Limitation Period Reconsidered For Failure to Appropriately Insure

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In the recently released decision of *Henry v Thyssenkrupp Elevator (Canada) Limited,*2018 ONSC 1659, the Superior Court provided some clarity regarding the appropriate limitation period for claims based on a party's failure to obtain the required insurance. The *Henry* decision runs contrary to the recently released *Brookstreet v Economical* decision by the same Court, which BLG previously reported on in our bulletin.

The underlying action in *Henry* dealt with a claim for injuries sustained by the plaintiff while exiting an elevator, which was alleged to have been improperly levelled at the floor. The elevator was located in the residential apartment building of the defendant owner, which was managed by the defendant property management company (the "principals"). The plaintiff sued the principals as well as the elevator maintenance contractor. While the maintenance contractor had obtained insurance coverage benefiting the property owner, it did not do so for the property manager, in breach of its contractual obligations pursuant to a maintenance agreement entered into amongst all the defendants.

The maintenance agreement required certificates of insurance to be delivered to the principals prior to the commencement of the term of the contract. It also required that the contractor bear the cost of any deductible in the insurance policy, which carried a self-retention limit of USD $250,000 ("SIR"). The existence of the SIR effectively meant that all insureds under the policy would have to self-insure up to the SIR limit before the insurance policy would apply. Accordingly, the threshold issue on the motion was whether the SIR was a deductible for the purposes of the policy. The Court found, in line with previous jurisprudence from the Ontario Court of Appeal, that the SIR was effectively a deductible, which the maintenance agreement dictated ought to be paid by the contractor.

Next, the Court dealt with the request by the principals for a declaration that the contractor was in breach of the maintenance contract by failing to add them both as additional insureds under the maintenance contractor's policy of insurance, and a declaration that it defend both principals and pay their defense costs incurred to date and ongoing. It was argued that these breaches of contract represented a claim for contribution and indemnity for which the limitation period did not begin to run until the

Statement of Claim had been served, pursuant to s. 18 of the *Limitations Act*. S.O. 2002 C. 24 (the “Limitations Act”).

In addressing the demand for a defense by the principals, a review of the pleadings led the Court to find the true nature of the claim to relate to elevator maintenance and, therefore, all claims fell within coverage under the contractor’s policy of insurance. However, the Court went on to consider whether the principals were time barred in requesting a defence from the contractor. The contractor, relying on the recent decision of *Brookstreet v Economical*, argued that the claim was time-barred, as the limitation period began to run when the principals ought to have reasonably inquired whether the contractor obtained appropriate coverage pursuant to the contract.

The Court rejected the contractor’s reliance on ***Brookstreet*** and held that the Ontario Court of Appeal’s decision in *Canaccord Corp v. Roscoe* *w*as dispositive of this issue. The Court noted that the policy was first provided to the principals in August 2016 (the underlying accident occurred in May 2014), despite the contract requiring delivery of a copy of the policy prior to the commencement of the term of the contract, which was dated May 1, 2010. Although the principals' claim was framed as a breach of contract claim, the Court found that the nature of the claim was still one of contribution and indemnity, and thus subject to section 18, and not section 5, of the Limitations Act. Citing the Court of Appeal’s decision in *Canaccord Corp.,*which was not considered in *Brookstreet*, the Court held that contribution and indemnity claims were governed by a two year limitation period notwithstanding the underlying legal theory, “whether the right to contribution and indemnity arises in respect of a tort or otherwise.” The Court held that the principals’ claim against the contractor was not time-barred and ordered that the contractor pay past and future defence costs.

This decision confirms that a breach of contract claim against the contractor, for failure to insure or failure to obtain appropriate coverage, is in essence, a claim for contribution and indemnity. The two-year limitation period for such a claim begins to run from the date of service of the Statement of Claim. Defendants asserting such claims ought to specifically plead breach of contract as part of their cross claim against their co-defendants, along with pleading reliance on the applicable insurance requirement and the defence and indemnity provisions of the contract.

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