Broder v. Broder, 2005 ABCA 442 (CanLII)

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Date: 2005-12-23
Docket: 0403-0202-AC • 0403-0267-AC • 0403-0356-AC
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In the Court of Appeal of Alberta

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Registry: Edmonton

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Between:

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Plaintiffs)

- and -

Don Broder and Craig Broder

Appellant
(Defendants)

- and -

Between:

Don Broder

Appellant
(Plaintiff by counterclaim)

- and -

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Defendants by counterclaim)

Docket: 0403-0356-AC

Between:

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Plaintiffs)

- and -

Don Broder and Craig Broder

Appellant
(Defendants)

- and -

Don Broder

Appellant
(Plaintiff by counterclaim)

- and -

Earl Broder, George Broder, Richard Broder, Margaret MacPhee, Doris Bibaud, Luella Adam, and Doris Bibaud and George Broder, personal representatives of the estate of Edmund Broder, also known as Ed Broder, deceased

Respondents
(Defendants by counterclaim)

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Peter Costigan

Memorandum of Judgment

Appeal from the Whole of the Judgment and Orders by
The Honourable Madam Justice M.B. Bielby
Date entered August 12, 2004
Date entered June 25, 2004
Date entered October 13, 2004
2005 ABQB 175 (CanLII), (2005 ABQB 175, Docket: 9703 12949)

Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal demonstrates the importance of applying for probate, or letters of administration, in a timely fashion. Some 37 years after the death of Ed Broder, his seven children are involved in litigation over the title to the World's Record Non-Typical Mule Deer Trophy (the "trophy"). The appellant, Don Broder ("Don"), appeals a finding that his father's estate owns the trophy. In addition, he appeals a finding of civil contempt and the penalties imposed with respect to that finding.

II. Issues on Appeal

[2] The appellant filed three separate appeals. First, he appealed the substantive judgment awarding possession and sale of the trophy to the estate. Second, he appealed the contempt finding and, finally, he appealed from the punishment imposed and the fine of $53,208.26.

III. Background

[3] Mr. Ed Broder died in 1968. Rather than apply for letters of administration, his seven children appointed George Broder to informally co-ordinate the division of the estate, and nominated the appellant, Don, to assist him. No decision was made about title to the trophy, which remained on display in the family home.

[4] In 1973, Don approached his brother Richard, who was then living in the family home, to borrow the trophy in order to exhibit it at a sportsman's show. Richard refused. Don subsequently entered the house, took the trophy, exhibited it, and retained possession in his own home.

[5] In 1994, the siblings, less Don, made an unsuccessful attempt to find a buyer for the trophy. Three years later, in 1997, they saw an article in the *Edmonton Sun* in which Don and his son Craig claimed joint ownership of the trophy. The siblings made a demand for the return of the trophy. Don refused. The siblings then brought a civil action seeking return of the trophy and a declaration of joint ownership. In addition to filing a statement of defence, Don brought a counterclaim seeking damages for care and maintenance of the trophy.

[6] In 2001, Don brought a motion to strike the siblings' action for lack of standing. The motion was adjourned, *sine die*, to enable the siblings to seek letters of administration. Don appealed that decision to a Justice of the Court of Queen's Bench. In the interim, Don's siblings, George and Doris, were granted letters of administration and appointed as personal representatives of the estate. They immediately applied to be added as parties to the action, seeking the return of the trophy. The two applications were heard concurrently. Don's appeal was dismissed and the siblings' motion to have the personal representatives added to the statement of claim was granted. Any issues of limitations or standing were, however, reserved for the trial judge. That decision was upheld on appeal to this court, on the basis that the limitation would be a live issue at the trial.

IV. Trial Judgment

[7] The matter came to trial in early 2004. The trial judge found that although the siblings were aware Don had taken and retained the trophy in 1973, they assumed he was merely holding it for their joint possession. She found that the first time they knew otherwise was in 1997, when they read a newspaper article in which Don and his son Craig asserted ownership. It was at this point, according the trial judge, that the siblings demanded the return of the trophy and Don refused to honour that demand.

[8] As a result of this finding, the trial judge found Don liable in both conversion and detinue. She concluded that the limitation period for both was two years from the date of discovery in 1997. She concluded, nonetheless, that the action by the personal representatives in 2001 was validated by application of s. 61(1)(b) of the former Alberta limitation statute, the *Limitation of Actions Act*, R.S.A. 1980, c. L-15. In addition, she found that the 1997 civil action was legitimized as an action taken for the benefit of the estate under the common law doctrine of relationship back (see: ***Stout Estate v. Golinowski Estate*** 2002 ABCA 49 (CanLII), (2002), 299 A.R. 13, 2002 ABCA 49 at para. 93; ***Frank v. Canada (Minister of Indian and Northern Affairs)*** 56 Alta. L.R. (2d) 289 (C.A.). She directed the return of the trophy to the personal representatives for sale and distribution of the proceeds. The trial judge allowed Don's counterclaim for expenses in the amount of $21,995, less the costs of the sale and subject to certain further conditions. With respect to costs, she found that, while the personal representatives had been successful, the excessive delay in this matter mitigated against any award of costs in their favor. She directed, therefore, that both parties bear their own costs.

[9] Following judgment, the appellant failed to deliver the trophy. On April 13, 2004, Veit J. ordered the appellant to deliver the trophy to the offices of a law firm and, if he failed to do so, he was to appear in chambers on Friday, April 23, 2004 to show cause why he should not be held in civil contempt. A fake trophy was delivered.

[10] On April 23rd, the appellant, aged 74, appeared before the trial judge. He was not represented by counsel, and did not disclose that the trophy had been sold and was no longer in his possession. Rather than show cause why he could not deliver the trophy, he took the position that there was a lien against the trophy and it would not be delivered until his charges were paid. The trial judge found him in contempt and ordered him taken into custody until he purged his contempt.

[11] At a subsequent chambers hearing, documentation was introduced demonstrating that an American businessman had bought the trophy some time in 2003. In the face of this new evidence, the appellant admitted that he had sold the trophy and that it was no longer in his possession. The trial judge directed that he was in continuing contempt, and he was to remain in custody until he paid the amount received for the trophy into trust for recovery of the trophy. The appellant produced the requisite funds and the trial judge released him, holding that he had purged his contempt. The trophy was recovered and then resold to the same individual at a higher cost by the estate.

[12] The estate subsequently applied to the trial judge for its costs from the date of trial. The trial judge did not adjust costs, but she imposed a fine of $53,208.26 instead on the appellant for contempt of court. The fine amounted

to the siblings' solicitor-client costs from the date of sale of the trophy up until the conclusion of trial ($37,887.13) and the accrued fees ($15,321.13) due to the contempt proceedings. The award was then discounted by $1,995 – the amount of costs for maintaining the trophy.

A. Standard of Review

[13] The appeal raises both questions of fact and questions of law. The standard of review for errors of fact is palpable and overriding error. The standard of review for errors of law is correctness: ***Housen v. Nikolaisen,*** 2002 SCC 33 (CanLII), [2002] 2 S.C.R.235 at para.8.

V. Decision

A. Appeal relating to determination of ownership of the trophy

[14] The appellant argues that the cause of action was statute-barred. We disagree. The trial judge made very specific findings as to the date when the respondents first became aware of Don's claim to ownership. She accepted that, although they knew Don had taken the trophy from the home, they understood he was keeping the trophy safe, on behalf of all of the family, until the day when it was to be sold. Indeed, Don did not testify otherwise. Her finding that the limitation period began to run on the date the article appeared in the *Edmonton Sun* in 1997 is a reasonable one. Similarly, her decision that the claim was not barred due to *laches* is also reasonable.

[15] The major argument on appeal was whether the trial judge erred in finding that the action was not statute-barred because more than two years had elapsed between 1997 and the date the personal representatives were added to the action in 2001.The trial judge characterized the 1997 action as one brought for the benefit of the estate. She relied upon s. 61 of the *Limitation of Actions Act*, and the common law doctrine of relationship back, to find that the action was not statute-barred. In regard to the latter, she carefully reviewed the common law relating to that doctrine, including the limitations on the application of relationship back, but was satisfied that the doctrine applied to the facts before her.

[16] We cannot say the trial judge erred in characterizing the 1997 action as one brought on behalf of the estate. The statement of claim clearly referenced the father's death, and stated that the trophy was an asset of the estate. The statement of claim also set out that there had been no administration of the estate, and that the benefits were being sought, not just for the plaintiffs, but for those who would be entitled to distribution of the estate. The trial judge found at para. 83 (AB 1, F26):

> That the action was brought for the benefit of the estate is not in question. The prayer for relief in both the original and amended Statement of Claim does not suggest any relief inconsistent with this result. Further, the evidence of the Plaintiffs, which I have accepted over that of the Defendant, was that their father repeatedly told a number of them during his lifetime that after his death he wanted the trophy sold and the sale proceeds divided among them, which is consistent with the conclusion the action was brought for the benefit of the estate.

[17] In our view, the trial judge's finding that the 1997 action had been brought on behalf of the estate was reasonable and did not amount to palpable and overriding error.

[18] Similarly, we find she did not err in law in finding the common law doctrine, surrounding relationship back, applied to save this action. Her factual findings support that conclusion. We do note that it is also arguable that the action in detinue may not have arisen until the personal representative was appointed, because this was when

someone became legally entitled to possession. It is, however, unnecessary to deal with that issue in view of our decision that the trial judge did not err in applying the doctrine of relationship back. Neither is it necessary to resort to s. 61 of the *Limitation of Actions Act.*

[19] We dismiss the appeal relating to the estate's entitlement to the trophy.

B. Appeal relating to the finding of civil contempt

[20] The appellant raises many issues with respect to the procedure, evidence and rights of an accused in a civil contempt proceeding (which is quasi-criminal in nature). We need not deal with all these arguments. In our view, there is a problem maintaining the contempt at this time, because the citation for contempt related solely to an act that could not be performed at the time it was ordered. The appellant was cited in contempt for failing to deliver the trophy. In fact, he did not have the trophy in his possession at the time of the citation having sold it in 2003.

[21] Having said that, the trial judge did not err on the facts before her. The appellant chose to remain mute about the whereabouts of the trophy and he has only himself to blame for the fact he spent time incarcerated for contempt. Instead of explaining that he could not produce a trophy he did not have, the appellant's son suggested the only reason it was not produced was because there was a lien on the trophy for work done, and that it had to be retained until all charges were paid or the lien would be lost. The trial judge had no way of knowing Don had already sold the trophy.

[22] Nonetheless, on appeal we are faced with a citation for contempt related solely to the performance of a directive that could not have been performed. The only issue before the judge was whether Don was in contempt of Veit J.'s order to produce the trophy and the trial judge's order to deliver the trophy to the personal representatives. While there may have been other matters for which the appellant could have been cited in contempt, such as his fraud upon the court, the contempt citation related only to delivery of the trophy. The trophy was not in his possession and compliance with the order was impossible. It is clear that a mere request to the new owner would not have produced the trophy. Thus, the actual finding of contempt cannot be upheld, although we wish to make it clear that it is on that technical basis only that we vacate the finding of contempt.

C. Appeal relating to penalty for contempt

[23] Having concluded that the citation for contempt cannot be maintained, it follows that any punishment imposed must also be vacated. Here the trial judge ordered a fine of $53,208.26 payable to the respondents. The trial judge refers to the punishment as a fine, noting that the respondents had merely requested a fine large enough to compensate them for their out-of-pocket costs as a result of the appellant having put them through "this charade" (AB 1, F53). The trial judge went on to say at F54/14:

> Had there been no contempt on the Court, had Mr. Broder not sold the antlers before the trial had started, had he come to Court and told the Court that he had sold the antlers and where they were at the time the trial had commenced, we would not be here today and this would not be an issue for me to decide. This decision is simply as a result of those events which happened independent of the trial. The misrepresentation to the Court, the lies that he told in regard to the location of the antlers and the fact that they were no longer, in fact, still in his possession.

[24] Although the trial judge ordered payment by way of fine, when the appellant's lawyer questioned whether she could fine a private citizen, the trial judge said, "That is what is anticipated by the Rules of Court." (AB 1, F55)

[25] Rule 704(1) provides the jurisdictional authority to punish for civil contempt. Section 704 empowers a judge to order, *inter alia*, imprisonment for not more than two years, a fine, and to pay the other person such costs and expenses as may be considered proper. It also provides that a court may waive the imposition of any sanction, or suspend any punishment, if the person purges his contempt.

[26] Here, although the trial judge called the award a fine, she was obviously referring to the portion of s. 704 that allows a judge to order a payment to the other person of such costs and expenses as may be considered proper. She specifically noted that she was not revisiting costs. It is clear, therefore, the order was made to punish for contempt, and as such it must be vacated if the citation is vacated.

[27] Thus, we vacate the citation and the fine imposed. That does not mean, however, that we cannot consider Don's conduct when we impose costs of the appeal. In addition, during argument, Don acknowledged that he should be responsible for the fees incurred in the contempt proceedings and offered to pay $15,000.00. We agree that he should do so. In addition, we are of the view that although he was successful with respect to the contempt appeal, he was unsuccessful on the appeal with respect to the merits of the conversion, detinue actions. The contempt appeal would never have been necessary but for Don Broder's deceptive conduct. As a result, in addition to the $15,000.00 the appellant has agreed to pay, we order one set of costs of the appeal in the sum of $13,500.00.

[28] In the result, we vacate the order for payment of a fine of $53,208.26 and direct that the appellant pay to the respondents (personal representatives of the estate), the sum of $28,500.00 in costs.

VI. Summary of Conclusions

[29] The appeal relating to the finding that the estate is entitled to the trophy is dismissed and the trial judgment confirmed. The citation for contempt, and the fine of $53,208.26, are vacated. Costs in the sum of $28,500.00 are awarded against the appellant in favour of the estate.

Appeal heard on December 1, 2005

Memorandum filed at Edmonton, Alberta
this 23rd day of December, 2005

_____ as

authorized by: Conrad J.A.

_____

Berger J.A.

Costigan J.A.

Appearances:

J.L.G. Lacourciere
For the Appellants

E.M. MacInnis and P.G. Kirman
For the Respondents