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Is your ~~Refrigerator~~ Limitation Period Running? Maybe Not Where One Party Promises to Fix the Problem

A contractor installs some equipment for an owner. The equipment doesn't work. Over the next two years, the contractor promises to fix the equipment on a number of occasions, but never does. A year later, the owner starts a claim. It's now been three years since the problem arose. Unfortunately for the owner, its claim is out of time, right? Not exactly.

In two recent decisions, the Court of Appeal clarified that the limitation period under the Ontario *Limitations Act*[1] does not run while one party is reasonably relying on the other to remedy the problem between them. This stems from s. 5(1)(a)(iv) of the Act which reads as follows:

(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,

[1] 2002, S.O. 2002, c. 24, Sched. B.

(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).

Below, we provide a brief summary of these two recent Court of Appeal cases, *Presley*[2] and *Zeppa*.[3] We then summarize the key takeaways parties should consider to avoid the surprise expiry or extension of the limitation period governing their claims.

Presley

Presley hired Van Dusen to install a septic system in 2010. There were problems with the system from the start, and by the spring of 2011, the system began to give off a smell. Van Dusen returned to fix the problem by replacing a sewage pump, but the smell returned in the spring of 2012 and 2013. Throughout this time, Presley and Van Dusen had ongoing discussions about fixing the problem, which ended in the winter of 2014. Van Dusen never came back to fix the problem. In 2015, the system was condemned and Presley had to replace it.

Presley accordingly started a claim against Van Dusen in August 2015. The Smalls Claims Court and the Divisional Court both dismissed Presley's claim on the basis that the limitation period had expired. Both Courts held that:

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[2] *Presley v Van Dusen*, *2019* ONCA 66.

[3] *Zeppa v Woodbridge Heating & Air Conditioning Ltd.*, 2019 ONCA 47.

(i) Presley's claim was out of time because it was discoverable when the smell came back in the spring of 2013; and

(ii) it was not necessary to undertake an analysis of s. 5(1)(a)(iv) to determine when Presley should have known that a legal proceeding was an appropriate means to remedy the problem.

The Court of Appeal disagreed on both fronts, holding that courts must always consider when a party should have known that a legal proceeding was an appropriate means to remedy the problem. Failure to do so is an error of law.

The Court of Appeal then held that Presley's reliance on Van Dusen's expertise and promise to fix the problem delayed the start of the limitation period. This was because Van Dusen's assurances led Presley to reasonably believe that the problem would be remedied without recourse to the courts. Presley was not settling a known claim, but rather fixing a problem in order to make litigation unnecessary.

The Court of Appeal concluded that Presley's claim was therefore not discoverable until at least the winter of 2014 when the parties last discussed fixing the problem. The claim was accordingly brought in time.

Zeppa

The Zeppas hired Woodbridge Heating & Air Conditioning Ltd. ("**Woodbridge**") to install an extensive HVAC system in their home in 2006. The Zeppas reported problems with the system to Woodbridge in 2007, who told the Zeppas the problem was due to lack of maintenance. Relying on Woodbridge's assessment, the Zeppas entered into a two-year maintenance agreement with Woodbridge but the problems, including mould growth, continued. The Zeppas accordingly ended the maintenance agreement in June 2009, at which time, Mr. Zeppa believed that Woodbridge had been "lying to [him] from day one."

In 2010, the Zeppas contacted the manufacturer of the HVAC system, who told them that the system had been improperly

installed. In 2010 and 2011, the Zeppas obtained multiple consultant reports regarding the mould caused by the HVAC system, as well as quotes from various contractors to replace the system. In February 2012, the Zeppas received a consultant report connecting the mould growth to Woodbridge's improper installation of the HVAC system.

Following that report, the Zeppas issued their claim against Woodbridge, who brought a motion for summary judgment on the basis that the limitation period for Zeppas' claim had expired. The motion judge agreed, finding that the Zeppas discovered their claim "well prior to February 2010". The Zeppas appealed arguing that they could not have discovered their claim until the manufacturer notified them in 2010 that the HVAC system had been improperly installed.

The Court of Appeal rejected this argument and upheld the motion judge's decision. The Court of Appeal held that while the Zeppas reasonably relied on Woodbridge to remedy the problems with the HVAC system during the course of the maintenance agreement, they stopped doing so when the maintenance agreement ended. Indeed, it was in June 2009 that Mr. Zeppa stated that he knew Woodbridge had been lying about the maintenance issue "from day one". This established, in the Court's view, that the Zeppas knew in 2009 that a proceeding against Woodbridge would be appropriate.

Key Takeaways

These two cases confirm that a limitation period will not run where one party has assured another that it will fix the problem between them, and that party reasonably relies on the first party to do so. This applies outside the construction context as well. The parties in that case just have a problem, not a claim that triggers the Court's involvement. However, as confirmed in Zeppa, this reasonable reliance has its limits.

Owners should therefore ensure they frequently communicate their reliance on a Contractor's promise to fix the problem. If too much time elapses, a Court may find that the Owner's reliance was no longer reasonable. Owners should also be aware that if they start to rely on a third party to fix the problem, this might trigger the start of

the limitation period for its claim against the Contractor. Similarly, if Contractors wants to trigger the start of the limitation period for an Owner's claim, they should communicate clearly that they should no longer be relied upon to fix the problem.

The policy rationale for the Court of Appeal's interpretation of s. 5(1)(a)(iv) is strong for two principal reasons. First, it encourages parties to settle disputes among themselves, avoiding unnecessary litigation. Second, it also ensures that a party cannot lull another into a false sense of security by agreeing to fix a problem, only to then have the other party's claim dismissed when the first party fails to cure the problem within two years.

P.S. Zeppa also dealt with issue of discovering a claim in the context of a fraudulent concealment. Readers are encouraged to review this analysis and in particular, the persuasive dissenting opinion of Feldman J.A. who would have held that the Zeppas claim was brought within the limitation period because Woodbridge fraudulently concealed the real reason there were problems with the HVAC system – Woodbridge's faulty installation.

by Jeremy Rankin and David Fanjoy (Articling Student)

For more information on this topic, please contact:

Toronto	Jeremy Rankin	647.943.8059	jeremy.rankin@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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