The Estate of Paton, Deceased, by His Estate Trustee During Litigation McKay et al. v. Ontario Lottery and Gaming Corporation, c.o.b. as Fallsview Casino Resort and as OLG Casino Brantford

[Indexed as: Paton Estate v. Ontario Lottery and Gaming Corp.]

2016 ONCA 458

Court of Appeal for Ontario, Hoy A.C.J.O., Pardu and L.B. Roberts JJ.A.
June 10, 2016

Equity — Unjust enrichment — S stealing large sums of money from plaintiff estates and losing most of it at defendant's gambling casinos — Plaintiffs suing defendant for unjust enrichment — Plaintiffs pleading that defendant received unconscionable benefit — Motion judge failing to consider possibility that juristic reasons for enrichment might be vitiated on ground of unconscionability — Claim not bound to fail.

Torts — Negligence — Duty of care — S stealing large sums of money from plaintiff estates and losing most of it at defendant's gambling casinos — Plaintiffs suing defendant for negligence — Plaintiffs pleading that defendant knew that S was problem gambler and that problem gamblers sometimes steal to support their addiction — Case law not establishing definitively that casinos owe no duty of care to third parties who are victims of problem gamblers — Claim not bound to fail — Motion judge erring in striking claim on pleadings motion.

Trusts and trustees — Trust funds — S stealing large sums of money from plaintiff estates and losing most of it at defendant's gambling casinos while holding herself out to be lawyer — Plaintiffs suing defendant for knowing receipt of trust funds — Plaintiffs pleading that defendant knew that S was problem gambler and that problem gamblers sometimes steal to feed their addiction — Claim not bound to fail — Motion judge erring in striking claim on pleadings motion.

The defendant was a Crown agency which operated and managed gambling sites in Ontario. S, a problem gambler, defrauded the plaintiff estates and then lost most of the proceeds of the offence by gambling at casinos operated by the defendant while holding herself out to be a lawyer. The plaintiffs sued the defendant for damages, asserting causes of action for negligence, unjust enrichment and knowing receipt of trust funds. The defendant brought a motion under rule 21.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 to dismiss the action on the grounds that the statement of claim disclosed no reasonable cause of action. The motion judge found that it was plain and obvious that the claims had no reasonable prospect of success. He struck the knowing receipt of trust funds claim on the basis that the fact that S held herself out as a lawyer was not sufficient to put the defendant on notice to investigate the source of the money S was losing. The unjust enrichment claim was struck on the basis that the defendant had valid juristic reasons for retaining any money it received, in that it entered into valid contracts with S and was a *bona fide* purchaser for value without notice that S was gambling with money obtained by fraud. With respect to the negligence claim, the motion judge concluded that the defendant did not owe a duty of care to the plaintiffs as it did not owe a duty of care to S as a problem gambler, and that even if the defendant owed a duty of care to problem gamblers, that duty would be negated because of residual policy concerns, specifically

the danger of indeterminate liability. The motion judge also noted that there were problems with proof of causation and that the defendant would still not owe a duty to the plaintiffs to investigate the source of S's money. The plaintiffs appealed.

Held, the appeal should be allowed.

Per Pardu J.A. (L.B. Roberts J.A. concurring): Read generously, the statement of claim pleaded that S was a problem gambler; that the defendant knew she was a problem gambler and knew and that problem gamblers sometimes steal to feed their habit and cause losses to others; and that S's gambling of vast sums of money over a relatively short period of time would have caused a reasonable person to make inquiries about the source of her funds and to suspect that the money might have been stolen. The claim for knowing receipt of trust funds was not bound to fail. Money obtained by fraud may be subject to a constructive trust. Given the plaintiffs' allegations that the defendant had sufficient notice to put a reasonable person on inquiry but failed to take the necessary action, the claim for knowing receipt of trust funds should be allowed to proceed to trial.

The plaintiffs pleaded that the defendant received an "unconscionable benefit". In striking the unjust enrichment claim, the motion judge did not consider the possibility that the juristic reasons for the enrichment might be vitiated on the ground of unconscionability. If the defendant knew that S was addicted to gambling and was unable to refrain from losing money but allowed her to continue gambling, the claim in unjust enrichment would not necessarily fail.

It was not plain and obvious that the negligence claim was bound to fail. Ontario case law does not establish definitively that casinos owe no duty of care to problem gamblers or to third parties who are victims of problem gamblers.

Per Hoy A.C.J.O. (dissenting): The plaintiffs did not clearly plead sufficient facts to support their claims. Regarding the knowing receipt of trust funds claim, there was no reasonable chance that a trial judge would find that the knowledge element that the plaintiffs relied on — namely, that the defendant had knowledge of circumstances that would put an honest and reasonable person on inquiry as to a breach of trust — was satisfied in this case and that the defendant was accordingly liable as constructive trustee for the breach of trust. The defendant's belief that S was a lawyer was not a fact that would put an honest and reasonable person on inquiry as to whether S was misapplying trust property. On the unjust enrichment claim, the motion judge correctly found that the defendant had a juristic reason for retaining the money that S gambled, as S had entered into a valid contract with the defendant and as the defendant did not have notice of S's fraud and was a *bona fide* purchaser for value without notice. There was no reasonable prospect that the plaintiffs could vitiate the contract between S and the defendant on the basis of an unconscionable benefit. With respect to the negligence claim, it was plain and obvious that the facts pleaded did not disclose sufficient proximity between the defendant and the plaintiffs. Moreover, the plaintiffs' claim alleged negligent inaction on the part of the defendant and they sought damages for pure economic loss. Canadian courts have been extremely reluctant to impose a duty of care in these circumstances.

Citadel General Assurance Co. v. Lloyds Bank Canada, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92, 152 D.L.R. (4th) 411, 219 N.R. 323, J.E. 97-2034, 66 Alta. L.R. (3d) 241, 206 A.R. 321, 35 B.L.R. (2d) 153, 47 C.C.L.I. (2d) 153, 19 E.T.R. (2d) 93, 74 A.C.W.S. (3d) 898; *Kakavas v. Crown Melbourne Ltd. & Others*, [2013] HCA 25, 298 A.L.R. 35, 250 C.L.R. 392, affg [2012] VSCA 95, **consd**