CITATION: The Ontario Flue-Cured Tobacco Growers' Marketing Board v. Rothmans, Benson & Hedges, Inc., 2014 ONSC 3469
COURT FILE NO.: 64462 CP
DATE: 2014/06/30

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: The Ontario Flue-Cured Tobacco Growers' Marketing Board, Andy J. Jacko, Brian Baswick, Ron Kichler and Arpad Dobrentey (Plaintiffs)

-and-

Rothmans, Benson & Hedges, Inc. (Defendant)

AND BETWEEN:

COURT FILE NO.: 64757 CP

RE: The Ontario Flue-Cured Tobacco Growers' Marketing Board, Andy J. Jacko, Brian Baswick, Ron Kichler and Arpad Dobrentey (Plaintiffs)

-and-

Imperial Tobacco Canada Limited (Defendant)

AND BETWEEN:

COURT FILE NO.: 1056/10 CP

RE: The Ontario Flue-Cured Tobacco Growers' Marketing Board, Andy J. Jacko, Brian Baswick, Ron Kichler and Arpad Dobrentey (Plaintiffs)

-and-

JTI-Macdonald Corp. (Defendant)

BEFORE: Justice H. A. Rady

COUNSEL: William Sasso & David Robins, for the plaintiffs
Orestes Pasparakis & Rahool Agarwal, for the defendants Imperial Tobacco Canada Limited
Brian Greenspan & Naomi Lutes, for the defendants Rothmans, Benson & Hedges, Inc.
Patrick Flaherty & Alex Smith for the defendants, JTI-Macdonald Corp.

HEARD: January 30 & 31, 2014

ENDORSEMENT

Introduction

[1] The defendants seek an order for summary judgment dismissing the plaintiffs' three claims as statute barred. They say that the plaintiffs knew or ought to have known with the exercise of reasonable diligence the material facts on which their claims are based long before 2009 and 2010 when these proposed class actions were commenced.

[2] The plaintiffs allege that the defendants were involved in the smuggling into Canada of tobacco designated for export abroad. As a result, they say that they did not receive the correct compensation for tobacco they sold to the defendants. Tobacco designated for export commands a lower price than that intended for the domestic market. The claims are framed in breach of contract.

[3] The defendants say that throughout the claims period, the plaintiffs knew that tobacco sold to the defendants was being smuggled back into Canada; that the defendants did not pay the higher domestic price for that tobacco; and as a result, the plaintiffs suffered a loss. They submit that the constituent elements of the breach of contract claim were therefore known to the plaintiffs during the claims period.

[4] The defendants further submit that their involvement in smuggling is not a material fact necessary to the breach of contract claim. Nevertheless, the defendants point to the volumes of media reports and other documentation that demonstrate speculation, if not the conclusion, that they were complicit in smuggling activities. They say that their involvement was open and notorious.

[5] In contrast, the plaintiffs say that they could not reasonably have known of the defendants' involvement in smuggling or responsibility for the breach of contract until the disclosure of certain settlement agreements, more particularly described below, and guilty pleas to a breach of the *Excise Act* that were made in 2009 and 2010. They point out that the defendants have consistently denied any

involvement in smuggling activities. They submit that knowledge of the defendants' identity as participants in smuggling is an essential element of the breach of contract claim.

[6] For the reasons that follow, I have concluded that there is a genuine issue requiring a trial respecting when the plaintiffs knew or ought to have known that they had a cause of action against the defendants.

The Parties

- The Ontario Flue-Cured Tobacco Growers' Marketing Board (the Tobacco Board) and Messrs. Jacko, Baswick, Kichler & Dobrentey who are individual tobacco growers.
- Imperial Tobacco Canada Ltd. (ITCAN)
- Rothmans, Benson & Hedges Inc. (RBH)
- JTI-MacDonald Corp. (JTI)

The Claims

[7] On November 5, 2009, the Tobacco Board and the four individual tobacco farmers started a proposed class action against RBH, seeking damages of $50,000,000. The action is said to be on behalf of growers and producers who sold tobacco through the Tobacco Board between 1986 and 1996. Proposed class actions were also commenced by the same plaintiffs against ITCAN on December 2, 2009 and JTI on April 23, 2010.

The Proceedings

[8] On July 31, 2008, RBH entered into a comprehensive agreement with Her Majesty the Queen Right of Canada and the provinces including Ontario, to settle claims arising from RBH's alleged role in tobacco smuggling between January 1, 1985 and December 31, 1996. Nearly identical agreements were executed that day with ITCAN and subsequently with JTI as well. The allegation was that tobacco

designated for export was smuggled back into Canada and sold on the domestic market. As a result, it was alleged that RBH, ITCAN, and JTI avoided payment of taxes, duties, excise or customs taxes.

[9] On the same day, RBH and ITCAN issued media releases announcing the settlements with Canada and the provinces to resolve an RCMP investigation and the governments' civil claims arising from the companies' involvement in tobacco smuggling in the late 1980s and early 1990s. That day, as a term of the settlements, both Rothmans and ITCAN pleaded guilty to violating section 241(1)(a) of the federal *Excise Act* by "aiding persons to sell or be in possession of tobacco products manufactured in Canada that were not packaged and were not stamped in conformity with the *Excise Act* and its amendments and the ministerial regulations".

[10] On April 13, 2010, JTI issued a media release announcing its settlement with Canada and the provinces to resolve the RCMP's investigation and civil claims arising from its involvement in tobacco smuggling in the late 1980s and early 1990s. That day, as a term of the settlement, JTI pleaded guilty to violating section 241(1)(a) of the federal *Excise Act* by "aiding persons to sell or be in possession of tobacco products manufactured in Canada that were not packaged and were not stamped in conformity with the *Excise Act* and its amendments and the ministerial regulations". The plaintiffs say it was only at this time that they were aware of all of the constituent elements of their claim.

[11] The class action against RBH was commenced in November 2009 and against ITCAN in December 2009, within approximately 16 months of the announcement of the settlement agreements.

[12] The class action against JTI was commenced in April 2010, ten days after the announcement of JTI's settlement with the governments.

[13] In each of the class actions, the plaintiffs claim on behalf of themselves and a putative class of Ontario tobacco producers that the defendants paid less to the Tobacco Board than contracted for prices for tobacco bought for duty-free and export cigarette/tobacco products but which were smuggled back into Canada and sold in the domestic market.

[14] The proposed class in each of the actions consists of Ontario growers and producers who sold tobacco through the Tobacco Board pursuant to agreements during the period January 1, 1986 to December 31, 1996.

[15] On March 29, 2010, following service of the statement of claim, ITCAN delivered notice to the province of Ontario of its intention to withhold payment under the settlement agreements. ITCAN asserted that the Tobacco Board's claim was a "released claim" as defined in the settlement agreements. Ontario disagreed. As a result, Ontario commenced an application for an order to compel ITCAN to pay the settlement money to Ontario pursuant to the settlement agreement. RBH participated in the application as an intervener and JTI agreed to be bound by the result.

[16] On January 25, 2012, I directed that the defendant's limitation period motions should follow the hearing of the application as the just, most expeditious and least expensive course of action. The application was argued on September 19, 2012. On January 2, 2013, I rendered a decision, which found in favour of the plaintiffs. I concluded that the class action was not a released claim by a releasing entity. On July 16, 2013, the Court of Appeal dismissed RBH's appeal of my decision.

[17] On May 3, 2013, each of the defendants served statements of defence in the class actions denying any involvement in tobacco smuggling. They also plead that the actions are barred by the provisions of either the *Limitations Act*, R.S.O. 1990, c. L.15 or in the alternative, the *Limitations Act*, 2002, S.O. 2002, c. 24, Schedule B.

The Evidence on the Motion

[18] In support of their motion, the defendants have filed a joint motion record containing the notices of motion of each defendant and an affidavit sworn by Chrysanthe Gravina sworn on July 23, 2013 with a number of exhibits appended.

[19] Ms. Gravina is a law clerk employed by Greenspan, Humphrey and Lavine, the solicitors who act for RBH Her affidavit consists of four volumes containing 143 exhibits and 1,349 pages of media and other reports that can be conveniently grouped into the following categories:

- Comments and opinions on taxes and policies relating to the tobacco industry, their effect upon the Canadian tobacco industry and the smuggling and sale of contraband cigarettes in Canada that has resulted from changes in Canadian government policies;

- Reports on alleged activities involving the illegal re-importation and sale by third parties of tobacco products that had been exported from Canada;

- Commentaries on legal proceedings brought against certain individuals and corporations in the United States and Canada concerning their alleged involvement in smuggling activities; and

- Reports, transcripts and/or press releases in which the Tobacco Board or a representative of the Tobacco Board comments on matters relating to the Canadian tobacco industry.

[20] In response to the motion, the plaintiffs have filed an affidavit from George Gilvesy sworn November 21, 2013. Mr. Gilvesy was the director of the Tobacco Board from 1987 until 2004. From 1990 to 1994 he was the vice chair of the Board and from 1995 to 1996, he was chair of the Board. From 1998 to 1999, he

was the vice chair and from 1999 until 2001, he was the chair. He was also a member of the Tobacco Advisory Committee (TAC) as will be more particularly described below. Mr. Gilvesy was also a tobacco grower from 1978 until 2004.

[21] Fred Neukamm also swore an affidavit dated November 21, 2013. He is the current chair of the Tobacco Board and has been a director since 2002.

[22] Finally, an affidavit from Barry Bresner, sworn November 21, 2013, was filed. Mr. Bresner is a partner at Borden Ladner Gervais, a Toronto law firm which has acted for the Tobacco Board since 1985. None of the affiants were cross-examined on their affidavits.

[23] Consistent with the practice as developed with respect to class proceedings, no documentary discovery nor examinations for discovery have occurred at this time.

[24] Mr. Gilvesy has deposed as follows:

> 6. Throughout my terms as officer and Director of the Board, I always held the same belief, namely, that none of the defendants in these proceedings had any active involvement in the smuggling of duty-free and export tobacco products for consumption in Canada.
>
> 7. The above core belief was supported by other related beliefs which I will explain in detail below. These beliefs include the following:
>
> a. The presence and growth of the contraband tobacco market due to smuggling undermine the legitimate tobacco market in Canada;
>
> b. the defendants could maximize profits from an orderly and legitimate tobacco marketplace which the three defendants effectively control;
>
> c. the defendants were cooperating with the governments and collaborated with the Board through TAC to maintain the legitimate marketplace because it was in their best financial interest to eliminate contraband tobacco;
>
> d. it was not possible for the defendants to determine which of their customers for duty-free and export tobacco were or were not legitimate;
>
> e. the members of TAC, which included representatives of the defendants, shared the objective of eliminating contraband tobaccos;

f. it was inconceivable to me that the defendants would hire qualified independent experts to study and report on the causes and persons involved in smuggling if they, themselves, were among the perpetrators;

g. in the proof of export reports delivered to auditors Deloitte and later MacGillivray Partners LLP. The defendants represented that their sales of duty free and export products were *bona fide* and made to purchasers who they believed were legitimate;

h. the various opinions and speculations regarding the defendants alleged involvement in smuggling were not credible because they offered no evidence in support and many of the sources were biased and their purpose was often to advance their own anti-smoking agenda; and

i. the defendants' representatives were more believable when they denied any active involvement in smuggling and/or stated that their sales of duty-free and export tobacco products were legitimate.

[25] Mr. Neukamm has deposed as follows:

> 24. Prior to July 31, 2008, I believed that none of the defendants in these proceedings had any active involvement in the smuggling of duty-free and export tobacco products for consumption in Canada because:
>
> (a) in their public statements, the defendants categorically denied any involvement in smuggling contraband tobacco;
>
> (b) the defendants told the Board that they sold duty-free and export tobacco products to legitimate purchasers in the United States;
>
> (c) the defendants collaborated with the Board in efforts to convince the federal and provincial governments to lower tobacco taxes in order to remove the incentive for smugglers;
>
> (d) the defendants were also working with the governments in the effort to eliminate contraband tobacco;
>
> (e) the defendants were our business partners and it was in the best mutual financial interest of the defendants and the tobacco growers to eliminate contraband tobacco; and
>
> (f) there was no way for the Board to prove that the defendants were actively involved in smuggling when the government had not been able to prove them guilty.

[26] Mr. Bresner has sworn to the following:

> 7. I am sure that I read one or more media reports on the tobacco smuggling problem, but I do not recall reading any reports which implicated the defendants in the smuggling activity. Similarly, I do not recall any discussions with anyone from the Board at that time about the possibility that the defendant manufacturers were

> involved in the smuggling. At no time prior to July 31, 2008, as detailed below, was I ever retained by the Board to advise it on any possible involvement by or recourse against the defendants in connection with the smuggling issues.

The Facts

The structure of the Canadian tobacco market

[27] The Tobacco Board is a corporation without share capital established by regulation under the *Farm Products Marketing Act.* Before the class actions were commenced, the Tobacco Board's primary role was to regulate and control the production and marketing of Ontario grown tobacco using a quota system. The Tobacco Board was made up of members elected by the tobacco producers with exclusive power vested in the Board to act as the producers' bargaining agent for the sale of tobacco to the defendants.

[28] The Board made agreements annually with RBH, ITCAN and JTI and their predecessor and related companies regarding the sale of tobacco by producers at the Board's auctions. These were known as "heads of agreement". The heads of agreement set out the terms and conditions for the annual sale of tobacco, the price paid for tobacco and the quantities of tobacco to be produced and marketed. The Tobacco Board administered the sale of tobacco by the producers pursuant to the heads of agreement, received payment from the purchasers and after the deduction of certain fees and charges, the net proceeds were distributed to the producers.

[29] The tobacco purchased by RBH, ITCAN and JTI for duty-free and export sales (DFX tobacco) was sold at floor prices determined at auctions administered by the Tobacco Board for each lot of tobacco sold by the producers. Unlike tobacco that was purchased for products to be consumed domestically, DFX tobacco was purchased without the requirement to pay a higher guaranteed minimum average price under the heads of agreement. The higher price was paid by way of a make-up payment representing the difference between the guaranteed minimum average price and the floor price per pounds of tobacco.

[30] The annual heads of agreement for the purchase and sale of tobacco were negotiated at the TAC where plans for the production and marketing of tobacco in Ontario were negotiated. The resulting heads of agreement were referred by the Board and the tobacco manufacturers for ratification before they were formalized and executed. The TAC was not a committee of the Board. TAC membership consisted of the following:

(a) the chair who was a representative of and appointed by Ontario;

(b) an additional Ontario government appointee;

(c) two federal government appointees;

(d) representatives of the Leaf Tobacco Exporters' Association;

(e) representatives of each of the tobacco manufacturers, including the defendants or their predecessor or related companies;

(f) representatives of the Tobacco Board consisting of the Tobacco Board's Chair and/or Vice Chair up to two additional elected Board representatives and one to two Board staff members.

[31] Mr. Gilvesy has deposed that the TAC's mandate was described in a letter dated August 29, 1986 signed by the defendants as follows:

> The Domestic Manufacturers agree to continue with discussions which have been initiated under the Tobacco Advisory Committee for the purpose of finding long-term solutions to optimize the growing and marketing of Canadian tobacco in a competitive [sic] manner, for the total market, such that a viable industry is the result.

[32] He also said he helped to create a work plan in 1992, the purpose of which was expressed as follows:

> …to operate a sound and viable industry encompassing growers, manufacturers, leaf dealers and governments in a manner to optimize the production of quality tobaccos, and to ensure the long-term reliability and stable supply of high quality Canadian tobacco to serve the total market in a competitive manner.

[33] Traditionally, the market for DFX tobacco products was very small, representing approximately one to three percent of Ontario tobacco farmers' total tobacco sales. DFX tobacco was used in products to supply consumers outside of Canada, including those Canadians living in the United States during the winter and ship chandlers and various other duty-free purchasers.

The Canadian contraband tobacco market

[34] Between 1991 and 1994, Canada experienced an increase in contraband tobacco product sales in response to significant tax increases imposed by the Canadian federal and provincial governments. These tax increases motivated consumers to seek cheaper contraband products, including DFX tobacco products.

[35] The single largest tax increase occurred February 1991. The federal government imposed new taxes on domestic tobacco products of approximately $6.00 per carton and this increase was matched by the provincial government. With these tax increases, the average retail price of a carton of cigarettes in Canada rose from $26.00 to $48.00 or more.

[36] DFX tobacco products were not subject to these tax increases. As a result, products sold in the duty-free market were substantially cheaper than domestic tobacco products. The same carton of cigarettes cost approximately $35.00 less in the United States than in Canada.

[37] The significant price differential between Canadian and American tobacco products created a demand among Canadian smokers for cheaper U.S. sourced cigarettes. The demand was met by smugglers who unlawfully brought U.S. sourced tobacco products into Canada.

[38] While there were apparently several sources of contraband tobacco products, the most significant were DFX tobacco products smuggled back into Canada from the United States. There is some evidence in the motion record filed by the

defendants to suggest that more than half of the contraband market was comprised of DFX tobacco products.

[39] There is also evidence in the record that by 1992, the street value of the contraband tobacco product market was in the neighbourhood of $1.1 billion and one in almost every six cigarettes sold in Canada was contraband.

[40] It seems clear that the existence of the contraband market was quite open and notorious. The Tobacco Board and TAC were certainly aware of it and its relationship to tax increases.

[41] From 1990 to 1993, the defendants commissioned a number of expert reports that investigated the extent and nature of tobacco smuggling. The perpetrators were identified as aboriginal people and organized crime groups.

[42] In April 1992, an announcement was made by the then federal Minister of Revenue, Otto Jelinek, which disclosed that the government had eliminated an export tax on tobacco products because it had obtained the defendants' cooperation and commitment to use tracking codes on packaging for exported tobacco products.

[43] By September 1993, the TAC work plan had been modified to include the objective of eliminating all contraband tobacco coming into Canada.

[44] During this time, the volume of DFX tobacco purchased by the defendants from the Tobacco Board had increased. In response to questions raised from time to time at the TAC meetings about the increased volume of DFX tobacco being purchased, the defendants responded that the purchases were made for legitimate buyers.

[45] The Board and the defendants administered the annual heads of agreement with the understanding that adjustments would be made if tobacco purchased for one

purpose was used for another. Mr. Gilvesy has deposed that he believes those adjustments were made regularly. So, for example, if one of the defendants purchased tobacco for the domestic account at the higher price but used it for export, it would request an adjustment of volume in its account to reflect the discounted floor price. The converse was also true.

[46] There was an issue respecting a tobacco company that operated in the Quebec market, Delta Leaf Tobacco. Because of concerns that Delta was involved in smuggling of tobacco, a decision was taken by the TAC not to engage in business with it, a decision Mr. Gilvesy considered was supported by the defendants as part of the common objective of eliminating contraband tobacco in Canada.

[47] In 1995, the Tobacco Board commissioned KPMG to study the potential impact on smuggling by the government's plan to require plain packaging for tobacco products. Another report was prepared in 2002. I understand that these reports did not implicate the defendants.

[48] Finally, there were media reports from time to time, which contained speculation and allegations about the defendants' complicity in the smuggling activities. Those reports were consistently denied by the defendants. For example in 1999, the federal government filed a lawsuit against JTI's predecessor in the United States. The allegations were denied. In fact, the lawsuit and subsequent appeal were later dismissed. Similarly, in 2002, reports were made of the RCMP's investigation of the defendants regarding tobacco smuggling. Again, any suggestion of impropriety was denied by the defendants.

[49] Mr. Gilvesy and Mr. Neukamm have both sworn that they believed the defendants' denials and their reasons for that belief.

The Law

The law respecting Rule 20

[50] On January 23, 2014, the Supreme Court of Canada released its decision in *Hryniak v. Mauldin*, 2014 SCC 7, which sets out the new test for summary judgment.

[51] It is helpful to set out the text of the rule before discussing the court's decision.

> 20.04
> …
>
> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment
>
> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent
>
> 3. Drawing any reasonable inference from the evidence
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[52] The court outlined when summary judgment can be granted:

> [49] There will be no genuine issue requiring trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[53] The overarching issue to be answered is "whether summary judgment will provide a fair and just adjudication" [para. 50]. The court went on to say at para. 50 that "the

standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it *gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.*" [Emphasis mine.]

[54] The powers available under Rules 20.04(2.1) and (2.2) are presumptively available. They only become unavailable where it is in the interest of justice for such powers to be exercised only at trial. The court noted at para. 56: "[t]he interest of justice cannot be limited to the advantageous features of a conventional trial, and must account for proportionality, timeliness and affordability. Otherwise, the adjudication permitted with the new powers – and the purpose of the amendments – would be frustrated."

[55] The motion judge must engage in a comparison between the advantages of proceeding by way of summary judgment versus proceeding by way of trial. Such a comparison may include an examination of the relative cost and speed of each medium, as well as the evidence that is to be presented and the opportunity afforded by each medium to properly examine it. The court noted that, "when the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so." However, the inquiry must go further, and must also consider the consequences of the motion in the context of the litigation as a whole.

[56] The court suggested at para. 66 the following process to guide the motion judge's approach:

1. The judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, without using the new fact-findings powers.

2. There will be no genuine issue requiring trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure.

3. If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2).

4. She may, at her discretion, use those powers unless it is against the interest of justice to do so. It will not be against the interest of justice if use of the powers will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

The Limitations Act, 2002

[57] The plaintiffs' claims are governed by the *Limitations Act, 2002,* which replaced the former *Limitations Act* on January 1, 2004. The new *Limitations Act, 2002* changed the limitation period applicable to most actions from six to two years and codified a test for discoverability.

[58] Section 4 of the *Limitations Act, 2002* provides that the basic limitation period of two years runs from the day on which a claim was discovered. A claim is defined as a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

[59] Section 5 of the *Limitations Act, 2002* sets out the rule with respect to discoverability and contains a presumption. It states:

> 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)

> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. [Emphasis added.]

[60] Section 24 of the *Limitations Act, 2002* sets out the transitional rules that apply 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" [i.e. January 1, 2004].

[61] Section 24(5) of the *Limitations Act, 2002* provides as follows:

> 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.

[62] The acts or omissions the plaintiffs allege against the defendants, namely breach of contract, took place before January 1, 2004, and the claims were not commenced until after January 1, 2004. Accordingly, the transitional rules apply to the claims.

[63] As a result, if the plaintiffs' claims were discovered before January 1, 2004, the former six year limitation period applies and the class actions would have been time barred before January 1, 2010. However, if the plaintiffs' claims were discovered after the January 1, 2004, the two year limitation period applies and the class actions are time-barred two years after the date of discovery.

[64] Section 15(2) of the *Limitations Act, 2002*, provides for an ultimate 15 year limitation period, but section 15(4)(1) states that period will not run in favour of a person who wilfully conceals that the act omission was that of the person against whom the claim is made.

[65] It has often been observed that the discoverability rule is a rule of fairness. See *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; and *Smith v. Waterfall* (2000), 50 O.R. (3d) 481 (C.A.). It prevents a claim from expiring before its constituent elements can be said to have become known to the claimant. It involves not only the identification of the alleged wrongdoers but also the discovery of an act or omission that attracts liability. It is not enough that the plaintiffs have suffered a loss and have knowledge that someone might be responsible. The identity and culpable acts of the wrongdoers must be known or knowable with reasonable diligence.

[66] In *Sheeraz et al v. Kayani et al* (2009), 99 O.R. (3d) 450 (S.C.J.), the court made the following observation, albeit in the context of a solicitor's negligence action:

> [24] …it is the nexus between the loss and the defendant from whom the loss is sought to be recovered that is material to when it is reasonable to expect a plaintiff to be in a position to commence an action to recover his loss from the defendant.

Analysis

[67] In my view, the plaintiffs have demonstrated that there is a genuine issue requiring a trial on the issue of discoverability and when the plaintiffs knew or ought to have known they had a cause of action against the defendants. I say this for several reasons.

[68] First, there has been no documentary or oral discovery, consistent with the practice that has developed in class proceedings. Consequently, the evidentiary record to date consists of what the parties have chosen to produce, rather than that which must be produced. The point is that there may be evidence in the defendants' control that is helpful to the plaintiffs' position.

[69] I have also considered the nature of the evidence led by the defendants and how it was placed before the court. None of the defendants swore an affidavit. Rather,

the affidavit in support was sworn by a law clerk with no personal knowledge of the facts or issues.

[70] In this regard, the comments of Morgan J. in *Stever v. Rainbow International Carpet Dyeing & Cleaning Co.*, 2013 ONSC 4054; leave to appeal to Div. Ct. denied, 2013 ONSC 6395 are pertinent:

> [2] The courts have generally found that, given these elements of the summary judgment test, the "best evidence" rule must be adhered to by including in the record affidavit evidence, and, potentially, cross-examination transcripts. In fact, this court found in *Wynn v. Belair Direct*, 2003 CarswellOnt3433, at para 66, "summary judgment could not be granted on the evidence of the law clerk employed by the plaintiff's counsel and be based on evidence of attached documents given to the plaintiff by the defendant." That kind of nominal affiant is really no affiant at all.
>
> [3] That is the situation which the Defendants as moving parties present here. They have provided no substantive affidavit, and no affidavit that indicates that all of the relevant documents have been produced. The cross-examination of the Plaintiff indicates that all of the correspondence between the parties during the relevant period is now in the record, but we know nothing of any other documents in the possession of the Defendants.
>
> [4] …Although a Plaintiff will have the ultimate onus of proof in the action, the record on a Rule 20 motion brought by Defendants should go beyond documents in the possession of the Plaintiff.
>
> [5] Cumming J. addressed a similar issue in the context of a motion for better production in *Cole v. Hamilton*, 1999 CanLII 14820, at para 3, where he commented that, "a party will often require production of documents by the opposition to prove the party's case." For that reason, summary judgment motions typically proceed wither after discoveries are complete, or with affidavit evidence and cross-examinations that go a long way to replicating what will be produced in discoveries.
>
> [7] …I certainly appreciate that the motion before me deals with the limitation period and not the merits of the Plaintiff's claim. Nevertheless, the Plaintiff's position is that the ultimate limitation period has not elapsed, and that the discoverability doctrine is engaged, if the franchise contract between the parties was renewed and is ongoing due to a course of conduct by the parties over time. Given this position, some evidentiary record appears necessary.
>
> [8] It may be, of course, that there is simply no evidence anywhere – including in the Defendants' files – that supports the Plaintiff's claim. The terms of the renewed contract that the Plaintiff submits were put in place, which include the Plaintiff being permitted to continue to run his franchise without paying any royalties to the Defendants, suggests that the Defendants *may* turn out not to have

> anything in their possession that supports the Plaintiff. Likewise, the fact that the Plaintiff apparently has not heard from the personal Defendant John Appel since 1995 suggests that his limitation defense *may* turn to be a cogent one. But the non-production by the Defendants at this stage, and the fact that they have put forward a legal assistant from their counsel's law firm as their sole affiant in support of summary judgment, makes me pause. The Defendants seek to end the case having produced nothing and having proffered no witnesses.
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> [10] The evidentiary record that Goldstein J. appears to have envisioned has not materialized. The Defendants have put forward a strong argument that the limitation period has passed, based on the pleadings and the limited record. In my view, however, it is dangerous for a motions judge to grant summary judgment and dispense with a party's rights in a final way in the absence of any evidence from the moving party.

[71] I agree with Morgan J.'s comment that it would be dangerous to grant summary judgment in the circumstances here.

[72] The defendants point to their substantial record with media reports and so on containing evidence respecting the defendants suspected complicity in smuggling activities. They ask the court to conclude that their involvement was open and notorious and therefore the plaintiffs must have had sufficient knowledge to start an action. The defendants say that the plaintiffs did not do so because they did not wish to jeopardize their business relationship with the defendants.

[73] Yet, in stark contrast, Mr. Gilvesy and Mr. Neukamm have deposed to their belief that the defendants were not complicit and why. They were not cross-examined and so their evidence is essentially unchallenged. Indeed, the defendants continue to deny that they were involved in smuggling in their statements of defence. In my view, the court is being asked to make credibility findings against the plaintiffs, which are not appropriate in the circumstances at this stage of the proceedings.

[74] I cannot agree with the defendants' contention that it is clear from the record that the plaintiffs knew or ought to have known that there was a breach of contract within the relevant limitation period. As noted above, the nexus of the loss and

the defendant from whom the loss is sought to be recovered is material to the doctrine of discoverability. This is a genuine issue requiring a trial.

[75] Mr. Gilvesy has deposed, and as already noted, his evidence is unchallenged, that the makeup payment was required under the heads of agreement when the tobacco manufacturer itself used tobacco it purchased for export purposes for products it later determined would be sold in the domestic market. He has said that the manufacturers who informed the Tobacco Board that their DFX purchases would be used for domestic sale, thereby triggering the obligation to make a makeup payment. Mr. Gilvesy makes the point that only the tobacco manufacturers knew whether the tobacco they purchased was ultimately used for a different purpose than originally intended. As a result, the plaintiff's ability to discover a breach of contract may have been impaired.

[76] Finally, there is a genuine issue requiring a trial about whether the defendants' conduct might justify the suspension of the limitation period. As already noted, the defendants have consistently denied their involvement in smuggling and continue to do so. Whether there has been a fraudulent or wilful concealment within the meaning of s. 15(4) of the *Limitations Act*, 2002 is an issue for trial when presumably the issue of the defendants' alleged complicity will be fully canvassed (assuming the case is certified).

[77] The motions are therefore dismissed. If the parties cannot agree, I will receive written submissions on costs first from the plaintiffs within 30 days and from the defendants within 15 days thereafter.

"Justice H. A. Rady"
Justice H. A. Rady

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