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Discoverability under Limitations Acts: Subjective and Objective Tests

Limitations acts in Canada all provide for a "discoverability" requirement. A two year limitation period in Ontario (or BC) starts to run only when on the date on which the plaintiff *actually knows* of the claim, or, when the claim *ought to have been discovered*. The determination of when someone had actual knowledge of a claim, or when a claim "ought to have been discovered", can be hotly contested and the applicable legislation provides enough room for argument that these issues are constantly being litigated. Two recent cases from the ONCA looked into these issues of discoverability.

Sec. 5 of the Ontario Act [Sec. 8 in BC] provides that the claim is "discovered" on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). [my underlining]

Section 5(a)(i) - (iii) of the Act sets out the *subjective* test: when did the plaintiff *actually* know there was a claim? Section 5(b) sets out an *objective* test: when would a so-called "reasonable person" have believed it? The limitation period starts to run on the *earlier* of these two dates.

An objective test inherently provides for the exercise of discretion on the Court's part since the Court decides what the "reasonable man" standard is in each case. Meanwhile, section 5(a)(d) allows for the court to exercise some discretion in the determination of the subjective test; to "cut some slack" to a plaintiff, if the circumstances require it. Thus, while a claimant might have had actual knowledge of certain facts on an early date, the limitation period will only start to run on the date when this person first knew "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy [the potential claim]."

In ***Mancinelli v. RBC****,* 2018 ONCA 544, a class action suit was brought against a variety of different financial institutions, alleging a secret conspiracy to manipulate the FX market. The alleged that the defendants took active steps to conceal their participation in the conspiracy. Plaintiffs settled out with the UBS defendants (before delivery of defences) in part of the basis that UBS provide certain documents. Pplaintiffs discovered in their review of this material that

BMO and TD Bank "(BMO") were apparently involved in the alleged conspiracy. Plaintiffs unsuccessfully moved to add BMO as defendants; BMO defended on the basis that with reasonable diligence, plaintiffs ought to have been able to discover the claim as against BMO more than two years prior to the motion. Judge found that plaintiff's evidence was "insufficient to establish that they behaved as a reasonable person in the same or similar circumstance". Thus, even though plaintiffs had not *actually* discovered BMO's apparent involvement, they did not lead sufficient evidence of their efforts to satisfy the judge that they had exercised due diligence.

The CA overturned and held that motion judge had established too high an evidentiary threshold for plaintiff. The CA held that the evidentiary threshold for a plaintiff on such a motion is low and must be considered in context. Here, the claim alleged a secret conspiracy where defendants took active steps to conceal their involvement. Further, a plaintiff in the class action is not akin to a regulator. Regulators often have investigative power that civil plaintiffs (whether or not in a class action) do not. This case is consistent with others I have seen in which a "difficult" defendant who conceals evidence should not be given the benefit of the doubt in being able to assert that a plaintiff ought to have discovered a claim in a more timely fashion.

In ***Gillham v. Lake of Bays*** (2018 ONCA 667), a cottage owner commenced an action arising out of construction deficiencies. The defendant MacKay as sub-contractor excavated a foundation and pier footings for a deck, and constructed and back-filled a stacked rock retaining wall for the cottage (in order to provide frost protection). The construction passed inspection. The cottage owner noticed a problem in 2009 when one of the deck piers had sunk about 2", pulling the deck post away from the cottage. Royal, the original contractors, recommended the owner retain an engineering firm to investigate. This firm's report in September 2009 suggested that the northeast corner of the deck was experiencing some settlement and recommended several expensive investigation and remedial steps. Both MacKay and Royal told plaintiff that "these types of retaining walls often settle a bit" and that plaintiff should just "wait and see if the stone retaining wall found its own level over the next year or two". The problems continued and in 2012, plaintiff retained Fowler Construction to inspect the property. A soil study was undertaken which revealed that the wall had been built on very loose sand and fill "without adequate support of the wall base/toe from the downgrade slope". Plaintiff sued in 2013.

Defendants moved for judgment on the basis that claim was out of time and that plaintiff discovered or ought to have discovered the claim in 2009. Motion was successful but the CA overturned it. The CA found that the 2009 expert report had not pinned down the true cause of the problem: that the wall had been built on loose sand and fill without adequate support. Further, CA noted with interest that the defendants in 2009 had actively discouraged plaintiff from concluding that litigation was a possibility. The Court noted that while the *Limitations Act* provides that a claim was discovered on the day when a reasonable person "first ought to have known of" the loss, the Act also provides that the Court should have regard to when a plaintiff, "having regard to the nature of the injury, loss or damage" knew that "a proceeding would be the appropriate means to seek to remedy it". The CA held that this term allows a motion judge to consider "the specific factual or statutory setting in order to determine whether or not it was reasonable for the plaintiffs not to immediately commence litigation, but to wait and see". In the circumstances, since the defendants had actively discouraged litigation, it was open to the motion judge to take that into account and thereby "cut some slack" to the plaintiff.

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