The Limitation Clock: Which Way Is The Pendulum Swinging?

The Court of Appeal for Ontario recently released two decisions involving limitation period issues. In both *Ali v O-Two Medical Technologies Inc*[1] and *948298 Ontario Inc v Penretail II Ltd and Bentall Retail Services LP*[2], the court overturned lower court decisions that found actions were commenced outside the two-year limitation period. Both cases turned on the issue of discoverability.

In *Ali*, the decision was based on well-established principles of contract law. However, in *Penretail*, the court seemed to depart from its earlier decision in *Lawless v Anderson*[3] and its recent decision in *Beaton v Scotia iTrade*[4] that a claim is discovered when a prospective plaintiff knows "enough facts" to assert a claim and that the extent of the loss need not be known.

Both of these decisions may be of great interest, as limitation period defenses are potentially robust tools in a defendant's arsenal.

Ali v O-Two Medical Technologies Inc.

The claim in *Ali* involved an employment relationship in which the plaintiff employee, Ali, brought a claim against his employer for unpaid commissions. In December 2006, Ali made a sale pursuant to his commission agreement, but one week later O-Two informed Ali that it was unilaterally changing the commission rate.

In November 2007, Ali became entitled to receive his commission but was paid the lower rate. Ali brought a claim against his employer in September 2009.

The lower court was asked to determine whether the limitation period commenced when the employer changed the contract, or when it actually paid the commission at the lower rate. The Ontario Superior Court of Justice dismissed Ali's claim at the summary judgment motion, finding that his claim was discovered when the agreement was unilaterally changed, or, at the very latest, early in 2007 when his employer told him he would be paid at the lower rate. Either way, the court found Ali commenced his action beyond the two-year limitation period. Ali's claim was dismissed.

The Court of Appeal reversed the lower court's decision and held that the limitation period did not begin until payment of the commission came due and the employer tendered payment at the lower rate. The court held that this was a case of anticipatory breach. In such cases, the innocent party has two options: (i) accept

the anticipatory breach and sue for damages; or (ii) continue to press for performance.

In this case, Ali did not accept the breach. He pressed for performance. As a result, the claim was discoverable only when the contract was actually breached—in November 2007—when Ali was entitled to receive his commission but was paid the lower rate. The Court of Appeal found the action was commenced within the limitation period.

948298 Ontario Inc v Penretail II Ltd and Bentall Retail Services LP

In *Penretail*, the plaintiff, a restaurant owner, commenced a claim for breach of contract and negligence against its landlord and the property manager of the mall its restaurant was located in, alleging construction at the mall caused its business to fail.

Construction began at the mall in 2004, and the restaurant's business declined between 2004 and 2007. In 2006, the plaintiff wrote a letter to the defendants complaining the construction led to a 40% decline in sales. On cross examination, the plaintiff admitted by that time it knew its business was "sinking." The restaurant closed its doors in February 2007. The plaintiff issued a notice of action in late February 2009, but the lower court found that the claim was commenced out of time. It held that the plaintiff discovered its claim by July 2006 when it knew its business was sinking.

On appeal, the court framed the issue narrowly. The court asked when the plaintiff would have known that a proceeding was an appropriate means to seek to remedy its alleged loss: on the date the business closed, or when the plaintiff knew its business was sinking?

Justice Laskin held that this question required a trial, and reversed the motion judge's dismissal of the claim. Justice Laskin noted there is a difference between a business "sinking" and being "sunk," explaining that the fact the plaintiff "carried on business for another eight months is perhaps the most cogent evidence that he thought he could turn it around."[5]

However, the court did not consider its earlier decisions in which it expressly found that "the question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant"[6] and that the "extent" of the loss need not be known for the cause of action to accrue.[7]

In our view, it was reasonable for the trial judge to decide that the *quantum* of damages (i.e., a decrease in sales vs. the total loss of business) is not something that needed to be known to the plaintiff before the limitation period started running. The court's finding that the degree of loss in determining discoverability created a genuine issue requiring a trial may create some uncertainty on future motions of this kind.

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Footnotes

1 2013 ONCA 733 [*Ali*].

2 2013 ONCA 718 [*Penretail*].

3 2011 ONCA 102 [*Lawless*].

4 2013 ONCA 554 [*Scotia iTrade*].

5 *Penretail* at para 24.

6 *Lawless* at para 23.

7 *Beaton v Scotia iTrade*, 2012 ONSC 7063 at para 13, aff'd 2013 ONCA 554.

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