"Appropriate Means" in the Discoverability Analysis: Timing is Everything

September 16, 2019

On August 30, 2019, the Ontario Superior Court of Justice handed down its decision in *Doyle Salewski Inc. v Scott* 2019 ONSC 5108.

Although this lengthy decision covers many topics, one of interest relates to the "appropriate means" part of the discoverability analysis when a Trustee in Bankruptcy brings a claim for unjust enrichment.

Background

Doyle Salewski Inc. (Salewski) was the Trustee in Bankruptcy of Golden Oaks Enterprises Inc. (Golden Oaks) and Jean-Claude Lacasse (Lacasse).

Golden Oaks was founded by Lacasse and operated in Ottawa between 2009 and 2013. Lacasse advertised Golden Oaks as a business that allowed individuals who did not qualify for a mortgage to buy a home. The company's operating name was "Rent2Own Canada". It focused on buying homes that were undervalued, fixing them up, and renting them to prospective buyers. Tenants would make a down payment and pay a slightly inflated rent, in return for a non-binding option to purchase the property three or five years later.

Golden Oaks was more realistically (and less publicly) promoted as a means to turn a quick profit. Individuals were invited to loan Golden Oaks money to fund its operations, acting as short-term lenders. In return for their advance of funds, they were given a promissory note entitling them to interest at a rate far greater than they could get otherwise.

From 2009 to May 2013, Golden Oaks issued 504 promissory notes to 153 investors. New investors were persuaded to make loans by early investors, who were paid commissions for each loan made by a lender whom they recruited. As Golden Oaks' financial situation worsened, the company issued more and more notes at effective interest rates in excess of 60% (above the criminal rate of interest).

Golden Oaks became a classic Ponzi scheme. The Rent2Own scheme was never viable. From March 1st, 2012 to February 28, 2013, only 3% of the monies deposited

into Golden Oaks' bank accounts were rental payments. Over 90% of the money collected came from investors. The only way Golden Oaks was able to stay on top of its mounting debt was to ensure new and existing investors advanced more funds.

In July 2013, the scheme collapsed. Golden Oaks and Lacasse went into receivership and a few weeks later, made assignments in bankruptcy. Salewski was appointed first as receiver and manager, and then as Trustee.

Salewski filed multiple reports with the court about its investigation into the bankruptcy, and on March 10, 2014, asked the court for the authority to commence litigation. On June 16, 2015, Kershman J. issued an interim decision on the show cause hearing, authorizing the Trustee to commence these actions. Salewski, in its capacity as Trustee of the Estate of Golden Oaks and Lacasse, began over 80 separate legal actions against various creditors, including 17 lawsuits against individuals and companies who received payments from Golden Oaks in 2012 and 2013. The 17 actions were heard together in a summary trial.

The Trustee's claims fell into two broad categories: first, it made statutory claims seeking repayment of alleged preferential payments and transfers under sections 95 and 96 of the *Bankruptcy and Insolvency Act* (BIA), and second it made unjust enrichment claims. This post will focus on the discoverability analysis of the unjust enrichment claims.

Unjust Enrichment

The Trustee was seeking to recover payments made by Golden Oak to the defendants, because it said they were made to the deprivation of the company and the enrichment of the defendants. The Trustee argued that prior to the bankruptcy, Golden Oaks could not have sued the defendants for unjust enrichment, because it was controlled by Lacasse, who was using it for a Ponzi scheme.

i) When did Knowledge of the Claim Arise?

Section 5(1)(a) of the *Limitations Act* provides that a claim is not discoverable until the person with the claim knew or ought to have known that:

1. An injury, loss or damage had occurred;
2. It was caused by a particular act or omission;
3. The act or omission was that of the person against whom the claim is made; and
4. A proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

Section 12 of the *Limitations Act* provides that:

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.

The Trustee in this case was deemed to have knowledge of the claims when the company did- or reasonably could have- discovered them. The court held that Golden Oaks was imputed to have known what Lacasse knew about the payments to the defendants, pursuant to the corporate identification doctrine, and therefore was aware of the claims prior to the receivership.

ii) Was a legal proceeding appropriate prior to the bankruptcy?

The court held that although Golden Oaks was deemed to have knowledge of the claims prior to the bankruptcy, the next part of the analysis looks at whether a proceeding was an appropriate means to seek to remedy the injury prior to the bankruptcy.

To date, there are two circumstances where s. 5(1)(a)(iv) of the *Limitations Act* has been held to delay discoverability. First is where a defendant has undertaken to repair a problem before an action is brought. Second is where a statutory or other alternative non-judicial process has been or must be invoked for the determination of a dispute.

In the recent case of *Ridel v Goldberg* (see previous post), the court held that where a director does not have absolute control of a company, and the shareholders are aware of what the director is doing, it is possible to bring a claim against the director prior to bankruptcy.

The court distinguished the present case, and said that a proceeding was not a legally appropriate means for Golden Oaks so long as it was solely controlled by Lacasse. Lacasse was the only corporate officer and director, and there was no evidence that anyone had the means to challenge his control of the company. Legal proceedings by Golden Oaks, against individuals to whom Lacasse had caused the company to pay interest and commission amounts, were not just inappropriate, but impossible.

The claims were therefore not properly discoverable by Golden Oaks until the receivership on July 9, 2013. The "appropriate means" step in the discoverability analysis means that knowledge of potential claims is not always enough to begin running the limitations period.

iii) When did a legal proceeding become appropriate?

Since the unjust enrichment claims were not discoverable by Golden Oaks until July 9, 2013, when Golden Oaks went into receivership, the Trustee brought many of the claims within the limitations period. However, several of the claims were brought between July 10-23, 2015, which would be presumptively time-barred.

The court ultimately held that it was not appropriate for the Trustee to bring the actions until June 16, 2015, when Justice Kershman issued an interim order on the show cause hearing. In the alternative, the actions were not the appropriate means until May 30, 2014, when the Trustee completed its analysis of the payments at issue in the actions.

The court concluded that this was a complex bankruptcy, made more difficult by a lack of records and proper accounting. This meant it was reasonable for the Trustee to wait until it had completed its investigation prior to look into beginning legal proceedings.

Therefore, the court held that the actions brought in June and July 2015 were not time-barred.

By

Christine Kucey

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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