Court of Appeal rejects “Appropriate Means” argument in finding that limitation period expired

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In *Nasr Hospitality Services Inc. v. Intact Insurance*, 2018 ONCA 725, the Ontario Court of Appeal considered the application of the “appropriate means” element of the discoverability test under section 5(1)(a)(iv) of the *Limitations Act, 2002*, B (the Act). A majority of the Court of Appeal panel rejected the motion judge’s finding that the date of the expiry of the limitation period was displaced because the plaintiff did not know that a proceeding was an appropriate means of seeking redress until several months after the loss.

Background

The plaintiff, Nasr Hospitality Services (Nasr), sought indemnification from the defendant, Intact Insurance (Intact), under a commercial insurance policy following a flood at its premises on January 31, 2012. Nasr notified Intact of the loss on the same day. On February 1, 2013, Nasr sought indemnification from Intact for the loss. Intact paid some expenses on the claim in the first few months and then advised Nasr on July 22, 2013, six months later, that there was no coverage because Nasr had violated the policy. Nasr issued a Statement of Claim on April 22, 2015, two years and two and a half months after the flood. Intact brought a summary judgment motion, arguing that Nasr’s action was statute-barred.

The motion judge dismissed Intact’s summary judgment motion. The motion judge assumed that Nasr knew on February 1, 2013, the day after it sought indemnification from Intact that the loss had occurred and that it had recourse through Intact. However, he found that Nasr did *not* know that a proceeding would be an “appropriate means” to remedy its loss until July 2013, when Intact formally denied its claim. Nasr was justified in waiting in light of the nature of the loss and the fact that Intact made some payments on the claim and did not initially repudiate its obligation to indemnify Nasr under the policy.

The motion judge found that the presumption that Nasr should have known about the claim on February 1, 2013 as per section 5(2) was rebutted and the action was not statute-barred by virtue of section 5(1)(a) of the Act, dealing with “appropriate means”. Section 5 of the Act provides that:

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.

Court of Appeal Decision

The Court of Appeal allowed Intact's appeal. Justice Brown, writing for the majority, found that both parties agreed that Nasr's cause of action for breach of the insurance contract arose on February 1, 2013, the day after Nasr had sought indemnification from Intact. Nasr also conceded that there was no issue of promissory estoppel — *i.e.* Intact did not promise through words or conduct that it would *not* rely on the limitation period. As a result, Justice Brown held that "the day on which Nasr knew or ought to have known an action was an appropriate means to remedy the loss [was] the day of the loss — namely February 1, 2013, the day after Nasr had sought indemnification for its loss from its insurer".

Justice Feldman dissented, stating that the "the triggering event for the discoverability analysis and for the two-year limitation to begin running is the date the insurer breached its obligation under the policy to indemnify the insured for the loss it suffered in the flood". The burden therefore rested with Intact, which did not include the policy in its motion record and had not established when its obligation to indemnify arose.

Significance of the Decision

This decision confirms that the "appropriate means" element in section 5(1)(a)(iv) is fact-specific and will only operate to displace the presumption in limited circumstances. In reaching this decision, the court emphasized the importance of *certainty* in limitation periods.

The Court of Appeal had recently dealt with the "appropriate means" test in a different set of circumstances in *Brown v. Woodstock (Police Services Board)*, 2018 ONCA 275*,* where it held that a civil action is not an appropriate means to seek a remedy while a criminal proceeding is pending. That decision is specific to claims against the police for assault/battery and the Court of Appeal seems to have confirmed in *Nasr Hospitality v. Intact* that there are limits on the "appropriate means" arguments under section 5.

Justice Feldman's dissent raises the question as to whether the result may have differed (or future cases could be distinguished) if the policy had been in the record and provided that the duty to indemnify only arose after a proof of loss was delivered.

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