

# THE GR COURT DOCKET

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## Time period expired: Claim for contribution and indemnity dismissed

By Stephen Thiele

Finality is an important concept in law. Finality provides certainty to the meaning of the law and ensures that the legal process is not endless.

While dissatisfied litigants often have the right to appeal a negative decision, a litigant's action can never proceed beyond a final decision of the Supreme Court of Canada.

A litigant is also required to start his or her claim in a timely fashion. People are entitled to live free from the spectre of litigation peering over their shoulder from incidents that occurred many, many years ago.

In Ontario, there is a general two year limitation period in which an action must be commenced against a wrongdoer, and, in most cases, there is also an ultimate 15-year limitation period that applies to undiscovered claims. Accordingly, a litigant's failure to commence his or her action before the expiration of an applicable limitation period will result in the dismissal of the claim and give the alleged wrongdoer finality.

It is for this latter reason that cases involving disputes about limitation periods often focus on when a claim was discovered or was discoverable. For a plaintiff, the principle of discoverability as now proscribed under s. 5 of the *Limitations Act, 2002* is used to delay the running of the limitation period. For a defendant, the principle of discoverability is used to ensure that a limitation period for a claim started to run as early as possible on the facts of any given case.

As determined in the recent case of *Reichert v. Meyrick*<sup>1</sup>, the foregoing applies to claims for contribution and indemnity. In this case, lawyers had represented the plaintiffs in a mortgage transaction, but had not been sued for contribution and indemnity based on negligence until more than two years after the male plaintiff had been sued for default under the mortgage.

The court was required to determine if the claim was started outside the general two year limitation period or if there were

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circumstances that delayed the discoverability of the claim.

After considering sections 5 and 18 (which specifically applied to claims for contribution and indemnity) of *Ontario's Limitation Act, 2002*, the court concluded that the plaintiffs' action had not been started in time and dismissed the action.

### **The Facts**

On February 23, 2011, the plaintiffs committed to a mortgage for a property in which they alleged they had been living as tenants. The plaintiffs asserted that the property was owned by a family trust and that the male plaintiff was acting as a trustee when he took the mortgage for the property. Indeed, the handwritten word "trustee", added by the plaintiff, appeared in two places on the mortgage commitment documents.

The defendant lawyers provided independent legal advice to the male plaintiff in connection with the mortgage and insisted that they told him that he could be personally liable under the mortgage if it went into default and a sale of the property did not result in proceeds sufficient to satisfy any outstanding indebtedness that might be owed to the mortgagees. The female plaintiff had consented to the mortgage as the spouse of the male plaintiff.

The mortgage went into default and on March 13, 2012 a notice of sale under the mortgage was served on the plaintiffs. A month later, the male plaintiff advised the mortgagees that he was not a mortgagor and that the family trust was the legal and registered owner of the property.

On November 27, 2012, the mortgagees started an action for possession of the property and for payment in the amount of nearly \$900,000 from the male plaintiff. In defending this action, the male plaintiff pled that the family trust owned the property, that a personal claim was unfounded, that the family trust was the mortgagor and that there was no personal liability under the mortgage.

The Court summarily granted the mortgagees' claim for possession on April 18, 2013. Among other things, the Court held that the mortgage was valid, that the plaintiffs failed to meet the burden of proof that a family trust owned the property and that the male plaintiff was the mortgagor, with the female plaintiff consenting to the mortgage as his spouse.

An appeal of this decision was dismissed on October 2, 2013.

On November 4, 2014, the sale of the property was approved and less than two years following the sale, on April 27, 2016, the plaintiffs issued a claim for contribution and indemnity against the lawyers who had provided independent legal advice.

The substance of the claim was that the lawyers were negligent for failing to make clear that the male plaintiff was personally liable under the mortgage.

### **The Arguments**

The lawyers sought to dismiss the plaintiffs' claim on the grounds that their action was statute-barred, that it was an abuse of process, and that, as a matter of law, the execution of the



mortgage as “trustee” still rendered the male plaintiff personally liable on the mortgage.

With respect to the limitation period argument, the lawyers contended that the potential action against them was discoverable as early as April 2012, or alternatively was discoverable when the plaintiffs were sued in their personal capacity on November 27, 2012 and at the latest when judgment was granted against them on April 18, 2013.

In contrast, the plaintiffs argued that their claim for contribution and indemnity against the lawyers was not discoverable until the court approved the sale of the property on November 4, 2014 because until such time no damages flowed from the lawyers’ alleged negligence. To support their argument, the plaintiffs relied on sections 5(1)(a)(i) and 5(1)(a)(iv) of the *Limitations Act, 2002*.

### **Court concludes that action is statute-barred**

The court ruled in favour of the defendant lawyers on the grounds that the plaintiffs’ claim against them was discoverable on December 2, 2012 when the mortgagees’ claim was served, or at the latest on April 18, 2013 when summary judgment had been granted for possession of the property in favour of the mortgagees.

The Court explained that in considering discoverability, it was required to look at both subjective and objective factors.

The start of a limitation period was triggered by the earlier of when a plaintiff first knew of the criteria set out in sections 5(1)(a)(i) to 5(1)(a)

(iv) of the Act, or when a reasonable person with the abilities and in the circumstances of the plaintiff first ought to have known of the matters set out in those sections.

The criteria were conjunctive.

While under section 5(2) of the Act, a plaintiff could rebut the presumption that they knew they had a claim on the day an act or omission took place, under section 18(1), in a case where a claim was brought by one alleged wrongdoer against another for contribution and indemnity – like in this case – the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity was sought, is deemed to be the day the act or omission on which the alleged wrongdoer’s claim was based took place.

The court noted that section 18 of the Act formed part of a comprehensive reform of limitation period law in Ontario and that its purpose was to provide that when a party sought contribution and indemnity, the claim on which contribution and indemnity was sought was deemed to be discoverable when a plaintiff was served with the original statement of claim.

This section applied to claims not only between tortfeasors, but between “wrongdoers” for other types of claims.

Applied to this case, the court held that the day the plaintiffs were served in the mortgagees action claiming that they were personally liable under the mortgage was the day that the act or omission they allege against the lawyers took place because the plaintiffs’ claim against

the lawyers was in substance a claim for contribution and indemnity relating to the claim by the mortgagees against the plaintiffs.

In the mortgagees original claim, it was clearly pleaded that the male plaintiff was personally liable as a mortgagor. Thus, the court reasoned that the plaintiffs were on notice of potential personal exposure under the mortgage once they had been served with the mortgagees claim.

In the alternative, the court found that the plaintiffs' claim against the lawyers was discoverable when the mortgagees were granted summary judgment for possession of the property. On that summary judgment motion, the motions judge had expressly found that the property was owned and controlled by the male plaintiff, and that the male plaintiff was the chargor on the mortgage.

The court in *Reichert* expressly dismissed the notion that the limitation period for the plaintiffs' claim for contribution and indemnity against the lawyers commenced to run from the date the sale of the property was approved by another judge on the basis that for a claim to be discoverable a plaintiff was only required to know, or reasonable ought to have known, that they suffered damage allegedly caused by the wrongful act or omission of the defendant.

Despite the plaintiffs' argument that the actual amount of their damages were not known until the order for sale was approved, the court held that a plaintiff did not need to know the extent of the damage for the claim to be discoverable.

## **Representation by Gardiner Roberts LLP**

The lawyers in this case were represented by Gavin Tighe and Alexander Melfi.

Mr. Tighe is a partner of Gardiner Roberts LLP and is a certified specialist in civil litigation. Mr. Melfi is a senior associate of Gardiner Roberts LLP, and is a litigation lawyer.

Mr. Tighe and Mr. Melfi were assisted in the preparation of written legal argument for the lawyer's summary judgment motion by Stephen Thiele. Mr. Thiele is a partner and is the Director of Legal Research at Gardiner Roberts LLP.

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<sup>1</sup>2018 ONSC 7092