



THE GR COURT DOCKET

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FAMILY LAW ACT REMEDY TRUMPS PROFESSIONAL LIABILITY CLAIM: CLAIM RELATED TO PROBLEMS WITH DOMESTIC CONTRACT RULED AN ABUSE OF PROCESS

By Stephen Thiele

In the recent case of *Sutton v. Balinsky*¹, Gardiner Roberts LLP lawyers were successful in obtaining the dismissal of a negligence action against a family law lawyer who allegedly had provided inadequate advice with respect to the terms of a marriage contract.

In dismissing the action, the court wholly agreed with our arguments that the plaintiff's claim was started outside of the general two-year limitation period found in the *Limitations Act, 2002*² and was an abuse of process.

With respect to abuse of process, it was contended that the plaintiff was obligated under the provisions of the *Family Law Act*³ (the "FLA") to commence a claim against her husband to set aside their marriage contract rather than to bring an action against her lawyer who had no recourse whatsoever to bring a third party claim in contribution and indemnity against the husband.

Relevant Facts

The facts disclosed that the marriage contract at issue was entered into on May 4, 2007 and that the plaintiff's claim against her former lawyer and other professional advisors was commenced more than 5 years later.

The plaintiff argued that the marriage contract was one-sided and that it failed in significant

ways to protect her rights as a spouse.

The plaintiff complained that when she signed the contract she did not receive adequate disclosure of material assets from her husband, did not adequately understand the nature and consequences of the agreement, and did not understand her rights to support and equalization of property under the FLA. In essence, the plaintiff submitted the marriage contract was an improvident bargain that adversely affected her rights when, to the surprise of her husband, she separated from him two days after the contract was signed.

The marriage contract was the culmination of the plaintiff's growing disenchantment with her marriage, and her lack of financial self-sufficiency and independence. As well, she was interested in completely withdrawing from her previous involvement with the successful family business she had helped her husband to build.

At the time of signing the contract, the plaintiff claimed that she understood its value to be nearly \$10.5 million, but that she discovered in 2012 that the present (2007) value of the agreement was only approximately \$4.7 million as a result of the impact of taxes or interest. Accordingly, the plaintiff felt that she had been given, among other things, negligent legal advice.

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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¹ 2015 ONSC 30810

² S.O. 2002, c. 24, Sched. B, as amended

³ R.S.O. 1990, c. F.3, as amended



Yet to maintain her claim in negligence against the lawyer, the plaintiff on these facts was required to prove that the contract's alleged inadequacies had not been and could not have been discovered by her until at least two years prior to the date she commenced her action.

The plaintiff submitted that she only discovered her action in 2012 when she received information concerning the differences in value and a subsequent opinion that was critical of her lawyer's work. Accordingly, the plaintiff argued that she was well within the two-year limitation period.

But evidence demonstrated that the plaintiff was sophisticated. She possessed a very sound general understanding of the family's finances and business, and her husband's potential resources. In addition, the plaintiff had been advised by her lawyer about certain tax consequences that impacted the terms of the marriage contract prior to signing it.

Moreover shortly after concluding the contract and separating from her husband, the plaintiff made very material complaints about the operation of the contract, which led to negotiations and an amending agreement.

Notes made by the plaintiff to a July 25, 2007 handwritten memo signed by the parties demonstrated that the plaintiff understood concepts of present value and time value which formed the basis of her 2012 action.

Limitation period findings

Pursuant to s. 4 of the *Limitations Act, 2002* no proceeding may be commenced beyond the second anniversary of the date the "claim" is discovered.

The court reasoned that since the plaintiff's claim existed at the time the marriage contract was signed, the plaintiff was obligated to prove that she had been unable

to discover her claim until September 27, 2010 (i.e. two years prior to the date she commenced her action).⁵

The plaintiff was unable to meet this burden.

The court concluded that on May 4, 2007, the plaintiff clearly knew that more than half of the payments she would receive under the contract from the family business would be subject to considerable tax and that deferred payments thereunder were worth considerably less in value than immediate ones.⁴

A contention that her claim was only discovered when she received an advisor's report in February 2012 was found to represent an *ex post facto* rationalization of the plaintiff's own inaction to commence a claim within the requisite two-year limitation period.

Although the plaintiff argued that she could not have discovered the claim against her former lawyer until she received appropriate legal advice in 2012, the court held that obtaining legal advice about possible claims against professionals was certainly not the test when the plaintiff knew or had ready access to all of the facts necessary to seek that advice but took no action.⁵

Abuse of process finding

While the judge's ruling on the limitation issue was enough to dismiss the plaintiff's action, he thoroughly considered whether the plaintiff's claim also constituted an abuse of process.

The judge noted that the plaintiff's claim was founded on the allegation that she had not received adequate financial disclosure from her husband and that her lawyer, among others, had failed to ensure that she adequately understood the nature of the

4. Para. 136

5. Para. 155



obligations contained in the marriage contract or its consequences upon her.

The judge further stated that the plaintiff's claim for damages were necessarily tied to the difference between what she agreed to receive under the contract and what she should have received under a domestic contract that was not tainted by the two defects.

Under s. 56(4) of the FLA, the court has authority to set aside a marriage contract on the same grounds complained about by the plaintiff in her action against the lawyer. Such an action, however, would be brought against the husband.

The judge concluded that given the provisions of the FLA, the plaintiff's action, which if successful would result in a variation of the marriage contract through the device of damages, was fundamentally unjust and an abuse of process.⁶

The judge explained that the plaintiff's claim was contrary to public policy as well. If the plaintiff's action was permitted to proceed and was successful it would essentially permit all spouses disgruntled with the amount of support or equalization payments agreed to under a domestic contract to treat their lawyers as *de facto* guarantors of their rights in circumstances where the lawyers have none of the rights of guarantors to seek contribution and indemnity from the party upon whom the obligation primarily lies.⁷

The plaintiff was not permitted to accomplish indirectly what she should have chosen to do directly under the FLA by bringing an application against her husband to challenge the marriage contract for alleged non-disclosure of relevant financial information. Based on the Ontario Court of Appeal decision in *Cunningham v. Moran*⁸, the judge accepted that the provisions of the FLA

provided a procedural code with respect to family law disputes.

He concluded:

There is no election of remedies between civil and statutory remedies where FLA rights are concerned. If the plaintiff has a claim under the FLA, she must pursue it directly under the FLA and not indirectly via a negligence or similar action against her lawyer or financial advisor, particularly where the consequences of the very thing she complains of – lack of disclosure and proper understanding – have been considered and provided for by the legislator.⁹

The plaintiff has appealed this judgment.

Defendant's lawyers

The defendant lawyer was represented by Gavin Tighe, certified specialist in civil litigation, and Jane Sirdevan.

They were assisted in the preparation of the factum filed in support of the motion to dismiss the plaintiff's claim by Stephen Thiele, Director of Legal Research.

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6. Para. 174

7. Para. 179

8. 2011 ONCA 476

9. Sutton v. Balinsky, at para. 177

