Case In Point

Appellate Court Considers “Appropriate Means” Test Under *Limitations Act* and Reliance on “Non-Traditional” Expertise

Date: May 14, 2019

In Presley v. Van Dusen, the Ontario Court of Appeal provided guidance on the statutory limitation period and the reliance on “non-traditional” experts.

Background

The appellant homeowners retained Van Dusen to install a septic system in 2010. There were problems with the operation of the system. The appellants called Van Dusen and he appeared to fix the problem. Further problems arose in 2012. Van Dusen advised the appellants that the cause was an unusually wet year. In 2013 there was both smell and effluent from the system. Van Dusen inspected the system and advised the appellants that he could remedy the problem. He assured them he would return to perform that work. Although the appellants had several discussions with Van Dusen in which he committed to fixing the problem over the course of 2013 and 2014, that failed to happen. Ultimately the appellants called the Health Unit (another Respondent in the action). The Health Unit condemned the system and issued an order requiring the appellants to replace the septic system. The appellants then commenced their action.

Court of Appeal

Before the Ontario Court of Appeal, at issue was the failure of the Small Claims Court trial judge and of Divisional Court to conduct an analysis under s. 5(1)(a)(iv) of the *Limitations Act, 2002* (Act). Under that section of the Act, a claim is discovered when, having regard to the nature of the injury, loss or damage, the person with the claim or a reasonable person ought to have known that a proceeding would be an appropriate means to seek a remedy.

The Court of Appeal looked at the principles enunciated in Presidential MSH Corp. v. Marr, Foster & Co. LLP, in relation to delaying legal proceedings against an expert professional in cases where the professional’s wrongdoing may be resolved by the professional himself without recourse to the courts or in cases where the plaintiff is relying on the superior knowledge and expertise of the defendant. The Court found those principles applicable to this case.

Previous cases in which the Court of Appeal made a finding that it was reasonable for the plaintiff to rely on the defendant’s superior knowledge and expertise have concerned traditional expert professions like physicians, dentists and accountants. However, in this case the Court of Appeal supported recent Superior Court decisions applying *Presidential MSH* to persons who are members of non-traditional professions or who are not professionals at all, such as those in a franchisor-franchisee relationship or investors and their investment portfolio manager.

The Court of Appeal found that Van Dusen had expertise upon which the appellants reasonably relied to an extent sufficient to delay commencing proceedings.

Conclusion

Where an expert defendant makes efforts or purports to make efforts to eliminate a loss or where the plaintiff relies on the superior knowledge and expertise of the defendant, this can have the effect of postponing the start date of the two-year limitation period beyond the date when a plaintiff knows it has incurred a loss. The Court of Appeal has expanded the application of this analysis beyond traditional experts to include non-traditional professions. The breadth of that expansion remains to be determined.