February 28, 2013

Limitation Periods and the Subjective Element

Written by: Colleen Ma

Case Considered: *Boyd v Cook*, 2013 ABCA 27

As my University of Calgary law professors repeat time after time, a missed limitation date is one of the few things you cannot fix as a lawyer. So, when I came across this recent Alberta Court of Appeal case, naturally I paid close attention. The underlying claim was an investment in an unsuccessful development project. Mr. Cook induced Mr. Boyd to invest in a mortgage company. The majority of the funds were used to invest in a development project that Mr. Boyd had flatly refused on several occasions to invest in. Mr. Boyd filed a Statement of Claim. Mr. Cook sought summary dismissal on limitation grounds. A Master dismissed the summary dismissal application (2012 ABQB 284), which was upheld by a chambers judge. It looked like the parties were going to trial. However, the Court of Appeal decided to allow the limitations defense.

Facts

Mr. Boyd, was a "sophisticated businessman" who was familiar with land developments; "reading financial and development statements and reports and evaluating land investments was part of his daily fare" (at para 6). Mr. Boyd and Mr. Cook knew each other previous to this investment opportunity. When Mr. Cook discussed investing in a certain land development, Mr. Boyd "said he did not like the idea at all, wanted nothing to do with it, and would not recommend that anyone else invest in it" (at para 7). However, Mr. Cook was successful in getting Mr. Boyd to invest in a mortgage company. What Mr. Boyd did not know was that 60% of the mortgage company's funds were invested in the very project that Mr. Boyd wouldn't "touch with a 10-foot pole" (at para 14). Mr. Boyd learned for the first time the true nature of his investment in March 2009, the same time he was notified that the project was in trouble. Mr. Cook assured Mr. Boyd that the investment was safe. Mr. Boyd took steps to get more information. The issues with the property were not resolved. Mr. Boyd filed his Statement of Claim on June 16, 2011.

The chambers decision was unreported, but was quoted in the Court of Appeal decision. The chambers judge agreed with the Master that the test was a "subjective/objective assessment that is best done after having an opportunity to assess the credibility of the witness" (para 1).

Legislation

Before delving into this particular case, the Court discussed the purpose of having a limitations defense (para 4):

> Limitations statutes exist for a purpose. They are not mere tidiness, nor a trick to give defendants windfalls or bargaining points. Limitations legislation, so-called "statutes of repose" exist to give some certainty in their lives to all those who may at some time be sued. That is not only true of businesses and professional people, but also ordinary citizens who can ill afford the mental and emotional stress of threats or lawsuits. It is a nuisance and an expense to have to keep voluminous records in perpetuity. Allowing large potential threats to hang over heads for a generation sterilizes capital and impoverishes businesses. What is worse, it is unjust to sue people once their former ability to defend themselves has evaporated. In many types of claim, a *prima facie* case is easy to prove.

Section 3 of the *Limitations Act*, RSA 2000, c L-12 sets out the relevant test:

> **Limitation periods**
> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
> (i) that the injury for which the claimant seeks a remedial order had occurred,
> (ii) that the injury was attributable to conduct of the defendant,
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding …
> […]
>
> the defendant, on leading this Act as a defence, is entitled to immunity from liability in respect of the claim.

Issue

The issue on this appeal was whether Mr. Boyd "in the circumstances ought to have known" on June 16, 2009 "that the injury, assuming liability on the part of the defendant, [warranted] bringing a proceeding."

Analysis

The Court of Appeal, unlike the lower decisions, found that credibility was not an issue. In discussing the test, the Court said (at paras 20 and 28 respectively):

> The Supreme Court has introduced a small subjective element into this otherwise objective test of "ought to have known." The "circumstances" include the knowledge and interest of the particular plaintiff.
>
> […]
>
> The test is largely objective, that of the reasonable person in the same circumstances

The Court also discussed the meaning of "warrants bringing a proceeding." An obvious reason for an injury not warranting bringing a proceeding is that the cost of litigation would likely

exceed the amount of recovery (at para 13). The Master found that Mr. Boyd knew by mid-June 2009 that, due to the fraud, it would be "highly unlikely" the investment money would be recovered but the amount of the loss could not be ascertained. The Court said it was not necessary to know the quantum of loss, just that there was enough information to calculate that the "amounts likely lost would be big enough to sue for" (at para 33).

The Court also made the point (at para 21) that the

> Alberta Rules allow a plaintiff to discontinue his lawsuit unilaterally until a very late stage. He or she may have to pay some party-party costs to the defendant, but in the early stages those would ordinarily not be heavy. And often the plaintiff can negotiate his or her way out of those costs: a discontinuance is usually very attractive to a defendant.

The Court found that Mr. Boyd would have been capable of doing the calculation to determine whether the likely loss warranted bringing a proceeding more than 2 years before the Statement of Claim was filed. The limitations defense was allowed and the action was dismissed summarily. There was no reason to delay in filing since Mr. Boyd had the option to discontinue under the Rules. If after questioning the "suit then looked shaky, discontinuing then would not be seriously expensive for a man of Mr. Boyd's position" (para 21).

Commentary

As a student trying to avoid future Law Society phone calls about missed limitation periods, what can I take away from this case?

First, when the limitation "clock" starts running is largely objective, but there is a small subjective element that should not be forgotten. Time might start ticking differently for a sophisticated versus a lay client since what they ought to have known given their particular knowledge and interests could arguably be different. It will be important to know my client.

Second, it will be important to think of the cost and benefit of litigation since the limitation period will not start to run until the injury warrants bringing a proceeding. The likely amount of recovery is not necessary, only that it will exceed costs. If the client first comes to my office with an issue that does not warrant bringing a proceeding, it will be important to revisit the issue from time to time to track whether possible recovery has exceeded the costs threshold.

Third, there is little harm in playing it safe and filing the Statement of Claim well within the limitations deadline since the claim can be discontinued unilaterally until a very late stage. It may cost the client some money, but it would probably be better than having the entire claim dismissed for a limitation period issue.