

James Hector Moody, personal representative (applicant) v. Charles Reginald Cecil Moody
(respondent)
(ES01 100128; 2011 ABQB 222)

Indexed As: Moody Estate, Re

Alberta Court of Queen's Bench
Judicial District of Calgary
Clark, J.
March 31, 2011.

Summary:

Moody died on December 3, 2005, leaving four adult children. Pursuant to Moody's will two of her children, James and Tyrell, were appointed executors of the estate. It was alleged that, during her lifetime, Moody made loans to her son, Charles. The loans were alleged to have been made between 1977 and 2005. Following the deceased's death, the executors sought payment of the loans. James moved to determine the following issues: first, were the alleged debts barred by the Limitations Act?; second, if the alleged debts were not statute-barred, was there a further limitation period within which the personal representatives had to commence proceedings to enforce them?; and third, if the alleged debts were statute-barred, could the personal representatives nevertheless take them into account in distributing the estate pursuant to the so-called rule in *Cherry v. Boulton*, (L.C. 1839)?

The Alberta Court of Queen's Bench determined the issues.

Limitation of Actions - Topic 2050

Actions in contract - Actions for debt - General - Moody died on December 3, 2005, leaving four adult children - Pursuant to Moody's will two of her children, James and Tyrell, were appointed executors of the estate - It was alleged that, during her lifetime, Moody made loans to her son, Charles - The loans were alleged to have been made between 1977 and 2005 - Following the deceased's death, the executors sought payment of the loans - James moved to determine whether, inter alia, the alleged debts were barred by the Limitations Act - The Alberta Court of Queen's Bench held that the debts were statute-barred - Pursuant to s. 3(2)(c)(i) of the Act, the limitation period with respect to any loans made prior to December 3, 2003 expired prior to the deceased's death - Any loans alleged to have been made prior to December 3, 2003 were statute-barred - The court rejected James' argument that the loans were statute-barred as against Moody, but not as against the executors - While ss. 3(2)(c)(ii) and (iii) provided for extensions of the limitation period in appropriate circumstances, it was clear from the wording of the statute that the period began to run at the earliest of the three starting times - "Actions which are statute-barred as against a person are not 'revived' by that person's death and the appointment of a personal representative" - See paragraphs 5 and 6.

Limitation of Actions - Topic 2050

Actions in contract - Actions for debt - General - Moody died on December 3, 2005, leaving four adult children - Pursuant to Moody's will two of her children, James and

Tyrell, were appointed executors of the estate - It was alleged that, during her lifetime, Moody made loans to her son, Charles - The loans were alleged to have been made between 1977 and 2005 - Following the deceased's death, the executors sought payment of the loans - James moved to determine whether, inter alia, the alleged debts were barred by the Limitations Act - The Alberta Court of Queen's Bench held that the debts were statute-barred - With respect to any loans alleged to have been made between December 3, 2003 and Moody's date of death, December 3, 2005, the executors asserted that they had no knowledge of any such loans at the time of their appointment and that they learned of the alleged loans on November 5, 2007 - The notice of motion was filed on July 14, 2009 - To find that the executors were within the limitation period, the court would have to conclude that they could not, with reasonable diligence, have learned of the alleged loans prior to July 15, 2007, nearly 14 months after their appointment and a year and a half after Moody's death - The court was not satisfied that it was so - Section 3(2)(c)(ii) of the Act would give the executors until April 25, 2008, two years after their appointment and more than a year after the discovery of the box of files, to bring the claim - Section 3(2)(c)(iii) extended the commencement of the limitation period until the personal representative acquired or ought to have acquired the requisite knowledge - Even applying this provision, the evidence showed that the executors had the necessary knowledge in March 2007 - No explanation was given for the failure to bring the claim until some 28 months later - See paragraphs 7 to 14.

Limitation of Actions - Topic 2052

Actions in contract - Actions for debt - When time begins to run - [See both **Limitation of Actions - Topic 2050**].

Practice - Topic 1854

Pleadings - Set-off - Rule in *Cherry v. Boulton* - Moody died on December 3, 2005, leaving four adult children - Pursuant to Moody's will two of her children, James and Tyrell, were appointed executors of the estate - It was alleged that, during her lifetime, Moody made loans to her son, Charles - The loans were alleged to have been made between 1977 and 2005 - Following the deceased's death, the executors sought payment of the loans - James moved to determine whether, inter alia, the alleged debts were barred by the Limitations Act and if the alleged debts were statute-barred, could the personal representatives nevertheless take them into account in distributing the estate pursuant to the so-called rule in *Cherry v. Boulton*, (L.C. 1839) - The Alberta Court of Queen's Bench found that the loans were statute-barred and held that "in this case, ... we are concerned with a statutory limitation period, which limits not merely the time for filing documents, but the time for commencing an action. I am satisfied that the better, more modern view is that such a limitation is substantive, not procedural. ... the effect of the expiration of a substantive statutory limitation period is to extinguish not just the remedy, but the underlying right. It follows, in my view, that the application of the rule in *Cherry v. Boulton* beyond the expiration of a limitation period no longer has a place in Canadian law. Once the limitation period in respect of a debt owed to a deceased person has expired, the right to collect the debt is extinguished. If such be the case, then what *Cherry v. Boulton* refers to as 'the right to pay out of the fund in hand' is also extinguished. The debt is no longer collectible and cannot be taken into account in making a distribution to the

debtor beneficiary. ...While the rule in *Cherry v. Boulton* has been applied in cases post-Tolofson [*Tolofson v. Jensen and Tolofson* (SCC 1994)], this has been done without detailed analysis of the current state of the law with respect to limitation periods." - See paragraphs 16 to 33.

Cases Noticed:

Cherry v. Boulton (1839), 4 My. & Cr. 442 (L.C.), *consd.* [para. 3].
Leeper Estate v. Leeper (1996), 76 B.C.A.C. 277; 125 W.A.C. 277 (Yuk. C.A.), *refd to.* [para. 16].
Biton v. Philp, [1943] O.J. No. 294 (H.C.J.), *refd to.* [para. 17].
Hutchinson Estate v. Hutchinson, [2006] A.R. Uned. 410; 2006 ABQB 418, *refd to.* [para. 19].
Nash Estate v. Lloyd Estate - see *Canada Permanent Trust Co. v. Lloyd*.
Canada Permanent Trust Co. v. Lloyd, [1968] S.C.R. 300, *refd to.* [para. 20].
Olympia & York Developments Ltd. et al. v. Royal Trust Co. (1993), 64 O.A.C. 324; 14 O.R.(3d) 1 (C.A.), *refd to.* [para. 21].
Rocky Mountain Sportswear Ltd. (Bankrupt), Re (2001), 301 A.R. 394; 2001 ABQB 743 (Q.B. Reg.), *refd to.* [para. 21].
Canada (Attorney General) v. Confederation Life Insurance Co. (2002), 32 B.L.R. (3d) 127 (Ont. S.C.), *refd to.* [para. 21].
Paragon Development Corp. et al. v. Sonka Properties Inc. et al., [2009] O.T.C. Uned. 758; 96 O.R.(3d) 574 (S.C.), *affd.* [2011] O.A.C. Uned. 18; 103 O.R.(3d) 481; 2011 ONCA 30, *refd to.* [para. 21].
Tolofson v. Jensen and Tolofson, [1994] 3 S.C.R. 1022; 175 N.R. 161; 77 O.A.C. 81; 51 B.C.A.C. 241; 84 W.A.C. 241, *refd to.* [para. 25].
Heuman v. Andrews et al. (2005), 389 A.R. 182; 2005 ABQB 832, *refd to.* [para. 25].
K.C. v. College of Physical Therapists (Alta.) (1998), 212 A.R. 16; 168 W.A.C. 16; 1998 ABCA 213, *refd to.* [para. 28].
Taylor et al. v. Scurry-Rainbow Oil (Sask.) Ltd. et al. (2001), 207 Sask.R. 266; 247 W.A.C. 266; 2001 SKCA 85, *refd to.* [para. 32].
Packer v. Packer, [1954] P. 15 (H.L.), *refd to.* [para. 33].

Statutes Noticed:

Limitations Act, R.S.A. 2000, c. L-12, sect. 3 [para. 4].

Authors and Works Noticed:

Mew, Graeme, *The Law of Limitations* (2nd Ed. 2004), pp. 65 [para. 23]; 66 [para. 24].

Counsel:

Jeffrey N. Thom, Q.C. (Miller Thomson LLP), for the applicant, James Hector Moody;
Dennis J. Pelkie, Q.C. (Borden Ladner Gervais LLP), for the respondent, Charles Reginald Cecil Moody.

This application was heard on October 28, 2010, by Clark, J., of the Alberta Court of Queen's Bench, Judicial District of Calgary, who delivered the following reasons for judgment on March 31, 2011.

Order accordingly.

Editor: Anick Ouellette-Levesque