COURT OF APPEAL FOR ONTARIO

CITATION: Amelin Engineering Ltd. v. Blower Engineering Inc., 2022 ONCA 785
DATE: 20221117
DOCKET: C69892

Fairburn A.C.J.O., Huscroft and George JJ.A.

BETWEEN

Amelin Engineering Ltd. and Michael Elinson

Plaintiffs/Defendants by Counterclaim
(Appellants)

and

Blower Engineering Inc. and Steam-Eng Inc.

Defendants/Plaintiffs by Counterclaim
(Respondents)

Matthew Diskin, Thomas Dumigan, and Dylan Gibbs, for the appellants

Jonathan F. Lancaster and Rachel Laurion, for the respondents

Heard: October 6, 2022

On appeal from the judgment of Justice Audrey P. Ramsay of the Superior Court of Justice, dated September 8, 2021, with reasons reported at 2021 ONSC 5799.

REASONS FOR DECISION

[1] This is an appeal from the judgment of the trial judge dismissing the appellants' action for negligent misrepresentation on the basis that the claim was statute barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B. The trial judge also found that the action could not succeed on the merits in any event.

[1] The appeal is dismissed for the reasons that follow.

Background

[2] The appellants purchased steam generators from the respondents over a period of several years, commencing in 1995. The appellant Michael Elinson, the founder and president of Amelin Engineering Ltd. (“Amelin”), entered into an agency relationship with the respondents in 1995 pursuant to which the appellant would sell generators designed and manufactured by the respondents for a five-year period. This agreement was subsequently extended for an additional five years. Different generators were purchased on various dates as outlined by the trial judge in paras. 45-52 of her decision.

[3] Repairs to the generators were made over several years, sometimes by the appellants and other times by the respondents. The trial judge noted that the appellants pleaded that they immediately encountered a number of difficulties and technical deficiencies with the generators, including critical components of the generators disintegrating within just a few days of operation and generators producing unacceptably high levels of CO and NO/NOx, and not operating at their rated maximum output.

[4] In April 2003, the appellants retained an independent firm, Bell Combustion, to carry out tests on a generator manufactured by the respondents at one of the respondents’ facilities. Bell Combustion delivered its report on April 16, 2003 (the

"Bell Report"), following which the appellants sent a letter to the respondents outlining their difficulties with the generators. The respondents demanded outstanding payments on November 26, 2003 and terminated the agreements with the appellants by letter dated January 12, 2004.

[5] The appellants' statement of claim for negligent misrepresentation was not issued until April 3, 2009, just under six years after receipt of the Bell Report. The respondents issued a counterclaim on July 29, 2009, seeking a set-off for unpaid invoices.

[6] The trial judge dismissed the action and the counterclaim following a 13-day trial. She found that the appellants' claim was statute barred and, in any event, could not succeed. The counterclaim was dismissed on the basis that there was no evidence as to when the debts were due.

The claim is statute barred

[7] It is not contested that the transition provisions of the *Limitations Act, 2002* apply to this claim, as the trial judge found. It follows that the former six year limitation period applies: *Limitations Act,* R.S.O. 1990, c. L.15, s. 45(1)(g). It is also agreed that the discoverability factors under the *Limitations Act, 2002* apply: see e.g., *St. Jean (Litigation Guardian of) v. Cheung*, 2008 ONCA 815, 94 O.R. (3d) 359, at paras. 57-59. Section 5(1) of the *Limitations Act, 2002* provides as follows:

> **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).

[8] The appellants submit that the trial judge erred in failing to consider s. 5(1)(a)(iv) of the *Limitations Act, 2002*. They argue that the respondent's president, Thomas Byrnes, an engineer who invented the steam generators in question, had superior expertise on which they reasonably relied; that he represented that the steam generators could operate in accordance with the representations in two sales brochures; and that he proposed remedies to resolve problems the appellants had experienced with the generators. The appellants say that assurances and ameliorative efforts of the respondents delayed the discoverability of their claim until May 2003, when repair efforts concluded, or April 16, 2003, when the Bell Report was delivered. In either case, the appellants'

statement of claim, issued on April 3, 2009, was issued within the required six year period.

[9] Although the trial judge's reasons do not specifically address s. 5(1)(a)(iv) of the *Limitations Act, 2002*, we are satisfied that the trial judge did not err in finding that the appellants' claim was statute barred.

[10] As this court explained in *Sosnowski v. MacEwen Petroleum Inc.*, 2019 ONCA 1005, 441 D.L.R. (4th) 393, at paras. 16-19, it may be appropriate to delay the start of a limitation period if a plaintiff is relying on a defendant's superior knowledge and expertise, especially where the defendant was taking steps to ameliorate a loss. That was the case, for example, in *Brown v. Baum*, 2016 ONCA 325, 397 D.L.R. (4th) 161 in which this court concluded that delay in suing a doctor who was taking steps to ameliorate problems arising out of a patient's surgery was reasonable.

[11] The rationale for delaying the discovery of a claim is that ameliorative efforts may reduce or eliminate a plaintiff's damages and render litigation unnecessary. However, discovery cannot be delayed indefinitely, subject only to the application of the ultimate limitation period. To do so would undermine the rationale for limitation periods. Thus, the test is not wholly subjective; s. 5(1)(b) of the *Limitations Act, 2002* establishes a "modified objective" test that requires consideration of what a reasonable person with the abilities and in the

circumstances of the claimant ought to have known: *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44, 136 O.R. (3d) 202, at para. 74; *Ferrara v. Lorenzetti Wolfe Barristers and Solicitors*, 2012 ONCA 851, 113 O.R. (3d) 401, at para. 70; *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc. (Texaco Canada Ltd.)*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 35.

[12] This case is concerned with the purchase of multiple generators over a period of several years. The trial judge found that the appellants knew or ought to have known of their potential claim as early as 1998 and, in any event, by November 2002 or January 2003. She found that the appellants knew that the generators purchased in 1997 could not operate at their rated maximum output and were aware of this throughout the course or their business relationship with the respondent. Further, the appellants were aware of high CO, NO/NOx emissions by late 2002. The trial judge found that the appellants did not require an independent report to know that they had suffered damage or injury.

[13] Putting the appellants' case at its highest, the respondents assured them that the generators could operate as represented. The respondents undertook ameliorative efforts from 1998-2003, which included sending staff to the Former Soviet Union to address problems; redesigning the generators in 2000; guiding and assisting the appellants through repair efforts at their customers' facilities from 2002-2003; and providing replacement parts. When the problems were not resolved, the appellants commissioned an independent third party to conduct an

emissions test which established the generators were inherently flawed. According to the appellants, that report, made April 16, 2003, is the earliest possible date their claim became discoverable, and they had six years from that date to bring their claim.

[14] We do not agree.

[15] As the trial judge noted, this was a case involving two professional engineers**.** Mr. Elinson, in his affidavit dated August 28, 2019, acknowledges his extensive experience in the thermal generation industry, including experience with steam and hot water. Mr. Byrnes presumably had greater knowledge, having invented the machines in question, but Mr. Elinson was capable of making his own judgment and in all the circumstances should have done so well before the Bell Report was received. Ameliorative efforts had been ongoing for several years prior to the decision to commission the Bell Report. It was not necessary to commission an expert report to confirm what the appellants ought reasonably to have known. A proceeding was an appropriate means to remedy the loss allegedly caused by the respondents prior to the Bell Report.

[16] In short, the appellants' decision to not bring their claim until April 3, 2009 was not reasonable in all the circumstances. The trial judge did not err in concluding that the claim was statute barred.

[17] We note that the trial judge went on to consider and reject the appellants' action for negligent misrepresentation, finding that she was not satisfied that any untrue, misleading, or inaccurate representation was relied on by Mr. Elinson. Given the claim was statute barred, there is no need to consider the substance of her decision on the negligent misrepresentation action and we make no comment on it.

Conclusion

[18] The appeal is dismissed. The respondents are entitled to their costs in the agreed amount of $35,000, all inclusive.

"Fairburn A.C.J.O."
"Grant Huscroft J.A."
"J. George J.A."