obligation to decide the matter before me based on the evidence before me and I do not feel it is appropriate for me to put pressure on the plaintiffs to conduct an appeal. If the plaintiffs did not have sufficient funds the effect would be to deny the plaintiffs the right to this action. In my view the plaintiffs have a good cause of action which they have a right to pursue and have done so.

I conclude that I am bound by the findings of Mr. Justice Spencer on the question of whether the limitation period has expired.

I conclude also that I am bound by Mr. Justice Spencer's findings of fact regarding the conduct of Mr. Ottho and those

findings of fact lead me to the conclusion that Mr. Ottho was negligent in the conduct of the affairs of the estate and the missing of the limitation period.

Costs follow the event.

F. Maczko, J.

Vancouver, British Columbia
January 14, 1991