COURT OF APPEAL FOR ONTARIO

CITATION: Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors, 2012 ONCA 851
DATE: 20121204
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Laskin, Sharpe and Epstein JJ.A.

BETWEEN

Antonio Ferrara, Cesan Mechanical Limited and 973976 Ontario Limited

Plaintiffs (Appellants)

and

Lorenzetti, Wolfe Barristers and Solicitors, and Stephen A. Schwartz

Respondents (Respondents)

Ronald Birken, for the appellants

Michael R. Kestenberg and Aaron Hershtal, for the respondents

Heard: June 6, 2012

On appeal from the order of Justice Beth A. Allen of the Superior Court of Justice, dated January 6, 2012, with reasons reported at 2012 ONSC 151.

Epstein J.A. (Dissenting):

I. OVERVIEW

[1] The issue in this appeal is whether the appellants' negligence action against the respondents, their former solicitors, is statute-barred. More

specifically, the focus is on the determination of the discoverability date – the date when it can be said that the appellants knew or reasonably ought to have known of their claim against the respondents. The respondents moved under rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for judgment dismissing the action as being out of time. The motion judge sided with the respondents and dismissed the action. This appeal is from that decision.

[2] The motion judge held that the discoverability date was September 19, 2006, when an action was commenced that brought into question the legal work the respondents performed for the appellants in a real estate transaction. It followed from this conclusion that on June 28, 2011, when the appellants sued the respondents for professional negligence in relation to that transaction, their claim was statute-barred.

[3] The motion judge also held that the action was an abuse of process, and on that additional basis concluded that it should not be allowed to proceed.

[4] On appeal, the appellants challenge both of these conclusions.

[5] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND FACTS

[6] The following is a summary of the relevant facts. None are contested.

[7] The dispute between the parties began with an agreement of purchase and sale of a one-half interest in co-tenancy lands (the “Property”) that was held

in trust by King Line Investments. The appellant, Cesan Mechanical Limited, with other co-tenants, owned shares in the Property. In July 2004 Cesan offered to purchase the Property and assigned that offer to the appellant, 973976 Ontario Limited ("973"). The appellant, Antonio Ferrara, is the principal and owner of both corporate appellants. In August 2004, another co-tenant made a matching offer. This offer was assigned to Gason Investments. In the result, each of the 973 offer and the Gason offer became proportionate offers to purchase a 50% interest in the Property.

[8] In order to reduce the land transfer tax on 973's purchase, King Line and 973 agreed that in the statement of adjustments involving that aspect of the sale of the Property, King Line would credit 973 with an amount equal to six times the value of one unit of the co-tenancy (the “Rollover Credit”).

[9] The 973 and Gason Offers were scheduled to close in February 2005. However, Greenbelt legislation was enacted that adversely affected the Property’s development potential and both 973 and Gason refused to close. As a result, on May 9, 2005 King Line brought an action against 973 and Gason (the “Breach of Contract Action”).

[10] This action was settled by Minutes of Settlement in June 2005. The Minutes of Settlement provided that 973 would purchase the entire Property in

two transactions: one on the same terms as 973's February 2005 offer, (the "First Transaction"), and the other on terms similar to the Gason offer.

[11] After closing, a disagreement arose over the Minutes of Settlement and the parties' intention concerning the Rollover Credit. King Line's position, if accurate, would mean that an error was made in the statement of adjustments and 973 would owe King Line $432,926.27. Unable to persuade 973 of its position, on September 19, 2006, King Line commenced an action against 973 for judgment in the amount of $432,926.27, and against King Line's real estate solicitors in the First Transaction (the "Cosman firm") for damages based on professional negligence (the "Deficiency Action"). 973 defended the Deficiency Action on the basis that no mistake was made: the statement of adjustments accurately reflected the transaction as contemplated in the Minutes of Settlement. 973 also counter-claimed against King Line for damages arising from a lien King Line had registered against the Property. In its reply and defence to counterclaim, King Line alleged that the statement of adjustments did not accurately reflect the agreement recorded in the Minutes of Settlement.

[12] Ferrara reviewed documentation surrounding the Deficiency Action with his lawyer and respondent in this action, Stephen A. Schwartz. At that point it was apparent that King Line was taking the position that the statement of adjustments had been improperly prepared, which, if correct, would mean that the appellants would suffer a loss.

[13] The appellants retained Graham Smith of Goodmans to represent them in the Deficiency Action. On November 21, 2001, Goodmans delivered a statement of defence and counterclaim on behalf of the appellants. In July 2008 Kevin Sherkin of Levine Sherkin Boussidan Barristers started acting for the appellants. Finally, sometime before the commencement of the trial the appellants retained Paul Pape as trial counsel.

[14] The trial of the Deficiency Action began on June 22, 2009, before Belobaba J. The issue for determination was whether the parties intended the Rollover Credit to be a "term and condition" of the agreement upon which the First Transaction was based. In his decision released on July 2, 2009, the trial judge found in King Line's favour and held that the Rollover Credit was not a "term and condition" of the agreement: *King Line Investments Inc. v. 973976 Ontario Ltd.*, [2009] O.J. No. 2747. This decision was upheld by the Court of Appeal on May 12, 2010: *King Line Investments Inc. v. 973976 Ontario Ltd.*, 2010 ONCA 345, [2010] O.J. No. 1984.

[15] On June 28, 2011 the appellants, represented by Michael Kestenberg of Kestenberg, Lipkus, Seigel LLP, commenced this action based on the respondents' negligence in acting for them in the preparation of the Minutes of Settlement and in ensuring that the settlement agreement was properly implemented in the First Transaction. They claim damages in the amount of the judgment against them in the Deficiency Action and related costs.

[16] The respondents brought the summary judgement motion on the grounds that the appellants' claim in solicitor's negligence is statute-barred by the *Limitations Act, 2002*, c. 24 as amended (the "*Act*").

III. REASONS OF THE MOTION JUDGE

(i) Is the action statute-barred?

[17] The appellants argued that the limitation period was triggered by the July 2, 2009 decision of Belobaba J., thereby placing their statement of claim within the statutory window. The respondents' position was that the appellants knew or ought to have known that they had a claim against them with the initiation of the Deficiency Action in September 2006. The action was therefore out of time.

[18] The motion judge's analysis focused on Ferrara's objective knowledge – when a reasonable person in his position ought to have known about a potential claim against the respondents. At para. 42, she held that "there were various points in time and occurrences before July 2009 which would cause a reasonable person to believe they had a claim against their lawyer". In the next paragraph, she made the following important finding:

> I accept the [respondents'] position that on an objective standard a reasonable person in Ferrara's position would have been alerted to a possible claim against Schwartz with the issuance of the claim in the [Deficiency Action] on September 19, 2006. After all, the central issue in that action was the negligence of King Line's real estate [solicitors] in preparing the statement of adjustments which was prepared with Schwartz's

> involvement. Ferrara knew at that time the material facts on which their current claim against Schwartz is based. [Citation omitted].

[19] The motion judge considered the appellants' argument that, prior to the release of Belobaba J.'s decision, it was not reasonable for Ferrara to have known that the appellants had a claim against the respondents. Ferrara, a relatively unsophisticated man, had been Schwartz's client for 20 years. Schwartz was intimately involved in the entire transaction. It was reasonable, therefore, for Ferrara to trust Schwartz and rely on his repeated assurances that the legal work performed for the appellants was correct. The reasonableness of this reliance, they argued, was reinforced because, as Ferrara stated in his affidavit, none of the experienced litigation lawyers representing the appellants throughout the resolution of this dispute – Smith, Sherkin or Pape – recommended that any action be taken against Schwartz.

[20] The motion judge rejected these arguments pointing to the fact that the appellants had been "savvy" enough to sue King Line's lawyers, had retained three litigation counsel before the date two years prior to the initiation of this action in June of 2011. The motion judge also held that the appellants' arguments were further impeded by the fact that they had not adduced sufficient evidence to support a finding that it was reasonable for them to ignore the implications of the Deficiency Action and what followed.

[21] Relying on the decision of Molloy J. in *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger,* 53 O.R. (3d) 208, the motion judge held that the proceeding had been brought out of time and dismissed the action.

(ii) Would allowing the solicitors' negligence action to proceed amount to an abuse of process?

[22] Although the motion judge's conclusion that the limitation period was triggered by the commencement of the Deficiency Action was dispositive of the matter, she nonetheless considered the respondents' alternative argument – that this action was an abuse of process.

[23] Here, too, the motion judge agreed with the respondents that the same issues to be decided in this solicitors' negligence action had already been finally determined in the Deficiency Action, giving rise to the possibility of inconsistent results.

[24] Again relying on Kenderry, the motion judge concluded that the action constituted an abuse of process and should not be allowed to proceed.

IV. ISSUES

[25] The appellants submit that the motion judge erred:

i. in finding that a reasonable client in the circumstances of the appellants would have discovered its claim against the respondents prior to July 2, 2009; and

ii. in concluding that this action constituted an abuse of process.

V. ANALYSIS

Rule 20 Considerations

[26] The motion judge correctly reviewed the current state of the law pertaining to motions for summary judgement and specifically the application of these legal principles where dismissal is sought on the basis of an action being statute-barred.

[27] The January 1, 2010 amendment to rule 20 gave the court broader authority than allowed under the predecessor rule to weigh evidence, evaluate the credibility of witnesses and draw any reasonable inference from the evidence. The test under rule 20.04(2)(a) is whether there is a "genuine issue requiring a trial".

[28] The implications of these changes were extensively considered in this court's recent decision in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1. At paras. 50 and 5, the court held:

> … [that] the passages set out in *Housen [v. Nikolaisen]*, at paras. 14 and 18, such as "total familiarity with the case as a whole", "extensive exposure to the evidence" and "familiarity with the case as a whole", provide guidance as to when it is appropriate for the motion judge to exercise the powers in Rule 20.04 (2.1). In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must

> ask the following question: can the full appreciation of the evidence and the issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?
>
> We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. [Citation omitted.]

[29] As a result of rule 20.04 (2.1), the motion judge can weigh evidence, make credibility findings and draw inferences. Given these expanded rights to assess evidence, a motion judge can now determine summary judgment when discoverability is a central issue: *Tim's Meat, Deli & Grocery Inc. v. Dubinsky,* 2010 ONSC 3829, at para. 22.

[30] It follows that here, the appellants, to successfully defend the motion for summary judgment, had to adduce evidence of material facts showing a genuine issue to be tried concerning the commencement of the limitation period. They had to put forward their best evidence capable of demonstrating that a trial was required in order to determine the discoverability date.

Is the action statute-barred?

Legal principles

[31] Section 4 of the *Act* establishes a basic limitation period of two years after the day on which the claim is discovered.

[32] According to the principle of discoverability, “a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered by the plaintiff by the exercise of reasonable diligence”: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 at 224. This principle is codified in s. 5 of the Act, which reads:

> 5(1) A 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).
>
> Presumption
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[33] Subsection 5(1)(a) is a subjective test. It requires a determination of when the claimant had actual knowledge of the material facts constituting the cause of action. Subsection 5(1)(b) is an objective test. It requires a determination of

when a reasonable person in the claimant's position would have been alerted to the elements of the claim.

[34] This takes me to the centre of the storm: the Deficiency Action and the decision of Molloy J. in *Kenderry*, a case involving strikingly similar facts, upon which much argument and, as previously mentioned, the motion judge's reasoning, were based.

[35] In that case, Kenderry, the plaintiff, was a condominium developer. It brought an action against its former solicitor for negligence in the preparation of an addendum to a purchase agreement. A dispute between Kenderry and the purchaser over the interpretation of the addendum ended in a trial in which the purchaser was successful – the trial judge held that the addendum did not reflect Kenderry's intention. As a result, Kenderry sued its solicitor. On the solicitor's motion for summary judgment dismissing the action on the basis that it was statute-barred, Kenderry submitted that the claim was only discovered when judgment was delivered in favour of the purchaser.

[36] Molloy J. concluded that the limitation period began to run when it was "reasonably clear" to Kenderry that there was a problem with the addendum. She held that by the time Kenderry filed its defence and counterclaim it should have been aware that, if it were wrong in its interpretation and the purchasers were right, it had a potential claim against its solicitors. Molloy J. also found that

due to the Addendum's lack of complexity, "Kenderry must also be taken to have been reasonably aware of the possibility that the Purchasers would be successful": *Kenderry* at para. 20.

[37] In her reasons, Molloy J. considered the application of the general discoverability rule in *Central Trust*, expressing the view that *the decision* does not stand for the proposition that the limitation period is necessarily triggered by the initiation of an action challenging the validity of a document prepared by a solicitor, but rather that the commencement of such an action is the earliest possible date for discoverability. She wrote:

> Once the issue of invalidity [of a document] is raised, the plaintiff is on notice that there may be a problem and must exercise reasonable diligence to determine whether there are facts giving rise to a cause of action. The date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence will depend on the circumstances of each particular case. [Emphasis added.]

See also *Indcondo Building Corp. v. Steeles-Jane Properties Inc.*, 14 C.P.C. (5th) 117, at para. 14.

[38] Molloy J.'s reasoning in *Kenderry* is compelling. However, it is important to note that she made a point of emphasizing that the limitation period in a solicitor's negligence action does not necessarily commence when a proceeding is initiated challenging the solicitor's legal work. As in all cases, the

determination of the commencement of the limitation period will depend on the particular facts.

Application of the Legal Principles to the Facts

[39] The Deficiency Action, commenced in September 2006, centred on the differences between King Line and 973 arising out of the Minutes of Settlement and the actions taken in implementation of that agreement – all of which was the work product performed by their respective solicitors. King Line, in its statement of claim, alleged that its solicitors had been negligent and claimed damages against the Cosman firm arising specifically out of its approving the "outdated and inappropriate" statement of adjustments prepared by 973. This reference to 973, of necessity, had to mean its solicitors, the respondents. In its reply and defence to counterclaim, King Line went further and explicitly implicated the respondents by referring to their participation in the preparation of the impugned statement of adjustments.

[40] Strictly applied, the reasoning in *Kenderry* would support the conclusion that the Deficiency Action provided Ferrara with sufficient appreciation of the material facts to understand that the appellants had a claim against the respondents. In September 2006, Ferrara understood the issues in the Deficiency Action. He understood that the legal services the respondents provided the appellants in relation to what was in dispute were being challenged.

He understood that the appellants would suffer a loss if King Line were to be successful in that action.

[41] However, as counselled by Molloy J. in *Kenderry*, each case must be determined having regard to its own circumstances.

[42] As they did before the motion judge, on appeal the appellants argue that the circumstances here are distinguishable in a material way. They submit that before the release of Belobaba's reasons, they had no reason to believe that they were actually exposed to a loss let alone that they had a claim against the respondents. In fact, they had every reason to believe otherwise. Schwartz, who was directly involved in the transaction and who had been Ferrara's lawyer for over 20 years, assured him from the start and indeed all the way through the Deficiency Action litigation, that King Line would not succeed. Moreover, according to Ferrara's affidavit evidence, none of the litigation lawyers who had acted for the appellants throughout the proceedings recommended that they sue the respondents.

[43] With respect, I am of the view that the motion judge erred in holding that the appellants knew or ought to have known they had a claim against the respondents at the time the Deficiency Action was initiated. The objective assessment of the discoverability date required a determination of when a reasonable person with the abilities and in the circumstances of Ferrara, first

ought to have known not only of his loss (or potential loss) but also of the fact that the act or omission causing the loss was that of the respondents. To conclude that when the Deficiency Action was commenced a reasonable person in Ferrara's circumstances ought to have known that he would suffer a loss that was caused by the respondents, would be to say that it was reasonable for Ferrara to have distrusted his lawyer simply on the basis that his advice had been called into question.

[44] The very nature of the adversary process demonstrates the perversity of such a conclusion. Litigation is premised on opposing views. Each party represented by counsel is presumably relying on the advice of his or her counsel that their position has merit. Through the litigation process, this advice is implicitly being challenged. To tell the appellants that they made the mistake of relying on their own lawyers and then allow these lawyers to use this erroneous reliance to support their position that the action was commenced out of time would reward a particularly pernicious violation of solicitor-client trust.

[45] However, in my view, the reasonableness of the appellants' forbearance to sue the respondents changed when they retained litigation counsel to represent them – Goodmans in November of 2006, followed by Sherkin in 2008 and Pape, just prior to trial.

[46] Ferrara says in his affidavit that these lawyers did not suggest to him that the appellants had a claim against the respondents. This assertion is difficult to accept. First, it begs the question of why these lawyers and their firms have not been named as defendants in this action. Second, given the issues raised in the Deficiency Action and the way in which they were described by Belobaba J., the implication being that it should have been relatively easy for Schwartz to have identified his error, and the level of experience of these lawyers, it is a difficult assertion to accept without clear and convincing evidence.

[47] If Ferrara's assertion is not accepted then he has no explanation as to why, after seeking the counsel of not one but three other senior lawyers, it remained reasonable for him not to appreciate that he had a claim against the respondents until the decision of Belobaba J. was released.

[48] But for Ferrara's "bald assertion" there was no such evidence. As mentioned, there was nothing in the record from the lawyers. No affidavits were filed. No documents were produced. No explanation for this lack of evidence was provided. By failing to adduce any further evidence the appellants asked the motion judge to make a finding critical to their defence to the motion that was not supported by the quality of evidence mandated by the rule and by the jurisprudence.

[49] In *Combined Air*, at para. 56, this court reinforced the warning previously expressed in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 at 434 (Gen. Div.), that a party is not entitled to sit back and rely on the possibility that more favourable facts may develop at trial. Each side must advance their best case and put forward the evidence on which they rely with respect to the material issues to be tried. The court is entitled to assume that the parties have met this obligation: *1061590 Ontario Ltd. v. Ontario Jockey Club*, 21 O.R. (3d) 547 (C.A.) and *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 at 265, (Ont. C.A.).

[50] In my view, a bald assertion, even one that remains unchallenged, made in circumstances such as this where supporting evidence must be presumed to be readily available, cannot defeat a motion for summary judgment. The parties must lead evidence that the court can weigh and from which it can draw inferences.

[51] Here, the respondents had the burden of “leading trump or risk losing”. They failed to “lead trump” – evidence from their lawyers – and lost.

[52] I agree, therefore, that this action is statute-barred. However, I do so for reasons that differ slightly from those of the motion judge. In my view, when the Deficiency Action was commenced it was reasonable for the appellants to rely on

the assurances of Schwartz. It therefore cannot be said that they reasonably should have known they had a claim against the respondents. However, the evidence does not support a finding that after the appellants retained independent litigation counsel, continuing to maintain this position remained reasonable.

[53] I would therefore not give effect to this ground of appeal.

Abuse of Process

[54] While in the light of my conclusion concerning the operation of the limitation period to preclude this action's proceeding, it is not necessary to consider the abuse of process issue, a brief comment is warranted.

[55] The authority to dismiss an action that is an abuse of process derives from rule 21.01(3)(d) of the *Rules of Civil Procedure* as well as the inherent jurisdiction of the courts. In *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77*,* the Supreme Court held at para. 35 that "[j]udges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice"." (Citation omitted).

[56] Arbour J., writing the principal reasons for the majority, also stated at para. 37 that:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

[57] As I previously noted, the motion judge, in concluding that this action would be an abuse of process, again relied on *Kenderry*. In that case Molloy J., in considering the abuse of process argument, noted Finlayson J.A.'s reasoning in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, aff'd 2002 SCC 63, [2002] 3 S.C.R. 307, at para. 34, that:

> [T]he Courts must be vigilant to ensure that our system does not become clogged with unnecessary, repetitious litigation. To allow the defendant to retry the issue … would be a classic example of abuse of process and a waste of the time and resources of the litigants and the Court. The retrying of the issues in this case would also erode the principle of finality that is crucial to the proper administration of justice.

[58] As found by the motion judge, the appellants were raising an issue that could have been raised in the Deficiency Action and there was a danger of inconsistent findings if the proceeding were to continue.

[59] I agree. The appellants did not bring the respondents into the Deficiency Action when they were able to. As indicated, the record does not contain evidence explaining why they failed to take this step when they could have and should have. This failure not only potentially leads to inconsistent results but also

may compromise the respondents' ability to defend the action due to the fact that the appellants, in their statement of claim and reply have pleaded issue estoppel. Given the absence of evidence supporting an explanation why this step was not taken within time, I would not interfere with the exercise of the motion judge's discretion to dismiss this action based on abuse of process.

[60] I would therefore not give effect to this ground of appeal.

VI. DISPOSITION

[61] For these reasons, I would dismiss the appeal. The respondents are entitled to their costs. I would fix these costs in the amount of $7,500, including interest and applicable taxes.

"Gloria Epstein J.A."

Laskin J.A.:

A. INTRODUCTION

[62] I have read the reasons of my colleague, Epstein J.A., and I am unable to agree with them.

[63] The principal question on this appeal is: should Ferrara have discovered his claim for damages for Schwartz's alleged negligence before July 2, 2009, the date of the judgment of Belobaba J. in the deficiency action? My answer is no. A secondary question is: should this action be dismissed as an abuse of process? Again, my answer is no.

[64] Accordingly, I would allow the appeal, dismiss Schwartz's motion for summary judgment, and grant Ferrara's cross-motion, by declaring that his action is not barred by the *Limitations Act, 2002*.

B. THE MOTIONS

[65] Both Schwartz and Ferrara moved for summary judgment. Both before the motion judge and in this court they agreed that the date Ferrara's claim against Schwartz was discoverable could and should be decided by summary judgment. Were it not for their agreement, I might have been inclined to dismiss both motions and order a trial.

[66] However, I accept the parties' agreement. Thus, we have three choices for the date when Ferrara's claim was discoverable:

(1) September 2006 - The motion judge says Ferrara's claim was discoverable on the date the statement of claim was issued in the deficiency action.

(2) November 2006 - Epstein J.A. disagrees with the motion judge and says the claim was discoverable on the date Ferrara retained litigation counsel in the deficiency action.

(3) July 2009 - Ferrara says the claim was discoverable on the date Belobaba J. released his decision in the deficiency action.

[67] For the reasons that follow, I accept Ferrara's position.

C. BACKGROUND FACTS

[68] My colleague has concisely summarized the relevant facts. Several of these facts deserve emphasis. They are as follows:

(1) As my colleague points out, Ferrara was a relatively unsophisticated client. He was 60 years old, worked as a plumbing contractor and had little formal education.

(2) The solicitor-client relationship between Schwartz and Ferrara was long-standing. Schwartz had acted for Ferrara for over 20 years.

(3) Schwartz continuously and repeatedly assured Ferrara that he, Schwartz, was right, and that Ferrara was entitled to a rollover credit. Schwartz gave Ferrara these assurances not only before

the deficiency action began but, as well, throughout the course of that action.

(4) Schwartz never once advised Ferrara that he may have been wrong or may have made a mistake.

(5) Schwartz did not fulfill his professional obligation to inform his client, Ferrara, of his possible error. Rule 6.09 of the Law Society of Upper Canada's *Rules of Professional Conduct* requires that when a lawyer discovers an error that may be damaging to the client, the lawyer shall promptly inform the client of the error. Schwartz did not comply with Rule 6.09.

(6) Ferrara gave evidence that none of the three litigation lawyers he retained in the deficiency action recommended suing Schwartz. Ferrara was not cross-examined on his evidence and Schwartz filed no contradictory evidence.

(7) Ferrara maintains that Schwartz participated actively in the deficiency litigation and helped to direct the defence. At the very least, Schwartz testified in support of his position that the minutes of settlement authorized the rollover credit in favour of his client, Ferrara.

(8) Ferrara's action against Schwartz was commenced less than two years after the decision of Belobaba J.

D. ANALYSIS

(1) Ferrara's claim against Schwartz was not discoverable before July 2, 2009

[69] Ferrara was required to start his action within two years of the day on which his claim against Schwartz was discovered. Section 5 of the *Limitations Act, 2002* sets out when a claim is discovered. Subsections 5(1) and (2) state:

> (1) A 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).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[70] Ferrara maintains that he did not know he had a claim against Schwartz until Belobaba J.'s decision in the deficiency action. However, I agree with the motion judge and Schwartz that the date Ferrara's claim was discoverable turns on the modified objective test in s. 5(1)(b) of the Act. And I accept that Ferrara must meet the presumption in s. 5(2). In my opinion, Ferrara has shown that a reasonable person with his abilities and in his circumstances would not have known he had a claim against Schwartz until July 2, 2009, the date of Belobaba J.'s decision.

[71] My colleague relies on Molloy J.'s comment in *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger* (2001), 53 O.R. (3d) 208, at

para. 19: “The date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence will depend on the circumstances of each particular case.”

[72] I agree with this comment. In the present case, two “circumstances” in combination support my conclusion that Ferrara’s claim against Schwartz was not discoverable before July 2, 2009: Schwartz’s repeated assurances that he was right; and Ferrara’s uncontradicted evidence that no one told him otherwise. The combination of these two circumstances distinguishes this case from the other cases relied on by Schwartz.

[73] First, Schwartz’s assurances. Schwartz repeatedly told Ferrara, even during the deficiency action itself, that Ferrara was entitled to a rollover credit. Never once did he tell Ferrara that he may have been wrong. So, Schwartz’s position comes down to this:

> I told you all along that I was right and that you were entitled to the rollover credit; I never told you that I may have made a mistake; and I never complied with my professional obligation under r. 6.09 of the *Rules of Professional Conduct* to inform you of my possible error. However, you should still have known that you had a claim against me once the deficiency action started.

Respectfully, it ill lies for Schwartz to take this position. I doubt any lawyer would have been justified taking this position against his own client, but certainly not a lawyer who had acted for his client for over 20 years and no doubt gained the complete trust and confidence of the client during that long relationship: see

Sheeraz v. Kayani (2009), 99 O.R. (3d) 450, at paras. 48-49; *Charette v. Trinity Capital Corp.*, 2012 ONSC 2824, 2012 D.T.C. 5100, at paras. 97-102.

[74] Second, Ferrara's uncontradicted evidence. Ferrara gave evidence, unchallenged, that no one – not Schwartz and not any of the three litigation lawyers he retained in the deficiency action – told him that he had a potential claim in negligence against Schwartz. Nonetheless, Schwartz, the motion judge and my colleague give Ferrara's evidence virtually no weight because it is not buttressed by the evidence of the three litigation lawyers.

[75] Schwartz says that Ferrara's evidence is "self-serving" and an adverse inference should be drawn because of the absence of affidavit evidence from the three litigation lawyers. The motion judge, at para. 48 of her reasons, said that Ferrara's evidence is a "bald assertion" and does not comply with his obligation to "put his best foot forward". Similarly, Epstein J.A. says that "[Ferrara's] assertion is difficult to accept…without clear and convincing evidence" and that "[b]ut for Ferrara's 'bald assertion' there was no such evidence."

[76] I would make two points in response. First, I think it unfair to criticize Ferrara for a "bald assertion". The assertion of a negative, that something did not occur, is necessarily "bald". Invariably the person making the assertion can say little more than that it did not happen.

[77] Second, I do not accept that to meet his obligation to put "his best foot forward", Ferrara was obliged to file the affidavits of his three litigation lawyers. He gave sworn evidence that "none of the said litigation counsel recommended that any action be taken against Schwartz either by way of third party action against Schwartz or otherwise." By giving this evidence he impliedly waived the right to claim solicitor-client privilege for any advice his litigation counsel may have given him about suing Schwartz in negligence.

[78] In *R. v. Youvarajah*, 2011 ONCA 654, 107 O.R. (3d) 401, this court discussed the circumstances under which a party may have impliedly waived solicitor-client privilege, at paras. 147 and 153:

> [A]n implied waiver of solicitor-client privilege may occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.
>
> …
>
> [I]mplied waiver has been found to occur in situations where a party "brings the suit or raises an affirmative defence that makes his intent and knowledge of the law relevant"…[Internal citations omitted.]

[79] Ferrara voluntarily disclosed that in his communications with his three litigation lawyers he was not advised he had a potential claim against Schwartz. This disclosure made his knowledge of whether he could sue Schwartz a relevant issue. His disclosure, thus, showed an implied intention to waive his solicitor-client privilege.

[80] Schwartz, therefore, could have cross-examined Ferrara on the advice he received. But Schwartz chose not to do so. Schwartz could have subpoenaed the litigation counsel and examined them to obtain their evidence for the motions. Schwartz chose not to do so. And Schwartz could have sought to file their affidavit evidence in reply. Again, he chose not to try to do so. In my view, Ferrara's evidence that no one told him he had a negligence claim against Schwartz is entitled to considerable weight.

[81] The combination of Schwartz's repeated assurances that he was right and had not made a mistake, and Ferrara's unchallenged evidence that no one told him about a potential negligence claim against Schwartz, support my conclusion that the claim was not discoverable before July 2, 2009.

(2) This action is not an abuse of process

[82] The motion judge also dismissed this action as an abuse of process. In her view, Ferrara's failure to name Schwartz as a defendant in the deficiency action raised the possibility of inconsistent results. Epstein J.A. agrees with the motion judge. She notes that there is no evidence in the record explaining why the appellants elected not to join the respondents "when they could have and should have."

[83] I do not consider this action an abuse of process. First, the evidence in the record explains why Ferrara did not join Schwartz as a defendant in the

deficiency action. It is the same evidence that explains why Ferrara did not discover his claim against Schwartz earlier. That evidence is Schwartz's repeated assurances that he was correct about the rollover credit, and Ferrara's unchallenged assertion that none of his litigation counsel told him to sue Schwartz. In this sense, the abuse of process argument fails for the same reason as the discoverability argument.

[84] Second, the possibility of inconsistent results between the two actions is non-existent. The only issue in the present action is whether Schwartz was negligent. That Ferrara is not entitled to a rollover credit was conclusively determined in the deficiency litigation. A court determining Schwartz's potential negligence will not be required to consider whether Belobaba J.'s conclusion on the rollover credit was correct.

[85] Finally, Schwartz cannot claim unfairness because he was not a named defendant in the deficiency litigation. He participated actively in that litigation. He testified in support of his opinion that his client Ferrara was entitled to a rollover credit. In effect, he stood in his client's shoes. He has not suggested that, if he had been sued and had his own counsel, he could have led any additional evidence, or made any different or additional arguments. Accordingly, I see no basis to dismiss this action as an abuse of process.

E. CONCLUSION

[86] I would allow the appeal. In my opinion, the claim against Schwartz was not discoverable before July 2, 2009, the date of the decision of Belobaba J. in the deficiency action. Accordingly, Ferrara's action against Schwartz is not barred by the *Limitations Act, 2002*. Further, in my view, this action is not an abuse of process.

[87] I would set aside the order of the motion judge. In its place I would order that Schwartz's summary judgment motion be dismissed, that Ferrara's cross-motion be allowed, and that Ferrara's action is not statue-barred. Ferrara is entitled to his costs of this appeal and the motions in the agreed-upon amounts of $7,500 and $8,500, inclusive of disbursements and applicable taxes.

Released: Dec. 4, 2012
"JL"

"John Laskin J.A."
"I agree Robert Sharpe J.A."