Date of Release: August 18, 1995 ***No. B915596***

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

)

MAUREEN ERLANDSON) ***REASONS FOR JUDGMENT***

)

PLAINTIFF)

)

AND:)

OF

)

HENRY ROUFOSSE, H.J. ROUFOSSE)

HEATING LTD., DEBARA LYNN BAILEY,)

and JIM PATTISON INDUSTRIES LTD,) ***MASTER DONALDSON***

dba JIM PATTISON LEASE)

) ***(IN CHAMBERS)***

DEFENDANTS)

Robert D. Gibbens, Esq. Counsel for the plaintiff

Timothy H. Pettit, Esq. Counsel for the defendant, Henry Roufosse

Date of Hearing: August 11, 1995

1 In this application, the defendant seeks leave to amend its statement of defence to include a plea related to s. 10 of the***Workers' Compensation Act***. It alleges that the plaintiff was an employee and in the course of her employment at the time of the accident, as was the defendant. If successful, that defence would be a bar to the plaintiff's tort claim against the defendant.

2 A chronology is important. The accident occurred the 9th of April, 1991, and on the 15th of April, 1991, a representative of the defendant first explored a "worker/worker" defence.

3 On the 23rd of October, 1991 the statement of claim was filed, and on the 16th of December 1991, I.C.B.C. instructed its then counsel to admit liability.

4 The 9th of April, 1992 marked the expiration date of the s. 52(2) W.C.B. limitation period.

5 On the 8th of July, 1993 defence counsel explored a "worker/worker" defence, and in November of 1993 stated in correspondence to counsel for the plaintiff that it would be seeking an amendment of its pleadings to claim a "worker/worker" defence.

6 The 9th of April, 1994 the s. 55(3) W.C.B. limitation period expired, and in July/August of 1995 application was brought to amend the statement of defence to add the worker/worker W.C.B. s. 10 defence.

7 It should be noted that the trial date is set for the 4th of January, 1996.

8 Section 55 of the***Workers' Compensation Act*** provides in part:

"(2) Unless an application is filed, or an adjudication made, within one year after the date of injury....no compensation is payable, except as provided in subsection (3).

(3) Where the board is satisfied that there existed special circumstances which precluded the filing of an application within one year after the date referred to in subsection (2), and

(a) where an application is filed within 3 years after that date, it may pay the compensation provided by this Part; or

(b) where the application is filed after 3 years after that date, it may pay the compensation provided by this Part but not in respect of a period prior to the date the application is received by the board."

9 There have been a number of authorities which have held that where prejudice results from an amendment it ought not be given. These include but are in no way limited to***Yuen v. Woodward and All Star Inland Freight Ltd.***, unreported, No. B883719, Vancouver Registry,***Ebach v. Holt and Agressive Transport Ltd.***, unreported, No. B926349, Vancouver Registry, and***Parmar v. Virk*** (1995) 5 B.C.L.R. (3d) 343. In those cases, an application to adjourn was coupled with the application to amend. It is my recollection that in all of those matters a trial date was fast approaching following the date the application to amend was brought. In this instance, the trial was set for the 4th of March, 1996.

10 In the event that the amendment is granted, the plaintiff will have to establish with the Board that "special circumstances" existed which precluded the filing of an application within one year, and also satisfy the W.C.B. that it should exercise its discretion in paying compensation, as where an application has not been filed within three years, payment of compensation is discretionary. In addition, because the application cannot now be filed within three years of the date of the accident, the Board cannot provide compensation for that period of time prior to the date the application was received by the Board. That is to say, it could not award compensation, even if it were satisfied of special circumstances and if it exercised its discretion for a period prior to August of 1995.

11 Counsel for the defendant points out that there is an equal responsibility and/or opportunity for a plaintiff and a defendant to bring application through the W.C.B. for compensation where there has been a "worker/worker" motor vehicle accident. He further points out that by November of 1993 a clear indication had been given to counsel on behalf of the plaintiff that a "worker/worker" defence was contemplated and that an amendment would be sought. It is perhaps noteworthy that subsequent to the November 1993 notification in this regard no application was brought until July/August of 1995. One could question whether or not the plaintiff had been lulled into a false sense of security by reason of the delay, particularly in the light of the response to that notification by the plaintiff wherein it stated it would vigorously oppose any such amendment.

12 Counsel for the plaintiff points out the prejudice which must arise from the provisions of s. 55 of the***Workers' Compensation Act***. Even if the special circumstances and discretion tests are overcome by the Board, no compensation can be made predating the date of application which of necessity will have to be no sooner than August of this year, thus the plaintiff has been lulled by the defendant into a false sense of security, firstly, by admitting liability, and secondly, by providing Part VII benefits, and one assumes thirdly, by failing to bring its application to amend for a significant number of months subsequent to November of 1993, and lastly, the evidentiary problems which will naturally flow from the delay resulting from the fact the motor vehicle accident occurred in April of 1991, and that no evidence will be presented to the W.C.B. until at least August or September of 1995.

13 While it is clear that both the plaintiff and the defendant were employees, it is apparently clear that the defendant is an employee in the course of his employment as is contemplated by the***Workers' Compensation Act***. However, the issue is far from clear in relation to the plaintiff. Although the plaintiff and a companion, both of whom are employed by the same employer, had gone for lunch and were returning when the accident occurred, it is not clear whether the lunch was a "social" or a "business" lunch. It is perhaps noteworthy that the plaintiff's companion claimed for her portion of the lunch from the employer. It is, however, my understanding that both the plaintiff and her lunch companion denied that it was anything other than a social lunch. It is suggested, on behalf of the plaintiff, that memories at the office of the employer will have faded in the four-plus years subsequent to that lunch as to whether or not there is a reasonable basis to conclude that the lunch was a business lunch or merely a social lunch.

14 It is argued that a discretion rests with the court as to whether or not an amendment is sought. It is also argued that the decision of the Court of Appeal in***McNaughton and McNaughton v. Baker***(1988) 25 B.C.L.R. (2d) at 17, remains good law and that if prejudice or other reason is absent for excluding the amendments, then the amendments should be permitted. Here, of course, it is argued that there is prejudice and therefore the court should not exercise its discretion to allow the amendment.

15 The defence advances several recent authorities for the proposition that in essence the amendment must be permitted as the amendment goes to the very jurisdiction of the court to hear the matter. ***Canadian Pacific Limited v. Jones et al***, Vancouver Registry B850230, (1989) W.C.W.L.D. (1967), and***Clack v. Duffus***, 1995, unreported, New Westminster Registry S09224, are germane.

16 In the***Canadian Pacific*** case, almost at the end of a very lengthy (approximately 180 days) trial, the issue of the role of the W.C.B. in the matter arose. In relation to some three employees, a "s. 10 defence" had been pled, and in relation to a fourth worker, no such defence had been pled.

17 In that decision, Mr. Justice Cummings, as he then was, stated at page 217:

" What must be borne in mind is that the provisions of the Act do more than simply provide a defence to an action; they go to the standing of the plaintiffs to maintain their action in the first place."

Reference is made in that case to the decision of***The Dominion Canners Limited v. Costanza*** [1923] S.C.R. 46 at pp. 62-63, and in particular:

"' If the defendant does not plead the statutory bar but facts stated in the pleading or adduced in evidence at the trial indicate that the case might fall within s. 3(1) of the statute and that ss. 15(1) and 60(1) might therefore apply, the court would, I think, be if not obliged certainly free proprio motu, to take cognizance of those provisions and stay further proceedings in the action until the question whether the right to maintain it had been taken away by the Act should be determined by the only competent tribunal.'"

Further comment is made at page 219 by Mr. Justice Cummings as follows:

" Furthermore, when the issues with which we are concerned here arise, the onus is not solely upon the defendant to seek a Section 11 determination. It is open to the plaintiff as well to do so, and, indeed, Anglin, J. in Dominion Canners indicated that this would be the prudent course."

In***Canadian Pacific***, a stay was entered.

18 In the unreported decision of***Clack v. Duffus***, Mr. Justice Boyle made reference to the***Canadian Pacific,Dominion Canners***, and***Yuen***cases, among others. The***Clack v. Duffus*** decision was an appeal from a master who had held that on the basis of prejudice, unfairness or injustice the amendment should not be granted. Mr. Justice Boyle found, at page 12, as follows:

" I am satisfied those considerations in any event do not apply, cannot raise an estoppel (as the Plaintiff argues) to the mandatory requirement of the Act. Nor can it be argued (as did the Plaintiff) that it is an abuse of process to raise the s. 10(1) question at this (perhaps at any) stage of the proceedings.

Under the statute, the Board cannot be prevented from deciding where jurisdiction lies. The legislature has given it absolute authority which cannot be ousted in this way - not by estoppel, not by a finding of an abuse of process. The Court could proceed to decide all the issues before it but, if damages were found and were quantified by the Court, an order in respect to damages would not be enforceable unless and until the Board decided the Act did not take precedence."

And later, at page 14, states the following:

" What the Defendant has raised is a question of jurisdiction which requires an answer before this action can proceed or abate."

19 I am loath to make an order which would in essence place a qualification on the decision of the Court of Appeal in***McNaughton and McNaughton v. Baker***to the effect the case is applicable dealing with matters of prejudice, etc., save and except in matters involving the W.C.B.

20 However, I am convinced by the reasoning in the decisions of***Canadian Pacific***and***Clack v. Duffus***that indeed the issue of jurisdiction must be dealt with.

21 I am satisfied that the amendment must be permitted and make that order.

Dated at Vancouver, British Columbia, this 18th day of August, 1995.

"Alan W. Donaldson"

Alan W. Donaldson

Master