A Commentary on *Kassburg v. Sun Life Assurance Company of Canada* - Limitation Periods, Summary Judgement, Standard of Review

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Kassburg v. Sun Life Assurance Company of Canada, 2014 ONCA 922, is a case in which the Ontario Court of Appeal ruled on a number of interesting issues involving limitation periods, insurance policies, summary judgment motions and the standard of review in appeals.

The fact situation is a little complicated. To distill it to its basics, the plaintiff was insured under a group disability benefits policy issued to the North Bay Police Association ("NBPA") by Sun Life. The plaintiff joined the group in 2003. There was a variation made to the policy in 2007.

The plaintiff made a claim on the policy for disability benefits in April 2008.

Sun Life wrote to the plaintiff on Dec. 4, 2008 denying the claim based on the submitted medical information, but adding, "Should you wish to appeal our decision, you need to submit new medical information". The letter cautioned that "[b]y considering an appeal, we are not nor do we intend to waive any of our rights under the policy, including our right to apply any available contractual or statutory limitation periods".

However, subsequent letters from Sun Life advised the plaintiff that her claim for LTD benefits would be given further consideration upon receipt of further medical information, and specified the type of information the insurer required.

On February 24, 2011, Sun Life advised the plaintiff by letter that the information submitted was insufficient and did not support total disability. Sun Life stated that the plaintiff's claim for benefits was declined at the "third and final appeal level", and stated that the plaintiff could either initiate a complaint with Sun Life's Ombudsman's Office, or she could "seek independent legal advice".

The plaintiff issued a statement of claim on February 21, 2012 and Sun Life brought a motion for summary judgment seeking a dismissal of the action based on expiry of the limitation period.

Contracting Out of the Limitations Act, 2002

The motions court first had to consider whether the applicable limitation period was the two-year limitation period under the *Limitations Act, 2002*, S.O. 2002, Chapter 24 Schedule B or a one-year limitation period contained in the contract of insurance.

This raised several issues. In the first place, Section 22(2) of the *Limitations Act, 2002* provides that a limitation period under the Act may be varied or excluded by an agreement made before January 1, 2004. The question arose as to whether this clause of the Act was applicable in view of the variation made to the contract in 2007.

The motions court judge held that it was unnecessary to decide this because, even if the effective date of the contract were held to be 2007, the limitation period in the policy would fit within the "business agreement" exception to contracting out of the statutory limitation period. Section 22(5) of the Act provides for the variation or exclusion of a limitation period by a "business agreement" made on or after October 19, 2006. A business agreement is defined to mean an agreement made by parties none of whom is a consumer as identified in the Consumer Protection Act, 2002, S.O. 2002, c. 30. The motion judge concluded that, because the parties to the insurance contract at issue were the NBPA and Sun Life, the contract was not entered into by an individual acting for personal, family or household purposes.

The Court of Appeal disagreed, holding:

> [58] The clear wording of s. 22(5) permits contracting out of the statutory limitation period, unless the parties to the contract include an individual, and the contract was for "personal, family or household purposes". There are therefore two requirements for a business agreement to exist: the parties must not include individuals, and the contract must not have been for personal, family or household purposes.
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> [59] The literal reading of the "parties" aspect of the section that appears to have been accepted by the motion judge, in my view, is inconsistent with the objective of s. 22 of the Limitations Act, 2002, which is to restrict the circumstances in which the statutory limitation periods under the Act can be altered by contract. In my view, the word "parties" in s. 22(6) should be given a broader, purposive reading to accord with the objective of s. 22.
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> [60] In this action, the respondent is asserting a personal claim for LTD benefits provided under a group policy. She is entitled to assert the claim directly against the insurer under s. 318 of the Insurance Act, R.S.O. 1990, c. I.8. Although the group insurance contract under which she is making her claim was entered into between the NBPA and the appellant, the appellant relies on a limitation period contained in that contract to exclude her claim. The respondent is in effect deemed to be a party for the purpose of asserting her claim, and for the purpose of the appellant's limitations defence.

This portion of the Court of Appeals decision is, however, *obiter dicta*, as the motion court judge held, for reasons set out below, that the limitation period set out in the insurance documents were otherwise unenforceable for reasons set out below.

The motions court judge held that there was an ambiguity between the wording of the limitation period set out on the Insurance Contract Document and the Insurance Booklet. The Contract Document provided for a one-year limitation period from "the end of the time period in which proof of the claim is required", but the Booklet provided for a one-year limitation period from "after the date [the insurer] must receive [the insured's] claim forms". The motions court judge held, based on reading the contract documents as a whole that "Proof of claim" is broader than "claim forms". "Proof of claim" is the entire process of providing information to the insurer to enable it to decide whether to pay benefits. As indicated by the language in the Booklet, filling out the "claim forms" is only one step in providing "proof of claim".

The motions court judge therefore concluded that the limitation period clauses of the policy documents were not clear and were therefore unenforceable, following *Boyce v. The Co-Operators General Insurance Co.*, 2013 ONCA 298, 116 O.R. (3d) 56, at para. 20, leave to appeal to S.C.C. refused, [2013] S.C.C.A. No. 296, which held that any contractual term purporting to shorten a statutory limitation period must "in 'clear language'" describe the limitation period, identify the scope of its application, and exclude the operation of other limitation periods.

Standard of Review of Contractual Interpretation

The Court of Appeal upheld the motion court judge's interpretation of the contract and reiterated the standard of review of contractual interpretation of the insurance contract recently set out by the Supreme Court of Canada, stating:

> [33] The interpretation of a contract involves questions of mixed fact and law. An appellate court should not interfere with the interpretation of a contract by a lower court, in the absence of a palpable and overriding error of fact or an extricable legal error, including the application of an incorrect principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 373 D.L.R. (4th) 393, at para. 53. The appellant has not demonstrated any legal error in the motion judge's interpretation of the contract in this case.

Discoverability

Having decided that the contractual limitation period was not applicable, the motions court judge then turned to the issue of discoverability under the statutory limitation period.

He held that, because of the language in the policy referring to "proof of the claim acceptable to Sun Life", the respondent only knew that she was "out-of-pocket" when the insurer denied the claim after receiving proof acceptable to it. He also concluded that the respondent would not have known that it was legally appropriate to start an action until she received a clear denial of the claim, which occurred when she was

advised that the appeal procedures had been exhausted. Thus the two-year statutory appeal period began to run on February 24, 2011.

As a result, he dismissed the defendant's motion for summary judgment.

Standard of Review of Summary Judgment

The Court of Appeal reiterated a position that it has taken consistently since *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87:

> [44] The appellant is inviting this court to reweigh the evidence that was considered by the motion judge to arrive at a different factual conclusion. That is not our function. Where the evidentiary record on a Rule 20 motion permits the motion judge to resolve the issues justly and fairly, his exercise of discretion in making factual determinations is entitled to considerable deference.
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> [45] In Hryniak, Karakatsanis J. for the Supreme Court stated that the exercise of a power under the summary judgment rule attracts deference and that when the motion judge exercises the "fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law" (at para. 81). Where there is no extricable error in principle, findings of mixed fact and law should not be overturned, absent palpable and overriding error (at para. 81).

(Note: see also our commentary on *Hryniak*.)

When Motions for Summary Judgment Backfire

As well as dismissing the defendant's motion to dismiss the action being barred by the limitation period, the judge on his own initiative determined that the limitation period had not expired. The defendant on appeal argued that since there was no cross-motion by the plaintiff seeking such a remedy the motions court should have left this as an issue to be determined at trial.

Consistent with our earlier commentary, "When Summary Judgement Motions Backfire", the Court of Appeal held:

> [52] I would not give effect to this ground of appeal. Consistent with the decision of the Supreme Court in Hryniak and the clear wording and purpose of the summary judgment rule, it was open to the motion judge to determine the issue of the limitation defence on a final basis on the record before him in this case. The parties put a comprehensive record before the court, which the appellant considered sufficient for the limitation period issues to be able to be determined. The appellant could have cross-examined on the respondent's affidavit filed on the motion, but chose not to do so. It is in the interests of justice that the issue was determined on a final basis by the motion judge at this stage.

In my view, the motion judge did not err in making the declaration he did as part of his disposition of the summary judgment motion.

Conclusion

Several lessons can be taken from this decision:

1. Clauses in group insurance policies purporting to shorten the statutory limitation period are not enforceable as the group policy is a not a "business agreement" for the purposes of the *Limitations Act, 2002*.

2. It is apparent from this case and a number of other recent decisions that the Court of Appeal is consistently applying *Hryniak* to grant deference to motions court judges in all but the most egregious situations.

3. Similarly, the Court of Appeal is consistently applying *Sattva Capital* to defer to motions court and trial judges in matters of contractual interpretation, absent a palpable and overriding error.

4. It is now clear that a motions court judge may go beyond merely dismissing motion for summary judgment and referring the matter for trial. The judge is entitled to make final decision in favour of the respondent on his own initiative, without the necessity of a cross-motion.

5. One wonders is this is part of an overall trend of the Ontario Court of Appeal to restrict appeals to matters of law and public importance and reduce its role of second-guessing trial judges.