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Is the Clock Ticking? The Court of Appeal Discusses Discoverability and the Application of Section 5(1)(a)(iv) of the Limitations Act, 2002

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In *Gillham v. Lake of Bays (Township)*, 2018 ONCA 667, a case about the discoverability of claims for damages arising out of construction deficiencies, the Court of Appeal confirmed that all factors under s. 5(1) of the *Limitations Act, 2002* must be considered in analyzing the question of discoverability and before a claim can be held to be statute-barred. The decision focused specifically on the application of s. 5(1)(a)(iv), which provides that one condition for a claim to be discovered is that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

The appellants hired the respondents, Royal Homes Limited ("**Royal Homes**") and J.D. MacKay, to assemble a prefabricated cottage and deck, and install a stone retaining wall, respectively. In 2009, three years after construction, the appellants observed that the deck had sunk into the ground by one inch and pulled away from the cottage. The appellants retained a structural engineering firm to investigate and prepare an expert report (the "**2009 Report**"). Royal Homes and J.D. MacKay dismissed the issues as "not serious" and due to settling which should resolve, and the appellants adopted a "wait and see" approach. However, the problems continued and the appellants commissioned another report in 2012 (the "**2012 Report**"). The report concluded that the stone retaining wall was failing due to issues with its construction and recommended that the wall be removed and reconstructed. When remedial work was conducted in 2013, it was discovered that there were also issues with the construction of the cottage foundation. The appellants commenced their claim in 2013.

On a motion for summary judgment, the motion judge found that the appellants knew the basic essential facts which gave rise to a claim against the respondents once they had reviewed the 2009 Report. As the appellants waited more than two years to commence a claim, the motion judge held that the action was statute-barred.

On appeal, the Court of Appeal overturned the motion judge's decision and found that the motion judge erred in failing to consider all the criteria for the discoverability of the appellants' claims and made palpable and overriding errors in his consideration of the evidence related to that question.

The Court of Appeal held that the motion judge's finding of discoverability was based on a fundamental misstatement of the 2009 Report. The motion judge stated that the 2009 Report identified a failure in the stone retaining wall, when it actually only identified a failure in a pre-existing wooden retaining structure. In addition, the motion judge failed to consider that the 2009 Report identified that the issues were naturally occurring due to the slope of the lot. The Court of Appeal also held that the motion judge erred in concluding that, even without the 2009 Report, the appellants should have known that they had a claim against the respondents, as there was no evidentiary basis for the appellants to reasonably suspect that there was anything wrong with the cottage until receipt

of the 2012 Report. The Court of Appeal further held that the motion judge misapprehended the contents of the 2012 Report and erred in treating that report as confirming the issues raised in the 2009 Report.

According to the Court of Appeal, the motion judge's "material misapprehension" of the 2009 and 2012 Reports caused him to err in his discoverability analysis. The motion judge did not consider whether, having regard to the nature of the injury, loss or damage, the appellants knew or should have known that a proceeding would be an appropriate means to seek to remedy it. This requirement is a legislative addition to the other factors under the discoverability analysis under s. 5(1)(a)(iv) of the *Limitations Act, 2002*, and it considers that a prudent plaintiff would not bring an action to recover a trivial loss. The Court of Appeal found that the motion judge failed to consider "the specific factual or statutory setting" of the case before him and determine whether it was reasonable for the appellants to consider not to immediately commence litigation but to "wait and see" if the issue with the deck would worsen over time or if it would resolve once the stone retaining wall had settled, as had been suggested by Mr. MacKay.

The Court of Appeal ultimately held that the appellants' claims were not statute-barred, as the evidence did not support the conclusion that they knew or ought to have known that their loss was not trivial and that initiating legal proceedings was the appropriate means to remedy their loss.

As in the Court of Appeal's decision in *Davies v. Davies Smith Developments Partnership*, 2018 ONCA 550 (discussed in the July 3, 2018 article by Nadia Chiesa), this decision shows that discoverability of claims is primarily a fact-specific issue. While a "wait and see" approach was found to be appropriate with respect to a claim regarding construction deficiencies where the loss was observed years before a potential cause of the loss was determined, such an approach may not be appropriate when dealing with payments required under a contract, even when the amounts owed may be in dispute or cannot be quantified until a later date (i.e. the factual situation in the *Davies* case). Given the difficulty in predicting the result of the discoverability analysis in a particular case, it can be very risky to delay commencing an action when damage has been suffered.

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