

Case Name:

York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.

Between

York Condominium Corporation No. 382, plaintiff, and
Jay-M Holdings Limited and the City of Toronto,
defendants

[2006] O.J. No. 246

Court File No. 05-CV-291992PD2

Ontario Superior Court of Justice

J.D. Ground J.

Heard: December 7, 2005.

Judgment: January 20, 2006.

(20 paras.)

Counsel:

Susan Ungar Alana Reitapple Blistein for the Moving Party The City of Toronto

Jonathon L. Rosenstein for the Responding Party, York Condominium Corporation No. 382

¶ 1 **J.D. GROUND J.**— This motion is brought in the within action by the Defendant City of Toronto ("City") for a determination that Section 15 of the Limitations Act, (2002) S.O. 2002 Ch. 24 (the "New Act") which sets out a 15-year ultimate limitation period is a bar to this action and, accordingly, for an order dismissing the action against the City.

Background

¶ 2 In this action the Plaintiff, York Condominium Corporation No. 382 ("YCC"), is suing the Defendant Jay-M Holdings Limited ("YM") the builder of the condominium building owned by YCC with respect to the demising walls constructed in the building. YCC alleges that the demising walls were not fire rated. YCC is also suing the City alleging the City was negligent in failing to detect that the demising walls were not fire rated and in issuing a building permit for the construction of the building. The building was constructed in 1977 and 1978 and it is agreed between the parties that the latest date as of which any negligence on the part of the City could have occurred was February 14, 1978. YCC did not discover that the demising walls were not fire rated until May 2004 and this action was commenced on June 22, 2005.

The New Act

¶ 3 The New Act came into force on January 1, 2004 and, with certain exceptions which are not material to this proceeding, applies to all proceedings commenced after that date.

¶ 4 The essential features of the New Act are that it establishes a basic limitation period of two years for all proceedings (Section 4) and sets out certain exceptions where the basic limitation period does not run or is postponed (Sections 6 to 12), none of which is applicable to the case at bar. The New Act also codifies the discovery principle and sets out specific rules for determining when a claim is discovered or deemed to have been discovered (Section 5).

Section 15 of the New Act establishes an ultimate limitation period of fifteen years. Section 15 states:

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.

- (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. (Emphasis added.)

¶ 5 The New Act also contains certain transitional provisions in Section 24, the relevant portions of which are as follows:

24(1) In this section,

"effective date" means the day on which this Act comes into force; ("date de l'entrée en vigueur")

"former limitation period" means the limitation period that applied in respect of the claim before the coming into force of this Act. ("ancien délai de prescription) 2002, c. 24, Sched. B, s. 24(1).

Application

(2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date. 2002, c. 24, Sched. B, s. 24(2).

Former limitation period expired

(3) If the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim. 2002, c. 24, Sched. B, s. 24(3).

Former limitation period unexpired

(4) If the former limitation period did not expire before the effective date and if no limitation period under this Act would apply were the claims based on an act or omission that took place on or after the effective date, there is no limitation period. 2002, c. 24, Sched. B, s. 24(4).

Same

(5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
2. If the claim was discovered before the effective date, the former limitation period applies. 2002, c. 24, Sched. B, s. 24(5).

No former limitation period

(6) If there was no former limitation period and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
2. If the claim was discovered before the effective date, there is no limitation period. 2002, c. 24, Sched. B, s. 24(6).

¶ 6 Subsection 24(2) states that the transitional provisions apply to claims based on acts or omissions that took place prior to January 1, 2004 and in respect of which no proceeding had been commenced before that date. The transitional provisions, therefore, are clearly applicable to the case at bar. The transitional periods which could apply to the case at bar are contained in Subsections 24(5) and 24(6). It is to be noted that Section 15 of the New Act establishing the ultimate limitation period makes no reference to discoverability but measures the 15-year period from the date on which the act or omission actually took place. There is no cross reference between Section 15 and Section 24 to assist in interpreting the statute as to which provision would apply in the event of conflict.

Submissions of the City

¶ 7 It is the submission of the City that the ultimate limitation period contained in Section 15 of the New Act overrides the transitional provisions contained in Section 24 and that, regardless which limitation period applies under the transitional provisions, no proceeding can commence more than 15 years after the date on which the act or omission actually took place. It is the City's position that, on the basis of principles of statutory interpretation, each provision of a statute must be looked at in the context of the total statute, the purpose of the legislation and the intent of the legislature. The City submits that the inclusion of the ultimate limitation period in the New Act is necessary to counterbalance the codification of the discovery principle in the New Act and to impose some outside arbitrary date by which proceedings must be commenced regardless of the discovery date. They submit that to interpret the New Act so as to be exempt from the ultimate limitation period claims based on acts or omissions which occurred prior to January 1, 2004 but were not discovered until after that date would be inconsistent with the theme and purpose of the legislation and the intention of the legislature. They point out that there is no reference in any of the explanatory notes to the New Act, the Report prepared by the Limitations Act Consulting Group appointed by the Attorney General for the purposes of the New Act or in any of the texts commenting on the New Act to the ultimate limitation period being anything other than 15 years from the date on which the act or omission actually took place and no indication that that would not be applicable in the case of proceedings to which the transitional provisions are applicable. They further submit that an ultimate limitation period is a practical necessity because witnesses die or can no longer be located, documents are destroyed or lost and standards of practice and behaviour change, all of which are equally applicable to claims based on very old acts or omissions whether the discovery date is after January 1, 2004 or prior to January 1, 2004 and there is no principle reason why the ultimate limitation period should not apply to claims where the date of the act or omission and the date of commencement of the proceeding straddle the effective date of the New Act.

¶ 8 On the interpretation of the New Act, it is the position of the City that the purpose of Section 24 is to establish which limitation period is applicable where the act or omission took place before the New Act came into force but the proceeding was commenced after the New Act came into force. They submit that it is illogical to interpret Section 24 as providing that a new ultimate limitation period applies to cases which happen to straddle the effective date and that such an interpretation would be inconsistent with Subsection 15 of the New Act which states:

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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. 2002, c. 24, Sched. B, s. 15(1).

¶ 9 The City submits that to interpret the phrase "this Act applies as if the act or omission had taken place on the effective date" in paragraph 1 of Subsection 24(5) and in paragraph 1 of Subsection 24(6) to mean that, in the straddle cases, the ultimate limitation period would not commence until January 1, 2004 would lead to the absurd result that, if a claim based on a 1978 act was discovered on December 31, 2003, it would be barred by the ultimate limitation period but, if discovered at any time between January 1, 2004 and December 31, 2018 a proceeding could be commenced at any time within two years from the discovery date. The City submits that this could not have been the intention of the legislature in enacting the ultimate limitation period and, if this had been the intent of the legislature, it would have specifically so provided either in Section 15 or in Section 24. The City further submits that, in cases where the ultimate limitation period is not applicable, it is specifically so provided in the New Act. For example, Subsection 15(3) of the New Act provides that "despite Subsection 15(2) no proceedings against a purchaser of personal property for value acting in good faith shall be commenced in respect of conversion of the property after the second anniversary of the date on which the property was converted" and Subsection 16(4) of the New Act expressly states that the limitation provisions set out in Section 16 with respect to proceedings referred to in Section 16 prevail over anything contained in Section 15.

Submissions of YCC

¶ 10 The principle submission of YCC is that there is no ambiguity in the wording of clause 1 of Subsection 24(5) of the New Act looked at alone or in a juxtaposition with Section 15 of the New Act and that the words "this Act applies as if the act or omission had taken place on the effective date" applies for all purposes of the New Act including Section 15. YCC points out that under the prior regime the applicable limitation period would be measured from the date of discovery and, as the act in our case was not discovered until January 1, 2004, there was no limitation period that had expired pursuant to the old regime. Accordingly, the applicable transition provision in the New Act is clause 1 of Subsection 24(5), which states "this Act applies as if the act or omission had taken place on the effective date". YCC submits that Subsection 24(5) does not specify a limitation period; it provides a method for determining a limitation period and accordingly, the introductory phrase of Subsection 15 "even if the limitation period established by any other section of this Act in respect of a claim had not expired ..." is not applicable to the case at bar. Accordingly, YCC submits that the only applicable limitation period for the commencement of a proceeding based upon the negligence of the City in 1978 is a limitation period running for two years from the date of discovery in May 2004 and, this action having been commenced on June 22, 2005, it is within the limitation period established by the New Act. YCC submits that the only effect of Section 15 is that its proceeding could not be commenced after January 1, 2019 if the negligence of the City had remained undiscovered because it is deemed to have occurred as of January 1, 2004. This is because Subsection 24(5) deems the negligence of the City to have occurred as of January 1, 2004 for all purposes of the New Act and "resets the clock" for the determination of the commencement of the limitation period.

Analysis

¶ 11 I am unable to accept the submission of YCC that there is no ambiguity in the meaning of the words "this Act applies as if the act or omission had taken place on the effective date" in subparagraph 24(5) and that the court must therefore give those words their plain meaning, that is that all provisions of the New Act apply as if the act or omission had occurred on January 1, 2004.

¶ 12 The fact that I have received very able submission from counsel on two conflicting interpretations of the transitional provisions is of itself compelling evidence of ambiguity particularly when viewed alongside the provisions of Section 15.

In any event, those words used in Subsection 24(5) cannot be looked at in isolation and must be interpreted in the

context of the New Act as a whole, the structure and purpose of such legislation and the intent of the legislature. This requires a purposive analysis. In my view the structure and purpose of the legislation incorporates the balancing referred to by the City between the discovery principle and the need for some cut-off date beyond which proceedings cannot be brought.

With respect to the intent of the legislature in "Sullivan and Driedger "The Construction of Statutes", 4th edition, the authors state at page 216:

... legislative purpose is often thought of in terms of the mischief or social ill it is designed to remedy or the problem it is meant to address. This problem may be identified in an authoritative source such as the preamble to legislation, a Commission report or a scholarly text. It may also be inferred by matching provisions in the legislation to conditions which existed at the time of enactment and to which the provisions are a plausible response.

¶ 13 In our case, all of the external sources cited to the court are consistent in establishing that it was the intention of the legislature to enact an ultimate limitation period to counterbalance the codification of the discovery principle in the New Act and to provide an outside arbitrary date after which proceedings could not be brought, regardless of the discoverability date. In view of the practical and evidentiary problems referred to in the explanatory notes to the legislation, the Report and the texts commenting on the new legislation, and the absence of any reference in any of those sources to the ultimate limitation period not being applicable to proceedings based on an act or omission which occurred prior to the effective date but is discovered after the effective date is, in my view, compelling evidence that this was not the intention of the legislature.

¶ 14 I am also concerned that, to interpret the transitional provisions as submitted by YCC, could lead to an absurd result in that a proceeding based on an act which occurred in 1978 where the claim was discovered in 2003 could not proceed whereas a proceeding based on the same 1978 act where the claim was discovered in 2018 could proceed. As stated by Iacobucci J. in *Re Rizzo and Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27 at page 43, "it is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences".

¶ 15 In *Sullivan and Driedger*, supra, the authors state at page 236:

The modern understanding of the "golden rule" or the presumption against absurdity includes the following propositions.

- (1) It is presumed that the legislature does not intend its legislation to have absurd consequences.
- (2) Absurd consequences are not limited to logical contradictions or internal incoherence but include violations of established legal norms such as rule of law; they also include violations of widely accepted standards of justice and reasonableness.
- (3) Whenever possible, an interpretation that leads to absurd consequences is rejected in favour of one that avoids absurdity.
- (4) The more compelling the absurdity, the greater the departure from ordinary meaning that is tolerated.

¶ 16 I have been cited no authorities on the interpretation of the ultimate limitation period provision or the transitional provisions of the New Act. Counsel for the City have, however, made reference to decisions of the British Columbia courts with reference to a 30-year ultimate limitation provision incorporated in the British Columbia Limitation Act in 1975. In *Armstrong v. West Vancouver (District)*, [2003] B.C.J. No. 303 ,

(B.C.C.A.), in commenting on the interrelation between the discovery principle contained in Section 6 of the Act and the ultimate limitation period provided in Section 8 of the Act, MacKenzie J.A. after referring to certain earlier authorities stated at paragraph 16:

As Wallace J.A. noted in *Wittman v. Emmott et al.* (1991), 53 B.C.L.R. (2d) 228 (C.A.) Wilson J. also commented:

It seems to me that the purpose of ss. 3(1)(a) and 6(3) was to give legislative effect to the reasoning in *Sparham-Souter* by postponing the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action. The Act has also resolved the problem of stale claims which was the major criticism of the principle. Section 8(1) reads in relevant part:

8(1) Subject to section 3(3), but notwithstanding a confirmation made under section 5 or a postponement or suspension of the running of time under section 6, 7 or 12, no action to which this Act applies shall be brought after the expiration of 30 years from the date on which the right to do so arose ...

This passage implies that the postponement provision in s. 6 has supplanted the common law rule. Under the Act, the cause of action arises when the damage occurs. This applies to both s. 3 and s. 8, but only the running of s. 3 time can be postponed under s. 6. Postponement is explicitly excluded from the ultimate limitation period in s. 8(1), and the outer limit for hidden damage claims is 30 years from the date that damage occurs.

¶ 17 In 410727 B.C. Ltd. et al. v. Dayhu Investments Ltd. et al. (2004), 241 D.L.R. (4th) 467 (B.C.C.A.) Newbury J.A., with reference to the policy considerations in the enactment of an ultimate limitation period, stated at paragraph 21:

Balancing the concern for plaintiffs with undiscovered causes of action was the concern that the new discoverability rules could result in limitation periods being postponed indefinitely.

Referring to the broad policy reasons for limitation statutes, the Commission noted in this regard:

Applied in isolation, a discoverability rules does not serve the purpose of freeing defendants, after an appropriate length of time, from the economic and psychological burdens of potential litigation and the practical difficulties of defending stale claims. It does not take into account broader social interests in seeking finality to litigation, such as the economic impact of increased liability insurance costs passed on the consumers of goods and services.

Once it is accepted that the goals of certainty and finality should yield to the unknowing plaintiffs right to present a claim when the facts come to light, it does not necessarily follow that they should be abandoned entirely. Replacing the traditional one-sidedness of limitations law favouring defendants with an equally one-sided regime favouring plaintiffs fails to achieve the necessary balance.

Some protection is needed against the injustice which may result where a plaintiff succeeds because the defendant is not able to present any evidence due to the lapse of time and lack of notice that a claim exists. [At 21-22.]

The "balance" struck by the Commission and by the Limitation Act was the 30-year limitations period established by s. 8. It provides in material part:

8(1) Subject to section 3(4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11(2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought.

...

(c) in any other case, after the expiration of 30 years from the date on which the right to do so arose. [Emphasis added.]

As I have attempted to explain (in this case and at greater length in *Arishenkoff*, [2004] B.C.J. No. 1101), s. 8 was intended to act as a "longstop" on the indefinite postponement of actions by the operation of the statutory discoverability rules, and represents a "balance" between the interests of society in finality on the one hand, and on the other hand, the interests of plaintiffs in being able to pursue longstanding claims only recently discovered. If the fire were regarded as giving rise to a new cause of action in this case, the intention of s. 8 would surely be frustrated: new claims could arise against designers, contractors, builders, and local governments indefinitely into the future after the completion of construction whenever a fire, flood or other external event occurred, and could arise repeatedly. The 30-year "ultimate limitation, which applies expressly notwithstanding the fact that the cause of action in question may not be discoverable, mandates that there be a point after which such prospective defendants may not be sued. In the case at bar, that point was reached, at the latest, in 1998 -- four years before the issuance of the plaintiffs writ.

¶ 18 I adopt the statements of the B.C. Court of Appeal in *Armstrong*, *supra*, and *Dayhu*, *supra*, which cases considered legislation and fact situations analogous to those in the case at bar.

¶ 19 Accordingly, on the basis of principles of statutory interpretation, a purposive analysis of the New Act, a review of source of materials related to the enactment of the New Act and the authorities cited above, I am of the view that Section 15 of the New Act is a bar to this action and an order will issue dismissing the action as against the City of Toronto.

¶ 20 Counsel may make brief written submissions to me with respect to the costs of this proceeding on or before January 30, 2006.

J.D. GROUND J.

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