COURT OF APPEAL FOR ONTARIO

CITATION: Ridel v. Goldberg, 2019 ONCA 636
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Feldman, van Rensburg and Benotto JJ.A.

BETWEEN

Jean-Marc Ridel, Nadine Suzanne Josephine Ridel
and Marc H. Ridel

Plaintiffs (Appellants)

and

Robert Goldberg

Defendant (Respondent)

Philip Anisman, for the appellants

Niklas Holmberg and Breanna Needham, for the respondent

Heard: March 11, 2019

On appeal from the order of Justice Thomas J. McEwen of the Superior Court of Justice, dated July 6, 2018, with reasons reported at 2018 ONSC 3113, 62 C.B.R. (6th) 68.

van Rensburg J.A.:

Introduction

[1] This is an appeal from the dismissal of an action. The appellants, judgment creditors of a bankrupt company, e3m Investments Inc. ("e3m"), took an

assignment of a claim of e3m from the trustee in bankruptcy and, in October 2016, commenced an action against e3m's former principal, Robert Goldberg, for breach of his duties as director of e3m. The central issue is whether the motions judge, who was considering competing motions for summary judgment, erred in concluding that the appellants' claim was statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. (the "*Limitations Act*").

[2] For the reasons that follow, I would dismiss the appeal. Pursuant to s. 12 of the *Limitations Act*, because the appellants were pursuing a claim belonging to e3m, which was assigned to them by e3m's bankruptcy trustee, the two-year limitation period for the claim ran from the earlier of when either the appellants or e3m knew or ought reasonably to have known of the elements of s. 5(1)(a) in relation to the claim.

[3] The motions judge erred in concluding that the appellants had discovered the claim before the bankruptcy of e3m, and before they were able to sue in e3m's name. However, the motions judge did not err in concluding, in the alternative, that e3m, as the appellants' predecessor in relation to the claim, had discovered the claim against Goldberg more than two years before the appellants commenced their action. Whether or not Goldberg's control of e3m was relevant to e3m's discovery of the claim, by April 2013 at the latest, a committee of e3m's shareholders knew of the facts underlying the claim and ought reasonably to have

known that an action by or on behalf of e3m would be appropriate, within the meaning of s. 5(1)(a)(iv) of the *Limitations Act*.

Facts

[4] In December 2006, the appellants commenced an action (the "Prior Action") against their broker, Armando Cassin, and his employer, e3m, for negligence, breach of contract and breach of fiduciary duty in the management of their investment accounts. They alleged, among other things, that e3m, contrary to legal and regulatory requirements, had failed to supervise Cassin's handling of their accounts. On April 17, 2013, after a ten-day trial, Pepall J. (as she then was) granted judgment against e3m and Cassin (the "2013 Judgment"), concluding that e3m was vicariously liable for Cassin's conduct and also directly liable to the appellants. The direct liability of e3m was based on its failure to supervise Cassin: *Ridel v. Cassin*, 2013 ONSC 2279. The reasons for judgment were critical of Goldberg, who was the founder, CEO, president and sole director of e3m: at paras. 222-229. On November 3, 2014, the 2013 Judgment was upheld on appeal to this court, and the cross-appeal seeking to recover certain additional amounts was granted: *Ridel v. Cassin*, 2014 ONCA 763.

[5] On January 20, 2015, e3m made an assignment in bankruptcy. At the time, the appellants were owed the sum of $1,036,245.85 under the 2013 Judgment, including post-judgment interest.

[6] On October 25, 2016, the appellants, as creditors of e3m, obtained an order under s. 38 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") from the Registrar in Bankruptcy, authorizing the assignment to them by the trustee in bankruptcy of e3m's right to sue Goldberg. The s. 38 order provided that the appellants were authorized to commence and prosecute an action against Goldberg "to recover the damages for which e3m became liable pursuant to [the 2013 Judgment, as amended in the cross-appeal to this court] in their own name and at their own expense and risk, based on Mr. Goldberg's failure to fulfil his obligations as a director and officer of e3m by abdicating his responsibility to supervise the [appellants'] accounts at e3m" (emphasis added).

[7] Pursuant to the order, the trustee assigned the appellants its right, title and interest to pursue e3m's right of action against Goldberg. The appellants commenced their action the day they obtained the s. 38 order, October 25, 2016.[1] The claim alleged that Goldberg was liable to compensate e3m for the amount of the 2013 Judgment. The claim asserted that the 2013 Judgment resulted from a breach of Goldberg's fiduciary obligations and duty of care to e3m, and from a breach of his duties to e3m under s. 134 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "*OBCA*").

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[1] Another creditor, owed an outstanding amount of $14,455.28, is participating in the action.

[8] The appellants brought a motion for summary judgment, claiming the sum of $262,165.10, the amount remaining unpaid after they had received payment under the 2013 Judgment from Cassin and as creditors in e3m's bankruptcy. As evidence in support of their claim, the appellants relied on the findings of Pepall J. in the Prior Action with respect to Goldberg's wrongdoing. They argued that Goldberg was estopped from denying the findings in Pepall J.'s reasons, and that his actions, on this evidence, constituted a breach of his duty of care and fiduciary duties to e3m, contrary to s. 134 of the *OBCA*.

[9] In response, among other things, Goldberg argued that the decision in the Prior Action could not be used as a finding of personal liability against him because he was not a party to the Prior Action. Goldberg also claimed that the assigned action was an abuse of process because the action made claims against him that could have been asserted in the Prior Action.

[10] Goldberg brought a cross-motion for summary dismissal of the action on the basis that the appellants' claims were statute-barred under the *Limitations Act.*

Decision of the Motions Judge

[11] The motions judge dismissed the appellants' motion, finding that there were issues requiring a trial. He concluded that, while the reasons of Pepall J. in respect of the 2013 Judgment were admissible, they were not determinative of Goldberg's personal liability to e3m. The parties to the Prior Action were different, as were the

causes of action. Goldberg had not been called upon in the Prior Action to defend himself regarding his personal liability under the *OBCA*. Nor was Goldberg a "privy" of e3m, such that he would be estopped from contesting Pepall J.'s findings: at paras. 22-35.

[12] The motions judge rejected the respondent's argument that the action was an abuse of process. While the appellants could have sued Goldberg in the Prior Action, in the normal course they would have expected to recover their entire claim against Cassin and e3m. And, although e3m could have joined Goldberg to the Prior Action, Goldberg was the directing mind, the sole director and in charge of e3m's defence. It was "hardly surprising" that Goldberg did not authorize e3m to pursue a lawsuit against himself, and e3m's pursuit of Goldberg for breaching his obligation to supervise would have run contrary to the defences the corporation was raising, at Goldberg's direction, against the Ridels' claim: at paras. 36-42.

[13] The motions judge considered the inadequate state of the record, with the appellants relying entirely on Pepall J.'s findings, and the respondent pointing to potential defences, but refusing to answer relevant questions in his cross-examination. He concluded that it was not possible to determine the issue of Goldberg's liability, which should be dealt with on a full record, in a contextualized fashion, with *viva voce* evidence: at paras. 44-49.

[14] The motions judge then considered Goldberg's motion for summary dismissal based on the alleged expiry of a two-year limitation period. Because the appellants obtained their right to advance e3m's claim by assignment from the trustee in bankruptcy, s. 12 of the *Limitations Act* was engaged: *Indcondo Building Corporation v. Sloan*, 2010 ONCA 890, 103 O.R. (3d) 445, at paras. 17-18. This meant that the date of the appellants' knowledge of the matters referred to in s. 5(1)(a) of the *Limitations Act* was the earlier of (1) the day the predecessor in right, title or interest first knew or ought to have known of such matters, and (2) the day the person claiming first knew or ought to have known of those matters.

[15] The motions judge concluded that, based on the findings of Pepall J., which referred to certain admissions by the appellants, as well as the absence of any evidence to the contrary, the appellants became aware of the facts forming the claim against Goldberg in July 2006, namely his failure to supervise Cassin. This was the case even though the appellants could not have brought an action on behalf of e3m against Goldberg until the company's bankruptcy: at paras. 63-66.

[16] The motions judge concluded in the alternative that the limitation period began to run against e3m in December 2006, when e3m was served with the statement of claim in the Prior Action, and therefore knew that Goldberg's conduct was at issue, or at the very latest when the 2013 Judgment was released (on April 17, 2013), and when e3m and its investors received a legal opinion about the poor

prospects of an appeal shortly thereafter. By that point, e3m had all the material facts required for a potential claim against Goldberg: at paras. 70-75.

[17] The motions judge accepted that, because the action was a claim for contribution and indemnity, the appellants had the onus of rebutting the presumption, under s. 18(1) of the *Limitations Act*, that the claim was discovered when the statement of claim was served on e3m in the Prior Action: at para. 71.

[18] The motions judge rejected the argument, based on s. 5(1)(a)(iv) of the *Limitations Act*, that, because a successful appeal might have eliminated the damages it was required to pay the appellants, e3m would not have known that an action against Goldberg was "an appropriate means" to seek to remedy its losses until November 2014, when the appeal of the 2013 Judgment was dismissed: at paras. 78-80.

[19] Finally, the motions judge considered the argument that e3m would not have sued Goldberg because this would have been against its own interest and would have amounted to Goldberg suing himself. While he accepted that this was a reason to dismiss the argument that the proceedings were an abuse of process, he stated that he did not find that this was relevant to the limitations period issue: at para. 81.

Issues

[20] At issue in this appeal is whether the motions judge erred in concluding that the appellants' claim against Goldberg was statute-barred. In particular, did the motions judge err when he concluded that (i) the appellants personally had knowledge of the claim against Goldberg, and (ii) e3m, as the predecessor of the appellants in respect of the claim, had knowledge of the claim more than two years before the action was commenced?

[21] As I will explain, in my view the trial judge erred in concluding that the limitation period ran against the appellants because of their personal knowledge of the relevant facts, when they had no capacity to sue in e3m's name until after the company was bankrupt. However, the trial judge did not err in concluding that the limitation period ran against their predecessor, e3m, based on its knowledge in relation to a claim against Goldberg – including, in the particular circumstances of this case, the knowledge of its shareholders – of the relevant matters under s. 5(1)(a) of the *Limitations Act*.

[22] Having determined that the action was properly dismissed on the basis of the expiry of a limitation period, it is unnecessary to address the appellants' argument that the motions judge erred in refusing summary judgment in their favour, when he concluded that Goldberg was not e3m's privy and therefore estopped from denying the findings concerning his conduct in the Prior Action.

Analysis

[23] Because the appellants' action against the respondent in respect of his breaches of duty to e3m was commenced on October 25, 2016, the question to be resolved is whether the motions judge erred in concluding that the appellants' claim was discovered or ought reasonably to have been discovered prior to October 25, 2014.

(1) Relevant statutory provisions and legal principles

[24] I begin my analysis of the limitations issue by setting out the relevant statutory provisions and legal principles.

[25] The claim asserted by the appellants is subject to the basic two-year limitation period provided for under s. 4 of the *Limitations Act*. The two years run from the "discovery" of the claim, which under s. 5 is defined as follows:

> 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.

[26] In addition to the deeming provision in s. 5(2), because the claim in this case was for contribution and indemnity (in respect of amounts owed by e3m under the 2013 Judgment), s. 18 is relevant. That section provides:

> 18(1) For the purposes of subsection 5(2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.
>
> (2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

[27] Under s. 18, unlike the prior limitations regime for claims for contribution and indemnity, the two-year limitation period presumptively runs from the day the first alleged wrongdoer is served with the claim in respect of which contribution and indemnity is sought: *Canaccord Capital Corporation v. Roscoe*, 2013 ONCA 378, 115 O.R. (3d) 641, at para. 20. The presumptive limitation period start date that arises from a combination of ss. 18(1) and 5(2) can be rebutted by the

discoverability principles prescribed in s. 5(1): *Mega International Commercial Bank (Canada) v. Yung*, 2018 ONCA 429, 141 O.R. (3d) 81, at paras. 67, 74.

[28] To rebut the presumption under s. 5(2) (and therefore under s. 18(1)), a claimant may point to evidence to establish that the claim was "discovered" on a date other than the date on which the "act or omission" took place – in a claim for contribution and indemnity, the date of service of the claim on the first alleged wrongdoer. As this court observed in *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600, at para. 31: "The presumption is displaced by the court's finding as to when the plaintiff subjectively knew he had a claim against the defendants". The evidentiary threshold to rebut the presumption in s. 5(2) is relatively low: *Presley v. Van Dusen*, 2019 ONCA 66, 144 O.R. (3d) 305, at para. 24; *Morrison*, at para. 31; *Apotex Inc. v. Nordion (Canada) Inc.*, 2019 ONCA 23, 431 D.L.R. (4th) 262, at para. 87.

[29] On bankruptcy, the property of the bankrupt vests in the trustee: *BIA*, s. 71. The bankrupt's property includes any cause of action the bankrupt may have: *BIA*, s. 2; *Douglas v. Stan Fergusson Fuels Ltd.*, 2018 ONCA 192, 139 O.R. (3d) 721, at para. 60, leave to appeal refused (2018), 68 C.B.R. (6th) 3. The trustee, with the permission of the inspectors, is empowered to bring, institute or defend any action relating to the property of the bankrupt: *BIA,* s. 30(1)(d). The trustee in bankruptcy may also have a range of other claims that can be asserted in its name, such as claims to set aside transfers at undervalue: *BIA,* s. 96. Thus, a trustee is

entitled to assert both claims that previously belonged to the bankrupt and claims that arise by virtue of the bankruptcy.

[30] Section 38 of the *BIA* permits the assignment of those claims to a creditor of the bankrupt:

> 38(1) Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

[31] Assignment of a cause of action raises the application of s. 12(1) of the *Limitations Act* because the assignor of a claim is considered a predecessor in right, title or interest. This section provides:

> 12(1) For the purpose of clause 5(1)(a), in the case of a proceeding commenced by a person claiming through a predecessor in right, title or interest, the person shall be deemed to have knowledge of the matters referred to in that clause on the earlier of the following:
>
> 1. The day the predecessor first knew or ought to have known of those matters.
>
> 2. The day the person claiming first knew or ought to have known of them.

[32] As the motions judge correctly noted, this court's decision in *Indcondo* is authority that s. 12 applies to claims asserted by a creditor who has taken an

assignment of a claim of a bankrupt under s. 38 of the *BIA*. The relevant discoverability date is the earlier of that of the predecessor (in *Indcondo*, the predecessor was the trustee in bankruptcy) or the person claiming through the predecessor (the assignee of the claim from the trustee). The assignment does not have the effect of restarting the running of the limitation period: *Indcondo*, at paras. 18-20. I will say more about *Indcondo* in the course of these reasons, and in particular, I will explain why that case is not determinative of the question of the appellants' knowledge of the claim against Goldberg, that is raised in this appeal.

[33] I turn now to consider when the appellants had personal knowledge of the claim in this case.

(2) Discovery of the Claim by the Ridels

[34] The appellants say that the motions judge erred in his conclusion that their action is statute-barred because they personally knew of the matters listed in s. 5(1)(a) more than two years before they commenced the action against Goldberg to sue for wrongs allegedly done to e3m. They assert that the motions judge erred in drawing an adverse inference against them, when they had not offered affirmative evidence of the matters referred to in s. 5(1)(a), and in concluding that they had knowledge of the claims, based on the reasons of Pepall J., in July 2006. They say that the limitation period could not have commenced until after e3m was bankrupt, and indeed until they ought reasonably to have obtained the s. 38 order.

Until that point, it would not have been possible for them to have prosecuted a claim by e3m against Goldberg.

[35] For his part, the respondent asserts that the motions judge did not err in concluding that the appellants had knowledge of the claim before they sued him in the Prior Action, at the time the Prior Action was commenced, or at the latest when they received the 2013 Judgment. He says that the motions judge was correct in concluding that the appellants did not offer evidence to rebut their knowledge of the claim, and further that the limitations issue in this case is similar to and governed by this court's decision in *Indcondo.*

[36] I begin with a brief comment on the motions judge's treatment of the presumption and the evidentiary record. At para. 15 of his reasons, the motions judge referred to the prior decision of this court allowing the appeal of the dismissal of the action on a r. 21 motion: *Ridel v. Goldberg*, 2017 ONCA 739. He noted this court's conclusion that a more complete record was required in order to determine the issues raised by the parties concerning the limitation period issue, and he observed, at para. 16, that the appellants had not filed any materials in support of their defence of the motion to have the action dismissed. At para. 63, the motions judge was critical of the appellants' failure to offer evidence as to when they discovered the matters referred to in s. 5(1)(a). At para. 66, he drew an adverse inference against the appellants because they failed to submit evidence as to when they had acquired personal knowledge of the contested facts. The motions judge

then determined that, while the appellants could not have brought an action on behalf of e3m against Goldberg until the company's bankruptcy, Pepall J.'s reasons demonstrated that they were well aware of the material facts required to commence a claim against him as early as July 2006 and they had submitted no evidence to the contrary.

[37] I agree with the appellants that, to the extent the motions judge determined the issue of their knowledge of the matters listed in s. 5(1)(a) based on their failure to submit evidence, this was an error. In the r. 21 appeal, this court's observation that an evidentiary record was required was based on the fact that the limitations issue had been determined by the motion judge based only on the pleadings. The fact that there was no evidentiary record at all prevented the proper determination of the limitations issue. By contrast, in this case, there was an evidentiary record. Even if the appellants had not put forward evidence about their own discovery of the claim, they relied on the evidence of Goldberg (who had filed an affidavit with various exhibits and been cross-examined) as well as the findings contained in Pepall J.'s reasons.

[38] In any event, the appellants' response to the issue was not to challenge the timing of their own knowledge of Goldberg's wrongdoing in relation to e3m, but to argue that they were not in a position to do anything about it, at least until the bankruptcy. It is to this issue that I now turn.

[39] I begin my analysis with *Indcondo*. As I will explain, while that case confirms that s. 12(1) applies in the context of an assignment of a claim by a trustee in bankruptcy under s. 38, it is not determinative of the question of when the appellants in this case knew of or ought reasonably to have known of the matters listed in s. 5(1)(a) in relation to the particular claim they are advancing.

[40] In *Indcondo*, a creditor of David Sloan, the bankrupt, brought certain alleged fraudulent conveyances to the attention of the trustee in bankruptcy, which the trustee chose not to pursue. After Sloan's discharge, Indcondo obtained an order under s. 38 of the *BIA* authorizing the assignment of the trustee's claim and permitting it to bring fraudulent conveyance proceedings. At issue was whose knowledge was relevant for determining the discovery of the cause of action. Because of the timing, the transition provisions of the *Limitations Act* applied. If the trustee's discovery date were used, the claim would be statute-barred. If the earlier (creditor's) discovery date were used, there was no limitation period defence, as under the former legislative scheme (carried over by operation of s. 24(6) of the *Limitations Act*) there was no limitation period for fraudulent conveyance claims. Accordingly, it was in Indcondo's interest to establish that the limitation period ran from when it first discovered the claim, prior to Sloan's bankruptcy.

[41] The court concluded that the limitation period ran from the date of Indcondo's knowledge of the claim, and that neither the bankruptcy nor the s. 38

order suspended or restarted the running of the limitation period. Accordingly, the action was not statute-barred.

[42] The respondent says that, like the creditor in *Indcondo*, the appellants knew all of the material facts relevant to a claim against Goldberg when they were involved in the Prior Action, and that the limitation period accordingly has run against them since 2006.

[43] I do not accept this argument. In *Indcondo*, there was no dispute about when the creditor knew all the elements of s. 5(1)(a) in relation to the claim that was assigned to it by the trustee. The claim was to set aside fraudulent conveyances, a claim that Indcondo, as a creditor, could have brought against Sloan under provincial statute, but for his bankruptcy. Indeed, before Sloan's bankruptcy, Indcondo had already sued in respect of the alleged fraudulent conveyance of Sloan's house to his wife. Indcondo subsequently discovered other potential fraudulent conveyances, which it brought to the attention of the trustee. All that was at issue was whether the limitation period ran from Indcondo's prior knowledge of the potential claim, which it could have brought in its own name, or whether Sloan's bankruptcy restarted the limitation period. This court held that, by virtue of s. 12, the limitation period ran from the earlier of Indcondo's or the trustee's knowledge of the claim, and did not restart with either the bankruptcy or the s. 38 order.

[44] In this case, by contrast, the appellants are pursuing a claim that initially belonged to e3m and that vested in the trustee on e3m's bankruptcy. The claim for breach of Goldberg's fiduciary and other duties to e3m is not one that the appellants could have pursued before e3m's bankruptcy. *Indcondo* did not address the question of when the limitation period under s. 12 would run in respect of a creditor who may well have known of the potential claim by the bankrupt, but had no way to enforce it until the bankruptcy.

[45] The appellants characterize the motions judge's error here as a failure to consider s. 5(1)(a)(iv) of the *Limitations Act* in relation to the claim against Goldberg. Whether a proceeding was an appropriate means to remedy a claim is an essential element in the discoverability analysis and the failure to consider s. 5(1)(a)(iv) is an error of law: *Presley*, at para. 15.

[46] I agree with the appellants that, because they lacked capacity to bring a claim in the name of e3m against Goldberg, any personal knowledge they might have had before e3m's bankruptcy respecting a claim did not cause the limitation period to run against them pursuant to s. 12(1). In my view, however, this result does not flow from the application of s. 5(1)(a)(iv).

[47] In determining when the limitation period began to run in respect of the appellants' claim, the question is when they, as "claimants" – that is, as persons who reasonably had the claim in question – knew or ought to have known of the

matters referred to in s. 5(1)(a). The application of the test in s. 5(1)(a) requires first that the claims at issue be defined or identified: *Morrison*, at paras. 33, 49.

[48] In this case, the claim advanced in the appellants' action is not a claim by them personally, or one that they could have advanced personally (as was the case in *Indcondo*), but a claim they are asserting on behalf of the bankrupt, e3m, against its former principal, Goldberg. Section 5(1) applies to "the person with the claim". When they were litigating against e3m in the Prior Action, the appellants may well have known of the various matters under s. 5(1)(a) in the general sense, but because they were not and could not have been "the persons with the claim" at that stage, any such knowledge was immaterial.

[49] Until e3m was bankrupt, any claim against Goldberg for breach of his duties as a director could only be pursued by e3m. The appellants had no right, title or interest in the claim. They had no ability to bring the claim while the claim continued to belong to e3m.

[50] In *Saran (Re)*, 2018 ONSC 2998, 60 C.B.R. (6th) 296, at paras. 43-45, 50, a bankruptcy trustee sought to challenge a transfer of the bankrupt's business to a corporation controlled by her spouse at undervalue. The transferee relied on the expiry of a two-year limitation period alleged to have run from when the trustee was in place during a proposal that was rejected by the bankrupt's creditors. Kershman J. pointed to the fact that the property of the bankrupt vested in the

trustee only on bankruptcy, and that until then the bankrupt had control of all of her assets. He held that any prior "knowledge" that a trustee had while wearing the hat of a proposal trustee was not imputed to the trustee as bankruptcy trustee so as to result in an earlier date for the start of a limitation period.

[51] Similarly, in this case, the appellants could not have asserted a claim against Goldberg for wrongs done to e3m until they obtained the s. 38 order. In other words, until they obtained the s. 38 order, they had no standing to claim for e3m's losses. Any knowledge of Goldberg's wrongdoing in relation to e3m, whether by virtue of what they themselves had pleaded in the Prior Action, or when they received Pepall J.'s reasons in the 2013 Judgment, was not sufficient for them to be able to act.

[52] The motions judge's conclusion that, because of their personal knowledge of the material facts in relation to e3m's claim against Goldberg, the limitation period began to run against the appellants as early as July 2006 and as late as April 2013, was therefore in error. Their knowledge of those matters did not become relevant until they had or ought reasonably to have had the authority to pursue the claim, which was, at the very earliest, upon the bankruptcy of e3m in January 2015.

[53] Under this analysis, s. 5(1)(a)(iv) is not engaged. The question is not whether the appellants knew or ought to have known that a proceeding by the

company would be an appropriate remedy for Goldberg's alleged wrongs. Until they had control over the claim, or the means to obtain such control (by moving promptly in e3m's bankruptcy), they were not "claimants" for the purpose of s. 5(1)(a) and therefore their knowledge was not the knowledge of claimants under the section.

(3) Discovery of the Claim by e3m

[54] I turn to consider the alternative discovery date for the limitation period under s. 12 of the *Limitations Act* – that is, when the appellants' "predecessor" knew or ought reasonably to have known of the claim against Goldberg.

[55] Two preliminary points are worth mentioning. First, in this case, the predecessor, for the purpose of the s. 12 analysis, is not the trustee in bankruptcy of e3m, but e3m itself. This is not a claim that arose on the bankruptcy, but a claim that vested in the trustee on e3m's bankruptcy, and then was assigned to the appellants. It is a claim that, subject to discoverability under s. 5(1)(a), e3m could have made itself against its director, Goldberg, prior to the bankruptcy. Accordingly, the two-year limitation period began to run against e3m in respect of the claim against Goldberg on the earlier of when e3m first knew or ought reasonably to have known of the matters set out in s. 5(1)(a): that the injury, loss or damage to e3m had occurred, that the injury, loss or damage was caused by or contributed to by an act or omission of Goldberg, and that "having regard to the

nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it".

[56] Second, the claim against Goldberg is in respect of the amount owed to them as judgment creditors of e3m following the Prior Action. The statement of claim expressly claims indemnification of e3m for the amount of the 2013 Judgment. Accordingly, the two-year limitation period presumptively runs from the date the statement of claim was served in the Prior Action (in December 2006), subject to the appellants proving that e3m did not know or that a reasonable person in e3m's circumstances would not have known of the matters referred to in s. 5(1)(a) in relation to e3m's claim for indemnity at the time the Prior Action was commenced. Section 18(1) of the *Limitations Act* places the onus on the appellants to rebut this presumption.

[57] The appellants say that e3m could only have known of the matters referred to in s. 5(1)(a) in respect of a claim against Goldberg, at the earliest, when e3m made an assignment in bankruptcy (in January 2015) and the trustee took control of the company's property, including any potential claims. It was only at that point that e3m knew or ought to have known of a potential claim against Goldberg, or that legal proceedings against Goldberg were appropriate.

[58] The appellants' principal argument that a claim against Goldberg was not discoverable in 2006 is that time ought not to have run against e3m while the

company was controlled by Goldberg. The appellants' argument is twofold. First, they say that e3m did not know about Goldberg's wrongdoing, because Goldberg, who was the directing mind of the company, had no such knowledge himself. They point to Goldberg's evidence on cross-examination, where he denied that he had done anything wrong.

[59] Second, because of Goldberg's control of e3m, until e3m was bankrupt, the company would not reasonably have known that a proceeding against Goldberg was the appropriate means to recover the amount awarded against e3m in the Prior Action. This argument focusses on s. 5(1)(a)(iv) of the *Limitations Act*. If Goldberg knew of such wrongdoing or ought reasonably to have known of it, his knowledge ought not to be attributed to e3m for the purpose of the running of the limitation period because he would never have acted on such knowledge and caused e3m to sue himself. e3m would not reasonably have known, "having regard to the nature of the injury, loss or damage, [that] a proceeding [against Goldberg] would be an appropriate means to seek to remedy it".

[60] The appellants point to the conclusions of the motions judge (when he dismissed the respondent's argument that the action was an abuse of process) that because Goldberg was the directing mind of e3m and, at the time of the Prior Action, the sole director and in charge of e3m's defence, it was "hardly surprising that Mr. Goldberg did not authorize e3m to pursue a lawsuit against himself", and that doing so "would have run contrary to the defences the corporation was raising,

at Mr. Goldberg's direction, against the Ridels' claim": at paras. 39-40. The appellants assert that the motions judge erred when, after making these observations, he concluded that Goldberg's control of e3m was irrelevant to the limitations issue: at para. 81.

[61] Finally, in arguing that the motions judge erred in his alternative conclusion that the appellants discovered the claim at the latest when the 2013 Judgment was released, the appellants contend that the running of the limitation period was suspended under s. 5(1)(a)(iv) until after this court disposed of e3m's appeal of the 2013 Judgment in November 2014.

[62] The respondent argues that there was no error in the motions judge's conclusion that the limitation period began to run against e3m in July 2006, based on the findings in the Prior Judgment. The respondent also asserts that the appellants have failed to rebut the presumption that e3m knew of the claim against Goldberg at the time it was served with the statement of claim in the Prior Action, and that whether or not Goldberg had control over e3m is irrelevant. Further, an action is "appropriate" when it is "legally appropriate" and there is no principle in the cases interpreting s. 5(1)(a)(iv) that would extend the limitation period in these circumstances.

[63] In the alternative, even if Goldberg's control over e3m could be a relevant factor, the respondent points to the evidence that, while Goldberg was the majority

shareholder, he reported regularly to and consulted with an investor group that had full knowledge of both the Prior Action and, in particular, of the 2013 Judgment and its ability to cause e3m to make a claim against Goldberg.

[64] Finally, if the limitation period ran from the 2013 Judgment, the respondent argues that the motions judge was correct in refusing to extend the limitation period on account of the appeal.

[65] Based on the following analysis, I would uphold the motions judge's decision that the limitation period had expired against e3m by the time the appellants commenced their action against Goldberg for breach of his duties to e3m. In the particular circumstances of this case, it is reasonable to conclude that e3m knew or ought to have known of a potential claim against Goldberg, at the latest, by the time of the 2013 Judgment, including that a proceeding against Goldberg would be appropriate.

a) e3m's knowledge of Goldberg's alleged wrongdoing in April 2013

[66] It is unnecessary to determine for the disposition of this appeal whether an assessment of the s. 5(1)(a) factors as of 2006, and in particular, the appropriateness of a proceeding against Goldberg, were affected by Goldberg's control of the company and his knowledge as its directing mind.

[67] On the evidence in this case, irrespective of Goldberg's knowledge of the claim or his unwillingness to act on such knowledge on behalf of e3m, at least by

April 2013, all of the other e3m shareholders had received a copy of the reasons of Pepall J. and the 2013 Judgment, which included the various references to Goldberg's wrongdoing, and they had the ability to cause e3m to sue or to bring a derivative claim on its behalf.

[68] The evidence on the motions was that Goldberg was the sole shareholder of e3m until September 10, 2003, when e3m issued nearly half of its outstanding common shares to nine sophisticated and active investors (referred to as the "Investor Group"). A Unanimous Shareholder Agreement granted the Investor Group the unfettered right to appoint a majority of e3m's five-member board of directors at any time, however the investors permitted Goldberg to remain the sole director. According to Goldberg, throughout the seven-year litigation in the Prior Action, he had open and free-ranging discussions with the Investor Group. Various documents, including emails Goldberg exchanged with members of the Investor Group both before and after the 2013 Judgment were released, confirm that the Investor Group was consulted about the litigation, including the decision to appeal the 2013 Judgment. Although Goldberg did not recall advising the Investor Group of his failure or that of e3m to supervise Cassin's activities, once they received the 2013 Judgment and reasons of Pepall J., which were sent to them directly by Goldberg, they had the necessary information to have reasonably concluded that e3m had a potential claim against Goldberg. The appeal proceeded with the

informed agreement of the Investor Group, and without the assertion of any claim on behalf of e3m against Goldberg.

[69] It is apparent from this evidence that, even accepting that Goldberg did not disclose the extent of his wrongdoing to the shareholders and assuming that in 2006 they could not have appreciated that a wrong had been done to e3m, when the trial decision was released they independently acquired knowledge of Goldberg's alleged breaches of duty to e3m. At that time, for the purposes of the discoverability analysis under s. 5(1)(a) of the *Limitations Act*, e3m knew that: an injury had occurred; its loss was caused by an act or omission; the act or omission was allegedly that of Goldberg; and a proceeding was an appropriate means to remedy it. Irrespective of Goldberg's control of the defence to the litigation, the shareholders could have assumed control of e3m's board of directors and caused e3m to make a claim against Goldberg, or they could have commenced a derivative action on e3m's behalf. That the shareholders opted instead to pursue the appeal was an informed choice that, for the reasons explained below, did not halt the limitations clock.

b) The effect of the appeal of the 2013 Judgment

[70] The appellants rely on s. 5(1)(a)(iv) of the *Limitations Act* to argue that the appeal of the 2013 Judgment postponed the running of the limitation period against e3m. They say that, because the appeal may have eliminated e3m's liability to the

Ridels and hence e3m's claim against Goldberg, they would not reasonably have known that an action was "an appropriate means" to seek to remedy e3m's losses until the appeal was dismissed.

[71] Appropriateness must be assessed on the facts of each case, and case law applying s. 5(1)(a)(iv) is of limited assistance: *Brown v. Baum*, 2016 ONCA 325, 397 D.L.R. (4th) 161, at para. 21. The jurisprudence has recognized two particular circumstances where the issue of "appropriate means" under s. 5(1)(a)(iv) most often delays the date on which a claim is discovered: *Zeppa v. Woodbridge Heating & Air Conditioning Ltd.*, 2019 ONCA 47, at para. 48. The first category concerns cases where a defendant, typically one with some level of expertise, has undertaken to repair a problem before an action is brought: see e.g. *Presley*, at paras. 17-22; *Presidential MSH Corporation v. Marr Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321, at paras. 20-26; *Brown*, at para. 18. The second category concerns cases where there is a statutory or other alternative non-judicial process that has been or must be invoked for determination of the dispute: see e.g. *Presidential,* at paras. 28-29, 48, 53; *407 ETR Concession Company Limited v. Day*, 2016 ONCA 709, 133 O.R. (3d) 762, at para. 40, leave to appeal refused, [2016] S.C.CA. No. 509; *Kadiri v. Southlake Regional Health Centre*, 2015 ONSC 621, at paras. 52-57, aff'd 2015 ONCA 847, 343 O.A.C. 186.

[72] The appellants rely on this court's decision in *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44, 136 O.R. (3d) 202, a case involving

an action in Ontario to enforce a foreign judgment, in support of their argument that it was not legally appropriate to commence a claim against Goldberg until the appeal of the 2013 Judgment was determined. In *Figliolini*, this court held, at para. 77:

> In the usual case, it will not be legally appropriate to commence a legal proceeding on a foreign judgment in Ontario until the time to appeal the judgment in the foreign jurisdiction has expired or all appeal remedies have been exhausted. The foreign appeal process has the potential to resolve the dispute between the parties. If the judgment is overturned, the debt obligation underlying the judgment creditor's proceeding on the foreign judgment disappears.

[73] The appellants say that, just as this court held that the basic limitation period for an action to enforce a foreign judgment in Ontario runs from the date of exhaustion of all appeals (subject to discoverability principles), the same should apply to a claim that, as here, is based on a domestic judgment. In either case, the debt obligation underlying the claimant's proceeding would disappear if the judgment were overturned.

[74] In my view, *Figliolini* does not apply by analogy or otherwise. The main issue in *Figliolini* was whether s. 16(1)(b) of the *Limitations Act* (which provides that there is no limitation period in respect of, among other things, "a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court") would apply to an action to enforce a foreign judgment. The court rejected that argument, and then went on to determine when the basic two-

year limitation period for an action to enforce a foreign judgment would begin to run.

[75] *Figliolini* dealt only with actions to enforce foreign judgments. Strathy C.J.O. noted that "a judgment creditor who brings an Ontario proceeding on a foreign judgment must show that the foreign court had jurisdiction and that the judgment is final and for the payment of money": at para. 51. An action to enforce a domestic judgment is, by s. 16(1)(b) of the *Limitations Act*, not subject to any limitation period. And, importantly, actions such as the present action – which are not to enforce a judgment, but to claim indemnity – are governed by their own provisions in the *Limitations Act* that would be entirely undermined if the appellants' argument were given effect. This is the fatal flaw in the appellants' reliance on *Figliolini.*

[76] Unlike proceedings to enforce a foreign judgment, which require finality, there is no requirement that in order to effectively claim contribution and indemnity there must be a final judgment against the claimant. To the contrary, the two-year limitation period runs from the date the claim is made against the first wrongdoer, subject to the discoverability rules in s. 5(1)(a): *Mega International*, at para. 74. In *Canaccord*, this court noted that s. 18 of the *Limitations Act* specifically departs from the previous law for contribution claims between tortfeasors, where the limitation period ran against the party claiming indemnity from the date of judgment: at para. 20.

[77] While not determinative, this court's decision in *Tapak v. Non-Marine Underwriters, Lloyd's of London*, 2018 ONCA 168, 76 C.C.L.I. (5th) 197, leave to appeal refused, [2018] S.C.C.A. No. 157, is instructive. In that case, the appellants relied on s. 5(1)(a)(iv) to argue that an appeal against other parties, if successful, might have eliminated their losses and that they therefore did not know that their action for contribution and indemnity was "an appropriate means" to seek to remedy their losses until the appeal was dismissed. At para. 13, the court rejected this argument, stating:

> [Section] 5(1)(a)(iv) is not intended to be used to parse claims as between different defendants and thus permit one defendant to be pursued before turning to another defendant. Rather, it is intended to address the situation where there may be an avenue of relief outside of a court proceeding that a party can use to remedy their 'injury, loss or damage'....

I agree with the latter observation that s. 5(1)(a)(iv) is not intended to operate in the manner proposed by the appellants.

[78] In the present appeal, the appellants assert that it was legally appropriate for e3m to delay an action against Goldberg until the Prior Action was finally disposed of on appeal. This is precisely the sort of litigation in stages which will not delay the commencement of a limitation period for purposes of s. 5(1)(a)(iv). In the usual case, s. 5(1)(a)(iv) will not suspend the limitation period as against a second defendant where a plaintiff has commenced a legal proceeding against another defendant for the same wrong: *Presley*, at para. 31. This general principle is

buttressed by the specific and certain rules for the commencement of claims for contribution and indemnity ushered in by s. 18 of the *Limitations Act*. Sharpe J.A., in *Canaccord*, carefully described the legislative history in concluding that s. 18 provided a "marked departure from" and "significant reforms to" the previous regime governing limitation periods for claims for contribution and indemnity: at para. 27. Under the previous law, a tort claimant seeking contribution and indemnity could wait for judgment in the main action before commencing a claim for indemnification. In contrast, "s. 18 significantly shortens the limitation period governing contribution and indemnity claims to two years from the date the first alleged wrongdoer was served with the underlying claim, thereby encouraging resolution of all claims arising from the wrong at the same time": *Canaccord*, at para. 20.

[79] In summary, then, on this ground of appeal I am satisfied that e3m had knowledge of the matters covered in s. 5(1)(a) more than two years prior to the issuance of the Ridels' statement of claim. The company's shareholders knew that e3m had a potential claim against Goldberg in respect of his alleged failure to supervise Cassin when the 2013 Judgment was issued (in April 2013). Whether or not Goldberg controlled e3m's defence to the litigation and would never have caused e3m to sue himself, by that point the shareholders could have caused e3m to sue or could have commenced a derivative action on its behalf. As a predecessor in interest, e3m's knowledge is imputed to the appellants for

limitations purposes through the application of s. 12(1). On that analysis, the action is time-barred.

Conclusion and Disposition

[80] For these reasons, I would dismiss the appeal. I would order the appellants to pay the respondents the costs of the appeal, fixed at $20,000, the amount agreed between the parties, inclusive of HST and disbursements.

Released: JUL 31 2019
K.F.

K. van Rensburg J.A.

I agree K. Feldman J.A.

I agree M.L. Benotto J.A.