Federal Court  Cour fédérale

Date: 20200114

Docket: T-1147-18

Citation: 2020 FC 47

Ottawa, Ontario, January 14, 2020

PRESENT: Mr. Justice Pentney

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Plaintiff

and

GARNET ALEXANDER HARMAN

Defendant

JUDGMENT AND REASONS

I. Introduction

[1] The Plaintiff brings a motion for summary judgment, seeking to recover the amount of $777,427.27, plus interest and costs, against the Defendant, claiming that the Defendant is in default of his repayment obligations for funds received from the Advance Payment Program under the *Agricultural Marketing Programs Act*, SC 1997, c 20 [*AMPA*]. The Plaintiff argues that this case should be determined by summary judgment because the evidence needed to fairly

adjudicate the matter is contained in the affidavits that are before the Court, and the matter turns mainly on legal questions relating to the interpretation of *AMPA*.

[2] The Defendant does not object to this matter being determined by way of summary judgment, and submits that the Plaintiff's claim for recovery is statute-barred because it was filed outside of the limitation period. The Defendant further argues that there is no evidence that the funds were actually paid. The Defendant seeks summary judgment dismissing the claim, with costs.

[3] For the reasons that follow, I am granting summary judgment in favour of the Plaintiff.

II. Context

[4] The dispute in this case relates to three payments received by the Defendant under the Advance Payment Program under the *AMPA*. Since these lie at the heart of the matter, it is important to review the history of each in some detail.

[5] On April 17, 2008, the Defendant applied to the Manitoba Livestock Cash Advance Inc. (MLCA) for an advance payment under the *AMPA* for the 2008-09 production year. The MLCA was an administrator of the Advance Payment Program. The Defendant received advances totalling $326,958.40, less an administration fee and withhold amount, on May 23, 2008, August 7, 2008, August 20, 2008 and September 23, 2008 (Advance Payment No. 1).

[6] On December 16, 2008, the Defendant applied to the Canadian Livestock Advance Association (CLAA) for an advance payment under the *AMPA* for the 2008-09 production year. The CLAA was an administrator of the Advance Payment Program. The Defendant received an

advance in the amount of $62,822.76, less an administration fee and withheld amount, on January 13, 2009 (Advance Payment No. 2).

[7] On April 1, 2011, the Defendant applied to the Canadian Wheat Board (CWB) for an advance payment under the *AMPA* for the 2011-12 production year. The CWB was an administrator of the Advance Payment Plan. The Defendant received an advance in the amount of $52,048.00, less an administration fee and withhold amount, on April 1, 2011 (Advance Payment No. 3).

[8] On May 13, 2009, the Defendant signed a Stay of Default Agreement with the MLCA in regard to Advance Payment No. 1. This lowered the interest rate on the first $100,000 advanced.

[9] On May 5, 2009, the Defendant signed a Stay of Default Agreement with the CLAA in regard to Advance Payment No. 2.

[10] The MLCA, CLAA, and CWB were entitled to seek payment for part of the moneys owed from the Minister. As required by subsection 23(1) of the *AMPA*, the Minister of Agriculture and Agri-Food (the Minister) paid out the guarantee on Advance Payment No. 1 to the MLCA on May 8, 2014. The Minister also paid out the guarantee on Advance Payment No. 2 to the CLAA on May 30, 2014. Finally, the Minister paid out the guarantee on Advance Payment No. 3 to the CWB on June 19, 2013. Pursuant to section 23 of the *AMPA*, the Minister became subrogated to the rights of the administrators. The Plaintiff now seeks recovery on those amounts, plus interest and costs, from the Defendant.

III. Issues

[11] The overarching issue is whether summary judgment should be issued in favour of the Plaintiff. The Defendant asserts that the claim is statute-barred, and, in the alternative, that the agreements are unenforceable because there is no evidence that the payments were actually made to him.

[12] I will address the issues in the following order:

A. Is the claim barred because it was filed beyond the applicable limitation period?

B. Should summary judgment be issued in favour of the Plaintiff?

IV. Analysis

A. *Is the claim barred because if was filed beyond the applicable limitation period?*

[13] The Plaintiff argues that the claim for recovery is subject to the specific limitation provisions set out in the *AMPA*. The general rule with respect to limitation periods in proceedings by or against the federal Crown is set out in section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, which provides that the laws in force in a province apply in respect of any cause of action arising in that province, and otherwise a six-year limitation period will apply. The Plaintiff submits that this action is not subject to these general rules, because it falls within the exception set out in the opening words of section 32: "Except as otherwise provided in this Act or in any other Act of Parliament…"

[14] The *AMPA* contains a specific limitation period that applies to actions by the Minister to recover any amounts owed. It should be recalled that under section 23 of the *AMPA* the

Minister's rights to seek recovery of amounts owed under the Advance Payment Program only arises once a producer is in default under the repayment agreement and an administrator has made a request to the Minister for repayment. Once this happens, subsection 23(2) states:

Subrogation	**Subrogation**
(2) The Minister is, to the extent of any payment under subsection (1) or (1.1), subrogated to the administrator's rights against the producer in default and against persons who are liable under paragraphs 10(1)(c) and (d) and may maintain an action, in the name of the administrator or in the name of the Crown, against that producer and those persons.	**(2)** Le ministre est subrogé dans les droits de l'agent d'exécution contre le producteur défaillant et les personnes qui se sont engagées au titre des alinéas 10(1)c) et d), à concurrence du paiement qu'il fait en application des paragraphes (1) ou (1.1). Il peut notamment prendre action, au nom de l'agent d'exécution ou au nom de la Couronne, contre ce producteur et ces personnes.

[15] The *AMPA* then sets out various rules regarding limitations of actions by the Minister, including the general rule set out in subsection 23(4):

Limitation or prescription period	**Prescription**
(4) Subject to the other provisions of this section, no action or proceedings may be taken by the Minister to recover any amounts, interest and costs owing after the six year period that begins on the day on which the Minister is subrogated to the administrator's rights.	**(4)** Sous réserve des autres dispositions du présent article, toute poursuite visant le recouvrement par le ministre d'une créance relative au montant non remboursé de l'avance, aux intérêts ou aux frais se prescrit par six ans à compter de la date à laquelle il est subrogé dans les droits de l'agent d'exécution.

[16] The Plaintiff submits that this provision governs this proceeding and that it launched its action for recovery within the six-year time period after the Minister became subrogated to the claims of the administrators.

[17] The Defendant advances several arguments in support of their position that the claim is barred by the operation of limitation periods. First, the Defendant submits that since the MLCA,

the CLAA, and the CWB were administrators of the Advance Payment Program under the *AMPA* on behalf of the Minister, these organizations and the Minister are, in reality, "one and the same." Under this view, the Minister cannot be in any better position than the administrators under the terms of the agreements signed by the Defendant.

[18] Second, the Defendant argues that the contract terms were fixed by the Minister and were not subject to any negotiation and, therefore, any ambiguity must be interpreted in his favour; the doctrine of *contra preferentum* applies. The Defendant, who is a resident of Saskatchewan, is bound by the agreement by which the more favourable two-year limitation period in the relevant Saskatchewan legislation does not apply and instead the six-year period set out in the Manitoba legislation applies. This is a departure from a fundamental right which was meant to protect persons such as the Defendant.

[19] In addition, the Defendant notes the wording of the agreements which establishes the link between the administrators and the Minister, including paragraph "m" of the application form for the CWB payment, under which a producer undertakes: "upon default, to repay the Minister of Agriculture and Agri-Food Canada for the amount in default, through the administrator, including interest at the rate shown in this application and any collection costs, including legal costs." The Defendant also points to the provision that "the CWB as an administrator, can forward the outstanding balance to Agriculture and Agri-Food Canada for collection." These provisions confirm that the Minister and the administrators are essentially the same entity under the terms of the agreements.

[20] The core of the Defendant's arguments derives from the specific situation that arises on the facts of this case. The Defendant contends that this is not a situation where a third-party

guarantor steps into the place of the principal to honour the loan guarantee. Here, the Minister and the administrators are, in reality, one and the same entities. Furthermore, the Minister defined the terms of the Advance Payment Program, which provides payments to qualifying farmers without the usual due diligence involved in arranging a commercial loan. The Minister defined all of the relevant terms and conditions of the program. The Minister decided to involve administrators in the operation of the program on a day-to-day basis. Under the terms of the *AMPA* and the agreements entered into by the Defendant, the Minister knew that if a default occurred, it would be obliged to pay the amounts owing if requested by the administrators. Therefore, the Minister's subrogation rights arose when the loans were defaulted, not when it made any payment to the administrators. As a consequence of this, the claim is filed out of time because the defaults arose long before the six-year period prescribed by the Manitoba legislation.

[21] The Defendant claims that the references in the agreements he signed about the Minister's subrogation rights are "merely procedural verbiage" which he had absolutely no control over. The Minister was not a party to the contracts the Defendant signed; the contracting parties, the MLCA, the CLAA, and the CWB, chose not to pursue their rights to seek recovery from the Defendant. Instead, they chose to request reimbursement from the Minister. This cannot have the effect of creating a completely open-ended limitations clause, to the detriment of the Defendant.

[22] As an alternative argument, the Defendant submits that the subrogation rights arose when the Minister is subrogated to the rights of the administrators, not when the Minister decides to make a payment pursuant to a demand from an administrator. On this reading of the agreements, the Minister's subrogation rights arise at the date the obligation to pay arises, and at the latest

when the demand for payment is made, rather than the date the payment is actually made. To interpret the agreements otherwise is to give to the Minister an unfettered right to unilaterally extend the applicable time limits, to the prejudice of the Defendant.

[23] The Defendant further contends that subrogation is an equitable remedy and, since the Minister's rights are the same as the administrators' rights, the time limitation must start to run at the same time for both. As stated in the Defendant's written representations, "[t]o infer anything to the contrary would be manifestly unfair to all producers and facilitate improper conduct by the Government…" The Defendant argues that the Minister should be barred from bringing actions now to pursue debts that were in default on October 1, 2010, and April 6, 2011, because the Minister does not come to court with "clean hands." It does not make sense that the Minister can bring this action within six years of making the payments to the administrators because that means that the Minister can unilaterally extend the time limit by delaying the payment to the administrators.

[24] The starting point for the analysis is the agreements signed by the Defendant, which incorporate or reflect certain of the provisions of the governing statute, the *AMPA*. In one sense, these agreements may be seen as "ordinary commercial transactions" by which farmers obtain advances on crops or livestock, which are to be repaid at the end of the growing season once the crops or livestock are sold to market. In reality, these agreements are more than that – they are the means by which the government has chosen to achieve its program objectives, consistent with the terms of the legislation adopted by Parliament to give effect to this objective, namely the *AMPA*. In this regard, these agreements take on the aspect of a program delivery vehicle, whose terms are set in part by the legislation.

[25] I agree with the Defendant that all of the key terms at issue in this case were fixed by the government. I also agree that it was the choice of the government to implement the program by using third-party organizations it designated as the day-to-day administrators of the Advance Payment Program. I am not persuaded, however, that this has the legal effect of making the Plaintiff and the administrators "one and the same" for the purposes of this claim. The *AMPA* and the agreements signed by the Defendant make clear that the agreements are between the producer (here, the Defendant) and the administrators. The administrators may be acting on behalf of the Minister, but that, in and of itself, does not effect a legal merger. As the Plaintiff notes, the administrators have legal rights separate and apart from those of the Minister; furthermore, the legislation which created the CWB stated explicitly that the CWB was not an agent of Her Majesty or a Crown corporation (subsection 4(2) of the *Canadian Wheat Board Act*, RSC 1985, c C-24).

[26] I find that, at all times relevant to the questions in issue in this matter, the Plaintiff and the MCLA, the CLAA, and the CWB were separate and independent entities; this is confirmed by the applicable legislation and consistent with the agreements signed by the Defendant.

[27] The Plaintiff's right of action in this case derives from the operation of the *AMPA*; this is a claim based on statute, not contract. The relevant terms of the statute, and in particular the Minister's subrogation rights, are reflected in the agreements signed by the Defendant, but that does not have the effect of transforming their essential nature. I do not accept the Defendant's contention that these are to be interpreted as equitable or contractual claims. I will discuss the "clean hands" argument below.

[28] I find that the agreements and the *AMPA* are consistent and clear: the Minister's right to bring an action for recovery of the amounts due arises only when a number of conditions have been met. First, the producer must be in default (section 22, *AMPA*). Second, the administrator must have made a demand to the Minister for payment of the amount specified by the legislation and Regulations (subsection 23(1), *AMPA*). Third, the Minister must have made a payment to the administrator pursuant to that demand (subsections 23(1) and (1.1), *AMPA*). Only if these conditions have been fulfilled does the Minster become subrogated to the rights of the administrator (subsection 23(2), *AMPA*). Once this occurs, the producer is liable to the Minister for the subrogated amount (subsection 23(3), *AMPA*). This is when the statutory limitation or prescription period begins to run, subject to the other provisions regarding time limitations set out in subsections 23(6) to (9) of the *AMPA*.

[29] The main elements of this scheme are reflected in the agreements, which include several references to the Minister's subrogation rights upon default. The Defendant signed these agreements as well as the subsequent Stay of Default agreements. Even if the *contra preferentum* doctrine is applied to these agreements, it is not evident how this advances the argument of the Defendant. Under the *AMPA* and the agreements, the producer is to apply for funds from an administrator of the Advance Payment Program – that is precisely what the Defendant acknowledges doing here. The funds were advanced and a contractual liability was owed by the Defendant to the MCLA, the CLAA, and the CWB, as program administrators. The terms of the liability are set out in detail in the agreements, including liability for interest and the rate of interest to be paid. The Stay of Default agreements alter these terms somewhat, by lowering the rate of interest and adjusting the payment periods, but they do not change the fundamental nature

of the agreement – indeed, they confirm that the agreements are between the Defendant and the MCLA or the CLAA.

[30] It is simply not possible to interpret these agreements, or this statute, as having the effect of making the Minister and the administrators to be identical in legal interest or position. They are not, and never have been "one and the same." The Defendant's argument to this effect must be rejected as contrary to the clear terms of the agreements and the statute that governs them. For example, the Defendant relies on paragraph "m" of the CWB agreement, but a plain reading of that clause makes clear that the obligation upon default is to repay the funds advanced to the producer. The fact that the funds originate from the government, as appropriated to the Minister, and flowed through the administrator to the producer, does not somehow have the effect of merging the rights and interests of the Minister with those of the administrator. The Minister has no automatic and independent right to seek recovery of the funds. Under the terms of the agreements and the *AMPA*, the Minister's rights only arise if the pre-conditions set out above are met.

[31] I therefore reject the argument that the agreements and the *AMPA* must be interpreted and applied as though the Minister and the administrators are "one and the same" entities. A number of conclusions flow from this finding.

[32] First, the Minister's subrogation rights did not trigger at the same time as the Defendant went into default under the agreements. The terms of the agreements were subject to the provisions in the *AMPA*, which sets out the statutory pre-conditions pursuant to which the Minister's subrogation rights arise. An interpretation that these rights arise at the same time as

the default on the obligation to the administrator is inconsistent with both the terms of the agreements and the scheme of the *AMPA*.

[33] Further, the argument that it is unfair or inequitable to the Defendant to interpret the *AMPA* as creating an "open-ended" right on the part of the Minister to unilaterally extend the limitation period is not well-founded either on the facts or the law. Here, the Minister is seeking to enforce an obligation that arises by operation of the *AMPA*, and the Defendant has not demonstrated any unfairness or undue prejudice relating to the period between his original defaults on the agreements, or the subsequent arrangements he entered into, and the launch of these proceedings. Without pronouncing on the question of whether such arguments could have any impact on the operation of the statute or terms of the agreements if undue delay was demonstrated, I would simply observe that any arguments to this effect would need a solid factual foundation. No such foundation has been established here.

[34] I therefore reject the Defendant's argument that the references to the Minister's rights amount to "mere procedural verbiage" or that the Minister does not come to this Court with "clean hands."

[35] For all of these reasons, I find that the Plaintiff's claims are not barred by the operation of the Manitoba limitations legislation. The Minister has acted within the time limits fixed by subsection 23(4) of the *AMPA* and this is the provision that governs these proceedings.

B. *Should summary judgment be issued in favour of the Plaintiff?*

[36] The Defendant has advanced a number of arguments against summary judgment, in addition the limitation argument considered above. The Defendant submits that there is no

evidence in the record that the payments were actually made to him. Again, I will deal with this submission briefly. The Defendant has not introduced any evidence to support this contention, and it flies in the face of the evidence and admissions on the record. The Plaintiff has produced copies of the applications made by the Defendant, together with business records showing payments being made to the administrators when they demanded that the government cover the amount. In his Statement of Defence, the Defendant has admitted that he went into default on the amounts owing. Furthermore, the Defendant signed subsequent agreements with the MCLA and the CLAA, in which he acknowledged his obligations and agreed to repay the amounts owing, subject to the amendments as to the interest rate and due dates for the various payments. All of this is consistent with the only logical conclusion that one can draw from the evidence in the record – which is that the sums were paid as agreed upon.

[37] In a motion for summary judgment, both sides must put their best foot forward. In particular, Rule 214 of the *Federal Courts Rules*, SOR/98-106 provides that a defendant cannot rely on making assertions about what the evidence at trial will show; instead, the Rule requires that the defendant set out specific facts and adduce evidence showing that there is a genuine issue for trial: see *Moroccanoil Israel Ltd v Lipton*, 2013 FC 667 at para 10.

[38] I can find no basis in the record to cast serious doubt upon the assertion that the payments were made, and instead I find substantial evidence, including the continuous conduct of the Defendant, that supports the conclusion that the money was actually advanced to the Defendant. I do not accept the Defendant's argument on this point.

[39] Based on the affidavit evidence filed by the Plaintiff, I am satisfied that the Plaintiff has established that the advance payments were made, and that the Defendant is in default. The

evidence also demonstrates that a demand for payment has been made by the Plaintiff, but the amounts remain outstanding. On the record before me, I can find no basis to decline to award summary judgment in favour of the Plaintiff.

V. Conclusion

[40] I find that the Plaintiff has established its claim for summary judgment, and that there is no compelling evidence or argument against the award of summary judgment in favour of the Plaintiff. I therefore award summary judgment in favour of the Plaintiff.

[41] The written representations of the Plaintiff and the affidavit of Glenda Probert filed in support of this Motion seek a judgment in the amount of $777,427.27. This includes the amounts owed to the Minister, including the principal and interest (calculated as of April 8, 2019) outstanding in regard to the Defendant's default under Advance Payment No. 1, Advance Payment No. 2, and Advance Payment No. 3, less payments already made, together with interest. This totals $608,404.64 in relation to Advance Payment No. 1, $92,848.00 in relation to Advance Payment No. 2, and $76,174.63 in relation to Advance Payment No. 3. The Plaintiff also claims pre-judgment interest from April 8, 2019, until the date of this judgment, calculated at a *per diem* rate of $115.85 in relation to Advance Payment No. 1, $13.23 in relation to Advance Payment No. 2, and $14.50 in relation to Advance Payment No. 3.

[42] In addition, the Plaintiff claims costs in the amount of $1,237.33, including disbursements plus counsel time calculated in accordance with Tariff "B". In exercise of my discretion pursuant to Rule 400, I find this to be a reasonable cost award. Finally, the Plaintiff

submits that post-judgment interest should be fixed at an annual rate of 5% per annum from the date of the judgment, in accordance with the *Interest Act*, RSC 1985, c I-15.

[43] For the reasons set out above, the Plaintiff is entitled to the relief requested, including judgment in the amount of $777,427.27, and pre-judgment and post-judgment interest, as well as costs.

JUDGMENT in T-1147-18

THIS COURT'S JUDGMENT is that:

1. The motion for summary judgment is granted, in favour of the Plaintiff.

2. The Defendant shall pay to the Plaintiff the sum of $777,427.27, which includes:

    a. The amount of $608,404.64 in relation to Advance Payment No. 1;

    b. The amount of $92,848.00in relation to Advance Payment No. 2;

    c. The amount of $76,174.63 in relation to Advance Payment No. 3;

3. The Defendant shall pay to the Plaintiff pre-judgment interest, from April 8, 2019, until the date of this judgment, calculated on a *per diem* rate of $115.85 in relation to Advance Payment No. 1, $13.23 in relation to Advance Payment No. 2, and $14.50 in relation to Advance Payment No. 3.

4. The Defendant shall pay to the Plaintiff costs and disbursements in the amount of $1,237.33.

5. The Defendant shall pay to the Plaintiff post-judgment interest at the rate of five (5) percent per annum, in accordance with the *Interest Act*.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1147-18
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v GARNET ALEXANDER HARMAN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*.

JUDGMENT AND REASONS:	PENTNEY J.
DATED:	JANUARY 14, 2020

APPEARANCES:

Don Klaassen	FOR THE PLAINTIFF
William R. Howe Tarissa L. Peterson	FOR THE DEFENDANT

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