COURT OF APPEAL FOR ONTARIO

CITATION: Mega International Commercial Bank (Canada) v. Yung, 2018 ONCA 429
DATE: 20180507
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Doherty, Paciocco and Nordheimer JJ.A.

BETWEEN

Mega International Commercial Bank (Canada)

Plaintiff

and

Tony Man Tung Yung (also known as Man Tung Yung) and Yvonne Pui Ling Lai

Defendants (Appellants)

and

Jimmy K. Sun and Sun & Partners

Third Parties (Respondents)

Eliot N. Kolers and Zev Smith, for the appellants

M. Scott Martin and Marco P. Falco, for the respondents

Heard: February 6, 2018

On appeal from the order of Justice Laurence A. Pattillo of the Superior Court of Justice, dated May 17, 2017, with reasons reported at 2017 ONSC 1005.

Paciocco J.A.:

OVERVIEW

[1] This is an appeal from a summary judgment dismissing the appellants' third party claims for contribution and indemnity against the respondent lawyer and law firm as statute-barred.

[2] Mr. Tony Man Tung Yung and Ms. Yvonne Pui Ling Lai commenced the underlying third party claims against their former lawyer, Mr. Jimmy K. Sun and his law firm, Sun & Partners, after Mega International Commercial Bank (Canada) ("Mega International") sued Mr. Yung and Ms. Lai on personal guarantees they provided to Mega International's predecessor, International Commercial Bank of Cathay (Canada) ("International Commercial"). Those personal guarantees were given to secure financing for a Toronto development property that Mr. Yung and Ms. Lai were involved in. Mr. Yung and Ms. Lai claim that their lawyer, Mr. Sun, was instructed to obtain releases from those personal guarantees, but failed to do so – hence their claims for contribution and indemnity.

[3] Mr. Yung and Ms. Lai did not sue Mr. Sun and his law firm until more than two years after Mega International served Ms. Lai with a claim against her on her personal guarantee. The motion judge held that s. 18 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B establishes an absolute two-year limitation period for contribution and indemnity claims, which commenced when Ms. Lai was served

with Mega International's claim. Hence, he found that Mr. Yung's and Ms. Lai's third party claims were statute-barred.

[4] There are two grounds of appeal. The first challenges the motion judge's interpretation of s. 18 of the *Limitations Act, 2002*. The second contends that the motion judge erred in exercising his fact-finding powers under r. 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"). Mr. Yung and Ms. Lai argue that because of this second error, findings of fact made by the motion judge should not be relied upon in this appeal to overcome the motion judge's error in interpreting s. 18.

[5] For the reasons that follow, I agree that the motion judge misinterpreted s. 18. That section does not displace the discoverability principles found in ss. 4 and 5 of the *Limitations Act, 2002*.

[6] I would further hold that the motion judge's decision to grant summary judgment was made in error. As a result of his misunderstanding of s. 18, he did not have a full appreciation of the significance of the conflicting evidence and the facts central to the discoverability issue when he decided to grant summary judgment. Consequently, the findings of fact he made in his summary judgment cannot be relied upon to resolve the s. 18 discoverability issue against Mr. Yung and Ms. Lai.

[7] I would therefore allow the appeal and remit the case to the Superior Court of Justice to proceed in accordance with these reasons and the *Rules*.

THE MATERIAL FACTS

A. THE PARTIES AND THE PROJECT

[8] Mr. Yung and Ms. Lai are married. From 1991 to 1995, the couple lived together in Toronto. However, since 1995, Mr. Yung has lived in Hong Kong while Ms. Lai continued to live in Toronto. They then separated in 1998 and have continued to live on separate continents since.

[9] Mr. Sun had been doing legal work for Mr. Yung and Ms. Lai since the early 1990s. It is not contested that Mr. Yung, an experienced businessperson in Hong Kong, knew little English. He relied upon Mr. Sun to translate and explain relevant legal documents. Nor is it contested that Ms. Lai had few direct dealings with Mr. Sun. She depended largely on Mr. Yung to deal with Mr. Sun on her behalf.

[10] In 1993, Mr. Sun acted for Mr. Yung and Ms. Lai when they began to develop a mixed use, commercial and residential building at 207-209 Yonge St. (the "Property").

[11] The Property was owned by 1036846 Ontario Inc. The corporation was a bare trustee for the Yonge Trust. The trustee of the Yonge Trust was a British Virgin Islands corporation, Hastings Services Limited. The beneficiaries of the Yonge Trust were Mr. Yung, Ms. Lai, and certain of their family members. Mr. Yung

and Ms. Lai were directors and officers of 1036846 Ontario Inc., the Yonge Trust, and Hastings Services Limited at various times.

B. FOUR MATERIAL EVENTS

[12] Four events linked to the Property are relevant to this appeal: (1) the acquisition; (2) the International Commercial refinancing; (3) the 2006 restructuring; and (4) the power of sale and the Mega International claims on the personal guarantees.

(1) The Acquisition

[13] Few facts relating to the acquisition matter. It is sufficient to note that the development of the Property was initially financed by Grand Pacific Finance Corp. (“Grand Pacific”) and 366 Madison Inc. (“Madison”), two related corporations the principals of which were Mr. Michael Lin and Ms. Anne Chen, who Mr. Sun also acted for.

(2) The International Commercial Refinancing

[14] By 2002 to 2003, the project was in financial difficulty. Mr. Yung and Ms. Lai had to refinance. They secured further funding from International Commercial in the form of a $10,400,000 loan to 1036846 Ontario Inc. and the Yonge Trust (the “Mortgage”).

[15] Mr. Yung and Ms. Lai say that Mr. Sun provided legal advice to them in connection with this refinancing.

[16] Mr. Sun disagrees. He contends that Mr. Yung and Ms. Lai negotiated the financing terms with International Commercial without his assistance. He claims that he acted solely for International Commercial on the refinancing after being asked by Mr. Yung and Ms. Lai to do so.

[17] Some of the money obtained from International Commercial was used to partially repay the money owed to the original financiers, Grand Pacific and Madison. In return, Grand Pacific and Madison subordinated their mortgage security in favour of International Commercial. Mr. Yung and Ms. Lai also provided personal guarantees to International Commercial as additional security.

(3) The 2006 Restructuring

[18] The International Commercial refinancing did not solve the financial pressure on the development project. By October 2003, negotiations were underway between Mr. Sun and Mr. Lin to change the Grand Pacific and Madison arrangement. By December 2004, terms had been reached, leading to a restructuring in June of 2006.

[19] Mr. Sun acted as lawyer for all of the parties in this restructuring.

[20] On April 6, 2006, Mr. Yung met with Mr. Eddie Ho Chow Mui, a Hong Kong lawyer licenced to practice in Ontario, and signed an Acknowledgment of Conflict of Interest and Consent relating to Mr. Sun's role in the restructuring. Mr. Yung also signed a Certificate of Independent Legal Advice confirming that he fully

understood the nature and effect of the transaction, and that he was signing the documents freely and voluntarily. Mr. Yung claims, however, that Mr. Mui did not translate the documents for him, and that he signed the documents under the direction of Mr. Sun.

[21] Mr. Yung and Ms. Lai do not agree with Mr. Sun about the nature of the 2006 restructuring that took place.

[22] Mr. Yung and Ms. Lai claim that they transferred their beneficial interest in the project to Grand Pacific and Madison. Mr. Yung claims that it was his understanding that, in return, the personal guarantees he and Ms. Lai signed in favour of International Commercial would be replaced by personal guarantees from Mr. Lin and Ms. Chen, the principals of Grand Pacific and Madison. He says that these were the instructions he gave to Mr. Sun. Mr. Yung says that he understood that Grand Pacific and Madison were going to secure financing to repay International Commercial, thus nullifying the guarantees.

[23] Mr. Yung claims that instead of paying off International Commercial as originally planned, Grand Pacific and Madison advised him that they had received International Commercial's consent to be assigned the Mortgage such that they would take over the responsibility of repaying the loan advanced to 1036846 Ontario Inc. and the Yonge Trust, and that Mr. Lin and Ms. Chen would take over the personal guarantees. Mr. Yung claims it was his understanding that this

happened. He believed that the personal guarantees to International Commercial that he and Ms. Lai had signed were no longer in effect.

[24] Mr. Sun does not accept this. He describes a more complex restructuring in which a new company, Yonge Linkage Limited, was created with Mr. Lin and Mr. Yung as its signing officers. Mr. Sun claims that 1036846 Ontario Inc. transferred its interest in the Property to Yonge Linkage Limited. The trust beneficiary did not change, but in this way control of the Property and the income generated therefrom was transferred to Grand Pacific through Mr. Lin. In return, Grand Pacific and Madison released Mr. Yung and Ms. Lai from the personal guarantees that Mr. Yung and Ms. Lai owed to Grand Pacific and Madison, but this had nothing to do with the personal guarantees that they provided to International Commercial.

[25] More significantly, Mr. Sun disputes Mr. Yung's and Ms. Lai's claims that he was instructed to secure releases of their personal guarantees to International Commercial. He says that such releases were never contemplated, and at no time did Mr. Lin or Ms. Chen provide replacement guarantees to International Commercial.

(4) The Power of Sale and the Mega International Action

[26] Whatever the restructuring arrangement was intended to be, it did not solve the project's financial challenges. By the summer of 2008, the Mortgage was in

default. On July 16, 2008, Mega International, International Commercial's successor corporation, issued a Notice of Sale under the Mortgage.

[27] Soon after, Mr. Yung and Ms. Lai became aware that Mega International was claiming the right to come after them on their personal guarantees for any shortfall in the sale price achieved under a power of sale.

[28] Mr. Yung claims that he was not alarmed when he learned that the guarantees might not have been cancelled by Mr. Sun since he thought the Property was worth much more than the outstanding mortgage amount. He claims that he asked Mr. Sun why the bank was unaware that the guarantees had been cancelled and that Mr. Sun told him he would check and get back to him, but never did.

[29] Mr. Yung also claims that Mr. Sun advised him that he could protect himself by redeeming the Mortgage or purchasing the Property. As a result, Mr. Yung wrote to Mega International expressing interest in acquiring the Property, but no concrete offer was ever made.

[30] Mr. Sun denies that Mr. Yung ever asked him about the cancellation of the guarantees. He acknowledges that he had advised Mr. Yung that he could protect himself from Mega International's claim by redeeming the Mortgage or acquiring the Property.

[31] On December 11, 2009, Mega International's lawyers notified Mr. Yung and Ms. Lai about an impending sale to another purchaser. On December 18, 2009, Mega International's lawyers sent a letter to Ms. Lai outlining the proposed sale price and the amount owing on the Mortgage, making it clear that there would be a shortfall in the sale. The letter stated in material part, "You and all other encumbrancers and guarantors have had a significant period of time in which to redeem, but have shown absolutely no indication of your ability or desire to redeem the mortgage."

[32] In a December 22, 2009 letter signed by Ms. Lai under Mr. Yung's direction, Ms. Lai responded, "Please clarify in the event that the property has been sold based on the terms that you referred to in your letter dated December 18, 2009, as a guarantor, am I liable for the shortfall of the actual outstanding amount of the mortgage?" Ms. Lai and Mr. Yung claim that Mr. Sun drafted this December 22, 2009 letter. Mr. Sun denies that he did.

[33] Mr. Sun produced a document signed by Ms. Lai confirming that Mr. Sun's firm did no more than translate the December 22, 2009 letter and could not provide her with legal advice. Ms. Lai claims that she signed this document because she was instructed by Mr. Yung to sign the documents that Mr. Sun presented to her.

[34] On January 15, 2010, the Property was sold to another buyer for $8,000,000.00. By contrast, the amount required to redeem the Mortgage was $9,138,963.03.

[35] On December 20, 2010, Mega International commenced the underlying action against Mr. Yung and Ms. Lai on their personal guarantees for the shortfall.

[36] On January 6, 2011, Ms. Lai was served with a statement of claim against her as a guarantor of the Mortgage for $1,216,101.78. Mr. Yung, living out of the country, was not served.

[37] Mr. Yung admits that he was made aware that Ms. Lai had been served. He says that he communicated with Mr. Sun about this. Mr. Yung claims that he relied on Mr. Sun's advice that: (1) he and Ms. Lai had no exposure because the sale price was an improvident one given that the property was worth much more than the sale price and the property had never been listed for sale on MLS (Multiple Listings Service); (2) his own offer to purchase the property would insulate him from liability; and (3) that since he had never been served with a statement of claim, any judgment could be enforced only against Ms. Lai and she did not have assets in her name. Mr. Yung claims that Mr. Sun nonetheless advised that Ms. Lai, an Ontario resident, should defend the suit.

[38] Mr. Sun denies that he told Mr. Yung not to worry about the personal guarantees. Mr. Sun says that he was not involved in giving advice on the power

of sale after he advised Mr. Yung that he could protect himself by redeeming the Mortgage or purchasing the Property. He also says that he sent Ms. Lai to a litigation lawyer.

[39] On March 2, 2011, Ms. Lai filed a statement of defence and cross-claim after consulting her litigation lawyer. She cross-claimed against Mr. Yung but made no third party claim against Mr. Sun or his firm.

[40] Two years later, Mega International secured an order to serve Mr. Yung. Pursuant to that order, service was to be accomplished by substituted service by April 30, 2013 through publication in the Toronto Star, in English in a Hong Kong newspaper, and by letter to Mr. Yung in care of Ms. Lai. Mr. Yung denies ever learning of the substituted service.

[41] Mr. Yung claims that in October or November 2013, unprompted, Mr. Sun delivered his entire legal file to him and Ms. Lai, but it was missing documents relating to the 2004 agreement and the 2006 restructuring transaction. This caused Mr. Yung to be suspicious of Mr. Sun.

[42] Based on the substituted service that was effected in April 2013, a default judgment was secured against Mr. Yung in 2015.

C. THE CLAIMS AGAINST MR. SUN

[43] Mr. Yung claims that he sought legal advice when he learned that a default judgment had been obtained against him. He says that it was only when he spoke

to a lawyer that he learned he had been served by substituted service, and that he was informed for the first time that he had a cause of action against Mr. Sun and his firm for failing to follow his instructions, for improper legal advice, and for acting in a conflict of interest. It was after this occurred that Ms. Lai learned, through him, that she too had an action against Mr. Sun and Sun & Partners.

[44] The parties agree that at no time had Mr. Sun told Mr. Yung that he might have a cause of action against him. Of course, Mr. Sun's position is that Mr. Yung has no such cause of action, so why would he tell him that he did? Similarly, there is no suggestion that Mr. Sun advised Ms. Lai that she had a potential cause of action against him.

[45] Mr. Yung managed to get the default judgment set aside, and on September 1, 2015, Mr. Yung and Ms. Lai instituted the underlying third party claims against Mr. Sun and his firm for contribution and indemnity. They allege that Mr. Sun and/or his firm, among other things:

(a) had a conflict of interest in acting for both Grand Pacific and Madison at the same time as Mr. Yung and Ms. Lai;

(b) failed to advise Mr. Yung and Ms. Lai of the conflict;

(c) failed to replace or cancel Mr. Yung's and Ms. Lai's personal guarantees to International Commercial as instructed and promised; and

(d) failed to accurately and fairly advise Mr. Yung and Ms. Lai as to their potential liability under their personal guarantees, and the nature and value of the guarantees.

D. THE SUMMARY JUDGMENT

[46] Mr. Sun and his firm moved for summary judgment seeking to dismiss the third party claims. Mr. Sun, Mr. Yung, and Ms. Lai presented affidavit evidence along with supporting documents. Transcripts of the cross-examination of Mr. Sun and Ms. Lai were put before the motion judge, along with "Questions and Answers on Written Examination" from Mr. Yung. No oral testimony was presented before the motion judge.

[47] At para. 31 of his reasons, the motion judge recognized that "the motion record contains conflicting evidence from Sun on the one hand and Yung and Lai on the other concerning their relationship and what took place between them in respect of the 2006 Restructuring and the Bank's subsequent Action." He went on to find that summary judgment was nonetheless appropriate since the issues could be resolved based on the undisputed evidence and through the utilization of the powers under r. 20.04(2.1) to assess Mr. Yung's and Ms. Lai's evidence.

[48] The motion judge went on to make significant credibility findings against Mr. Yung and Ms. Lai. These included findings that, contrary to their claims:

(i) Mr. Yung understood and consented to Mr. Sun acting for all parties in the 2006 restructuring (reasons, at para. 53);

(ii) Mr. Yung and Ms. Lai knew by December 2009 that their personal guarantees to International Commercial had not been extinguished (reasons, at paras. 55 and 58);

(iii) Mr. Yung was an experienced developer and businessman who "would have clearly known (and Lai by extension) that they had a claim against Sun for not following his instructions" (reasons, at para. 56);

(iv) Mr. Sun had not assured them that they had no liability concerning their personal guarantees (reasons, at paras. 59-63); and

(v) Ms. Lai would have told Mr. Yung about his substituted service on or around April 29, 2013, the date she received the substituted service letter (reasons, at para. 63).

[49] Based on these findings the motion judge ruled, at para. 49, that both Mr. Yung's and Ms. Lai's third party claims were statute-barred by the absolute limitation period provided for in s. 18 of the *Limitations Act, 2002*:

> The Statement of Claim was served on Lai sometime in early 2011, more than four years before the Third Party Claim was issued. It was served on Yung effective April 29, 2013, more than two years, four months prior to the Third Party Claim being issued. While, in my view, s. 18

> provides that the date when the time begins to run is from the date of service of the Statement of Claim on Lai (the first wrongdoer), in either case the Third Party Claim was commenced more than two years from the service of the Statement of Claim and is accordingly statute barred.

[50] He then went on to hold that there was no fraudulent concealment that would enable Mr. Yung and Ms. Lai to avoid the two-year limitation period. He reasoned that since Mr. Yung and Ms. Lai became aware in December 2009 of the facts material to their cause of action, nothing was concealed from them.

[51] On that basis, summary judgment dismissing Mr. Yung's and Ms. Lai's third party claims for contribution and indemnity was granted.

THE ISSUES

[52] Mr. Yung and Ms. Lai appeal the summary judgment against them. Two general issues must be determined to resolve this appeal:

A. Does s. 18 of the *Limitations Act, 2002* establish an absolute two-year limitation period or does it incorporate discoverability principles?

B. If the discoverability principles under ss. 4 and 5 of the *Limitations Act, 2002* apply, should the motion judge's findings relating to Mr. Yung's and Ms. Lai's knowledge of their claims against Mr. Sun, made in the context of the fraudulent concealment determination, be relied upon to resolve the discoverability issue?

[53] In resolving this latter issue it is also necessary to decide whether the motion judge erred in the way he used his summary judgment fact-finding powers.

ANALYSIS

A. THE EFFECT OF THE *LIMITATIONS ACT, 2002*, SECTION 18

[54] In my view, the motion judge erred in law in holding that the *Limitations Act, 2002*, s. 18 creates an absolute limitation period of two years for the commencement of contribution and indemnity claims. Properly interpreted, s. 18 works with other provisions of the *Limitations Act, 2002* to create a presumed start date for the running of the limitation period. That presumed limitation period start date will result in a claim for contribution or indemnity being statute-barred two years after the party seeking contribution or indemnity is served with a claim in the proceeding in which contribution or indemnity is sought, unless that party proves that the claim for contribution or indemnity was not discovered and was not capable of being discovered through the exercise of due diligence until some later date.

[55] The scheme of the *Limitations Act, 2002* is important to this conclusion. Subject to a few exceptions, s. 4 creates a “basic limitation period” of two years commencing on the date the claim was discovered. Section 5(1) goes on to define when a claim was discovered, and s. 5(2) creates a rebuttable presumption to assist in applying discoverability principles. If a claim is not commenced within 15 years of the day on which the wrong occurred, the ultimate limitation period defined

in s. 15(2) will expire. Section 18 operates within this general scheme. These are the material provisions:

> 4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> **Discovery**
>
> 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 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.

> […]
>
> **Ultimate limitation periods**
>
> 15(1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.
>
> **General**
>
> (2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

[56] Section 18 of the *Limitations Act, 2002*, the section directly in issue in this appeal, provides:

> **Contribution and indemnity**
>
> 18(1) For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.
>
> **Application**
>
> (2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of tort or otherwise.

[57] Decisions of the Ontario Superior Court of Justice are split on the proper interpretation of s. 18. The leading case favouring the absolute two-year limitation period interpretation preferred by the motion judge is *Miaskowski (Litigation guardian of) v. Persaud*, 2015 ONSC 1654, 51 R.P.R. (5th) 234, at paras. 94-97,

reversed in part 2015 ONCA 758, 393 D.L.R. (4th) 237. To the contrary, *Demide v. Attorney General of Canada et al.*, 2015 ONSC 3000, 47 C.L.R. (4th) 126, at paras. 84-95 is the most fully reasoned case holding that s. 18 simply identifies the presumptive trigger date for the limitation period for contribution and indemnity claims, subject to discoverability principles.

[58] This court has not yet settled the matter. There are passages in *Canaccord Capital Corp. v. Roscoe*, 2013 ONCA 378, 115 O.R. (3d) 641 that appear to favour the absolute limitation period interpretation. By contrast, there are passages in *Placsek v. Green*, 2009 ONCA 83, 307 D.L.R. (4th) 441, *Waterloo Region District School Board v. Truax Engineering Ltd.*, 2010 ONCA 838, 103 O.R. (3d) 81, and *Levesque v. Crampton Estate*, 2017 ONCA 455, 136 O.R. (3d) 161, reconsideration refused 2018 ONCA 75 that seem to support the presumptive trigger date interpretation. None of these cases, however, engage or purport to resolve the question of how s. 18 is to be interpreted.

[59] The interpretation of s. 18 therefore falls to be determined by applying the principles of statutory interpretation affirmed in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, citing E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense

> harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 136; and *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 313, at para. 23.

[60] I note that, as this issue involves a question of law with respect to statutory interpretation on appeal from a judicial decision, the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8; *Harvey v. Talon International Inc.*, 2017 ONCA 267, 137 O.R. (3d) 184, at para. 32; and *Blue Mountain*, at para. 22.

[61] The words in s. 18, interpreted in their grammatical and ordinary sense, do not establish an absolute limitation period. The provisions in the *Limitations Act, 2002* that do establish finite limitation periods, such as ss. 4, 15(1), 15(2), and 15(3), direct that “a proceeding shall not be commenced” or “no proceeding shall be commenced” after a described limitation period. Section 18, on the other hand, does not use such language or speak in any other terms that can be read as imposing an absolute limitation period, nor does it even identify a time span that could serve as a limitation period.

[62] On its face, s. 18 does no more than deem a fact without disclosing the significance of that deemed fact. Specifically, it directs that the day on which a party is served with the claim in respect of which they seek contribution or

indemnity, is deemed to be the day the act or omission on which that alleged claim is based took place. As this court similarly described in *Levesque*, at para. 39, s. 18 is obviously intended to work harmoniously along with other provisions of the *Limitations Act, 2002* to give this deemed fact meaning.

[63] In my view, s. 18 takes on meaning when it is linked to the *Limitations Act, 2002*, s. 5(2). Subject to the absolute 15-year limitation period in s. 15(2), ss. 5(2) and 18 together establish the presumptive limitation period for contribution and indemnity claims – a presumptive limitation period that incorporates the discoverability principles outlined in ss. 4 and 5(1). I emphasize the interaction between ss. 5(2) and 18 for two reasons.

[64] First, s. 18 is linked expressly to s. 5(2) in its opening phrase, “For the purposes of subsection 5(2) and section 15”. In my view, this opening phrase cannot be read as a direction to exclude contribution and indemnity claims from the operation of ss. 5(2) and 15, as was suggested in *Hughes v. Dyck*, 2016 ONSC 901, 129 O.R. (3d) 495, at para. 37. The clause “for the purposes of” invokes these provisions. It simply cannot properly be read as dispensing with these provisions as if it said, “Notwithstanding subsection 5(2) and section 15”.

[65] Second, the thing or fact that s.18 deems to have occurred is the same thing or fact that is used in s. 5(2) as the trigger for the presumptive limitation period in ss. 4 and 5. Section 18 deems “the day on which the first alleged wrongdoer was

served with the claim in respect of which contribution or indemnity is sought [to be] the day the act or omission on which the alleged wrongdoer's claim is based took place." Meanwhile, s. 5(2) treats "the day the act or omission on which the claim is based took place" to be the day on which a person with a claim is presumed to know that they have a claim within the meaning of s. 5(1). Section 5(2) is the only other provision in the *Limitations Act, 2002* apart from s. 18 that uses the operative phrase that I have underlined in the preceding sentences. The two sections are clearly meant to intersect and work together. In effect, s. 18 provides the variable used in s. 5(2) as the trigger for the presumed limitation period for contribution and indemnity claims.

[66] Put more directly, and incorporating s. 18's deemed fact into the text of s. 5(2):

> A person with a claim [for contribution and indemnity] shall be presumed to have known of the matters referred to in clause (1)(a) on the day [on which that person was served with the claim in respect of which contribution or indemnity is sought], unless the contrary is proved.

[67] Sections 18 and 5(2), in my view, work hand in glove in contribution or indemnity claims. Together, these two provisions identify the presumptive limitation period that applies in contribution and indemnity claim cases.

[68] In this way, s. 18 works not as an exception to the "basic limitation period" in s. 4 of the *Limitations Act, 2002*, but as part of the integrated scheme established by ss. 4 and 5.

[69] The claim that s. 18 establishes an absolute limitation period also encounters difficulty, in my view, when its connection to s. 15 is considered. Section 15, of course, is the other *Limitations Act, 2002* provision apart from s. 5(2) that s. 18 invokes expressly in its opening phrase, “For the purposes of subsection 5(2) and section 15.” As indicated, s. 15 imposes a 15-year cap on all limitation periods, regardless of discoverability concerns. The difficulty is that if s. 18 does establish an absolute two-year limitation period, then s. 15’s ultimate limitation period would not be relevant. Why then would s. 18 cross-reference s. 15? As a majority of the Supreme Court recently reaffirmed in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at paras. 45-46, it is presumed that the Legislature avoids superfluous or meaningless words. There is a presumption that the words of a statute are to be interpreted in a way that avoids a “mere surplusage” of words.

[70] In saying this, I am mindful that ss. 15(4) to 15(6) refine when limitation periods run, and that these provisions could work with an absolute two-year limitation period. In my view, it is unlikely that the Legislature would have invoked s. 15 in its entirety in s. 18 if it simply wanted these select subsections of s. 15 to apply to s. 18. The most logical conclusion is that all subsections of s. 15 that are capable of being interpreted harmoniously with s. 18 were intended to work with s. 18.

[71] The integrated legislative scheme I have just described is not only driven by the language of s. 18 and the *Limitations Act, 2002* taken as a whole, it is also in keeping with the object of the Act.

[72] I appreciate that the *Limitations Act, 2002* was passed to promote certainty and finality, and that certainty and finality could better be achieved by a fixed limitation period in s. 18: *Miaskowski*, at para. 95; and *Hughes*, at para. 37. As Sharpe J.A. pointed out in *Canaccord Capital*, at para. 17, however, the reform of the law of limitations in Ontario was "aimed at creating a clear and cohesive scheme for addressing limitation issues, one that balances the plaintiff's right to sue with the defendant's need for certainty and finality." As the "basic limitation period" in s. 4, combined with the discoverability principles in s. 5 demonstrate, that balance is generally achieved in the *Limitations Act, 2002* by adopting short limitations periods triggered by presumed knowledge of a claim, but subject to rebuttal based on the discoverability principles. There is no reason why a similar balance would not have been intended for contribution and indemnity claims.

[73] Indeed, I agree with the observations of Leach J. in *Demide*, at para. 88. There is an element of injustice in using a limitation period to deny a claim that could not have been discovered with reasonable diligence, and "the court should be reluctant to adopt a legislative interpretation that permits the possibility of such an injustice, unless that is the outcome clearly dictated by the legislation." In my

view, that outcome is not clearly dictated by s. 18. On the contrary, the opposite outcome is indicated.

[74] I would therefore hold that the motion judge erred in his interpretation of s. 18. The two-year limitation period prescribed by ss. 4, 5(2), and 18 for contribution and indemnity claims presumptively begins on the date of service of a claim in respect of which contribution and indemnity is sought. That presumptive limitation period start date, however, can be rebutted by the discoverability principles prescribed in s. 5 of the *Limitations Act, 2002*.

[75] There is a further problem with the motion judge's interpretation of s. 18 that requires mention. At para. 49 of his reasons, he stated that "the date when the time [against both Mr. Yung's and Ms. Lai's claims] begins to run is from the date of service of the Statement of Claim on Lai (the first wrongdoer)". The suggestion that the limitation periods for both Mr. Yung and Ms. Lai commenced with the service of Mega International's statement of claim upon Ms. Lai is incorrect. Mr. Yung's presumptive limitation period commences when he was served, not when Ms. Lai was served.

[76] It is likely that the motion judge made this error by misinterpreting the reference in s. 18 to the "first alleged wrongdoer". Properly understood, this is not a reference to the first wrongdoer to be served by a plaintiff in a case involving multiple wrongdoers. The term "first alleged wrongdoer" is meant to identify which

of the two wrongdoers already mentioned in s. 18 – the wrongdoer claiming contribution and indemnity and the wrongdoer that the contribution and indemnity claim is brought against – is being referred to in the balance of s. 18. It is helpful to reproduce and emphasize the relevant terms in s. 18 to make this point:

> 18(1) For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.

[77] The motion judge therefore erred when he stated that Mr. Yung's and Ms. Lai's claims were barred by an absolute two-year limitation period that was triggered when Ms. Lai was served. He should have held that the presumptive limitation periods against Mr. Yung and Ms. Lai run separately, depending on when each of the them was served, and he should then have gone on to resolve the discoverability issue.

B. CAN THE MOTION JUDGE'S FRAUDULENT CONCEALMENT FINDINGS BE USED AS INDIRECT DISCOVERABLITY FINDINGS SUCH THAT MR. YUNG'S AND MS. LAI'S CLAIMS ARE STATUTE-BARRED?

[78] In law, fraudulent concealment differs from discoverability in its focus and its requirements: compare, *e.g., Giroux Estate v. Trillium Health Centre* (2005), 74 O.R. (3d) 341 (C.A.), [2005] O.J. No. 226, at para. 29 *per* Moldaver J.A. (as he then was), affirming (2004), 69 O.R. (3d) 689 (S.C.), [2004] O.J. No. 557 (describing fraudulent concealment); and *Lawless v. Anderson*, 2011 ONCA 102,

276 O.A.C. 75, at para. 22, citing *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.), [1998] O.J. No. 459, at p. 170 (describing the principle of discoverability). The motion judge nonetheless made a finding while addressing the fraudulent concealment claim that Mr. Sun relies on as resolving the discoverability issue in his favour. Specifically, the motion judge found, at para. 57 of his reasons, that there was no fraudulent concealment because Mr. Yung and Ms. Lai were "aware of the essential facts giving rise to a claim against the alleged wrongdoer", Mr. Sun.

[79] In my view, the finding that Mr. Yung and Ms. Lai were aware of the essential facts giving rise to a claim against Mr. Sun is not a finding of discoverability, within the meaning of the *Limitations Act, 2002*, s. 5(1). I would not, therefore, utilize this holding to dismiss this appeal on the basis that the motion judge resolved the discoverability issue indirectly.

[80] The reason the motion judge's "knowledge" finding is not the same as a discoverability finding is because the knowledge finding does not resolve the discoverability consideration in s. 5(1)(a)(iv) of the *Limitations Act, 2002* with respect to whether the party with the claim knew that bringing the claim was legally appropriate: *Brown v. Baum*, 2016 ONCA 325, 397 D.L.R. (4th) 161, at paras. 20-21; and *Prudential MSH Corporation v. Marr Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321, at para. 54. This can be an important consideration where, as here, a party claims to be "relying on the superior knowledge and expertise of the

defendant […] in a professional relationship": *Prudential MSH Corporation*, at para. 26. The law is sensitive to the risks in solicitor-client cases that a lawyer can forestall or hide a cause of action against themselves through the advice they give: *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851, 113 O.R. (3d) 401; *Lauesen v. Silverman*, 2016 ONCA 327, 130 O.R. (3d) 665. Indeed, this is the very claim that Mr. Yung and Ms. Lai are making.

[81] It would not be appropriate in these circumstances to treat a finding that the defendants had knowledge of the main action as a finding that a third party claim against their lawyer was discoverable. The motion judge has not overtly addressed whether Mr. Yung or Ms. Lai knew it to be legally appropriate to bring their third party claims against Mr. Sun. This, in my view, is enough to dispose of the appeal.

[82] However, even if it is implicit in the motion judge's finding, that Mr. Yung and Ms. Lai knew about their claim and that they also knew it to be legally appropriate to sue Mr. Sun, I would not import the motion judge's factual findings to resolve this appeal. In my view, the motion judge erred in principle in deciding to conduct the summary judgment motion in the way that he did. As a result, no deference is owed to the findings made.

[83] Before identifying and explaining the error in principle I have referred to it is important to reaffirm that summary judgment motions under r. 20 are a significant alternative model of adjudication, available to improve access to justice: *Hryniak*

v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87, at paras. 34-44. Indeed, where a summary judgment is sought, judges are obliged to grant summary judgment where they are satisfied that there is no genuine issue requiring a trial: *Hryniak*, at para. 68. “There will be no genuine issue requiring a trial if the summary judgment process provides [the judge] with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure”: *Hryniak*, at para. 66. Moreover, the fact-finding powers in rr. 20.04(2.1) and (2.2) – to weigh evidence, evaluate credibility, draw reasonable inferences, or receive selected oral evidence – are presumptively available to a summary judgment motion judge to use to fairly and justly adjudicate a claim at a motion for summary judgment: *Hryniak*, at para. 45.

[84] Significantly, a motion judge’s exercise of the summary judgment rules attracts deference. Whether there is a genuine issue requiring a trial, or whether the fact-finding powers in rr. 20.04(2.1) and (2.2) should be used are questions of mixed fact and law. Unless the motion judge applies an incorrect principle of law or errs with respect to an extricable question of law, these decisions are reviewable only for palpable and overriding error: *Hryniak*, at paras. 81-83.

[85] In spite of the deference owed to summary judgment motion judges, this may be one of those uncommon cases “where, given the nature of the issues and the evidence required, the [motion judge] cannot make the necessary findings of fact, or apply the legal principles to reach a just and fair determination” in a

summary judgment motion: *Hryniak*, at para. 51. On the motion judge's own assessment, it was not possible to resolve all the conflicting evidence in the summary judgment motion, including, for example, whether Mr. Sun wrote the December 22, 2009 letter. The conflicting evidence spanned the entire relationship of the parties, involved successive complex corporate transactions, cast doubt on the content of client instructions, and went to the core of the nature and duration of a solicitor-client relationship.

[86] I need not resolve whether this case was unsuitable for summary judgment, because even if it was a matter fit for summary judgment, in my view the motion judge committed an error of principle making it inappropriate for this court to rely on his factual findings about Mr. Yung's and Ms. Lai's knowledge of their third party claims as dispositive of this appeal.

[87] Specifically, the decision of the motion judge to grant summary judgment was undermined by his misinterpretation of the *Limitations Act, 2002*, s. 18. Simply put, that error clouded the motion judge's understanding of the nature and complexity of the case he was being asked to resolve on summary judgment. Had he appreciated the nature of the dispute before him, *i.e.*, when Mr. Yung and Ms. Lai discovered that it was legally appropriate to commence a third party claim against their own lawyer, he may have found a genuine issue requiring a trial.

[88] The application of an absolute limitation period, the primary issue the motion judge thought he was adjudicating, is generally a relatively straightforward factual issue. In contrast, determining discoverability, the issue the motion judge should have been adjudicating, is not a relatively straightforward factual issue. Indeed, it was believed for a time that, as a general rule, discoverability cases should not be decided using summary judgment because of their complexity: *Aguonie*, at para. 36. There is no longer a general rule to this effect after *Hryniak*, given the more robust approach now being taken to summary judgment: *Charette v. Trinity Capital Corporation*, 2012 ONSC 2824, at paras. 69-70, *per* Strathy J. (as he then was); and *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, at para. 52. Still, the basic point remains true. Discoverability cases do tend to be contentious and complex, and this can, depending on the circumstances, affect their suitability for summary judgment.

[89] As I have indicated, this may be particularly so in claims brought by a client against their lawyer where reliance on the lawyer and the risk of abuse of power can make clients vulnerable to delaying legal action: *Ferrara*; and *Lauesen*.

[90] While the motion judge did not expressly state that the absolute limitation period he believed to apply made the matter conducive to summary judgment, his introductory overview to his decision suggests that he took comfort from the absolute nature of the limitation period:

> Based on the material filed, I am satisfied that the Third Party Claim can be determined by way of summary judgment. Section 18 of the Act sets out an absolute two year limitation period in respect of Yung and Lai's Third Party Claim which begins to run from the time the defendants were served with the Statement of Claim in the action. As both Lai and Yung were served with the Statement of Claim more than two years before the Third Party Claim was commenced, the Third Party Claim was commenced after the limitation period had expired and cannot succeed.

[91] Failing to appreciate the factual demands of a statutory provision when deciding to proceed by summary judgment can be an error in principle. For example, in *Miaskowski v. Persaud*, 2015 ONCA 758, 393 D.L.R. (4th) 237, at paras. 42-56, reversing in part 2015 ONSC 1654, 51 R.P.R. (5th) 234, the motion judge was found to have erred in principle in granting summary judgment without appreciating the full demands of the statutory provisions at issue. In that case, he did not properly consider the standards imposed by a relevant regulation, or whether a landlord's statutory duty could be removed by the lease. These errors clouded his decision that there was no genuine issue requiring a trial.

[92] The same is true here. In my view, the finding that Mr. Yung and Ms. Lai had knowledge of their causes of action against Mr. Sun was arrived at in a summary judgment motion held without a full appreciation of the complexity of the issues at stake. That finding of fact should therefore not be relied upon or equated to a finding that could dispose of the issue of discoverability for the purposes of the *Limitations Act, 2002* on summary judgment.

CONCLUSION

[93] I would allow the appeal, set aside the summary judgment dismissing Mr. Yung's and Ms. Lai's third party claims for contribution and indemnity, and order that the matter proceed in accordance with the *Rules*.

[94] The parties have agreed on costs. In keeping with their agreement, I would reverse the costs order made by the motion judge, and order costs in the motion below to the appellants, together, in the amount of $25,000, inclusive of disbursements and applicable taxes. I would also award costs of this appeal to the appellants, together, in the amount of $25,000, inclusive of disbursements and applicable taxes.

Released: May 7, 2018 ("D.D.")

"David M. Paciocco J.A."
"I agree. Doherty J.A."
"I agree. I.V.B. Nordheimer J.A."