CITATION: Acs et al. v. Love et al., 2023 ONSC 2357
COURT FILE NO.: CV-22-00676422-00ES
DATE: 20230419

2023 ONSC 2357 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

ESTATES LIST

BETWEEN:	)	
Catherine Acs, in her capacity as Trustee of the Hunt Family Growth Equity Trust, Stuart Hunt, in his capacity as Trustee of the Hunt Family Growth Equity Trust, Pamela Sarracini, in her capacity as Trustee of the Hunt Family Growth Equity Trust and David Hunt, by his Litigation Guardians Catherine Acs and Stuart Hunt.	)	*Megan Shortreed* and *Michael Fenrick*, for the Plaintiffs
Plaintiffs (Responding Parties to the Motion)	)	
– and –	)	
James B. Love, Love & Whalen, Legacy Private Trust and BDO Canada LLP	)	*Cynthia Spry, Brendan Monahan* and *Aaron Gold*, for the Defendants, James B. Love, Love & Whalen and Legacy Private Trust
Defendants (Moving Parties)	)	*Norm Emblem* for the Defendant, BDO Canada LLP
	)	**HEARD:** April 5, 2023

C. GILMORE, J.

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

Introduction

[1] The defendants, James B. Love, Love & Whalen and Legacy Private Trust (the "Love defendants" or "the defendants") bring this motion for summary judgment to dismiss the

plaintiffs' action as statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The basis of the relief sought is that the within action was commenced more than two years after the plaintiffs' then lawyer, Allen Bronstein ("Mr. Bronstein") of Torkin Manes LLP discovered the issues alleged in the within claim.

2023 ONSC 2357 (CanLII)

[2] In this action the plaintiffs claim damages in negligence, breach of contract and breach of trust in relation to legal advice and services provided by the defendant Mr. Love during the establishment of the Hunt Family Growth Equity Trust ("the Trust") in 2004.

[3] The plaintiffs allege that the Trust was not properly established and as a result, s. 75(2) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), may apply. If s. 75(2) applies, the disposition of any property during the life of Mr. David Hunt (the settlor of the Trust) by deemed disposition or otherwise would result in significant tax consequences.

[4] According to the plaintiffs, Mr. Love has always maintained that that there was no issue with the application of s. 75(2) to the Trust. The defendant BDO Canada LLP ("BDO") accepted his position and took no steps to bring any concerns to the family's attention for a decade. The first time the plaintiffs became aware of a potential issue with Mr. Love's advice was at a meeting with their professional advisors on February 22, 2016. At that point, the possibility of a claim against Mr. Love was mere speculation and further investigation was required.

[5] After some investigation, BDO prepared a memo dated February 24, 2017, which concluded that there was an issue with Mr. Love's advice and a risk that s. 75(2) could apply to the Trust. The plaintiffs claim that the limitation period therefore began to run on February 24, 2017. Their claim was issued on February 21, 2018, well within the two-year limitation period. The information which the plaintiffs had prior to February 24, 2017 was insufficient to ground the required knowledge to discover their claim.

[6] The Love defendants deny that s. 75(2) applies and in any event assert that the claim is statute barred. Their position is that a conversation between Dianne McMullen of BDO ("Ms. McMullen") and Mr. Bronstein on December 31, 2015, and her follow up email on January 4, 2016 containing a memo from 2005 ("the 2005 Memo") was sufficient to attribute knowledge of the potential tax issue to Mr. Bronstein. Such knowledge must be imputed to the plaintiffs as of December 31, 2015 or at the latest January 4, 2016.

[7] Further, the Love defendants contend that it is not a defence to the claim that the plaintiffs did not learn of the issue until the family meeting held on February 22, 2016, as they are deemed to have known of the 2005 Memo by latest January 4, 2016. As the claim was not issued until February 21, 2018, the action is statute-barred.

[8] For the reasons set out below, the motion is dismissed. The claim was issued well within the limitation period. As discussed below, the 2005 Memo briefly summarizing the conversation between Mr. Love and Ms. McMullen was insufficient to ground a plausible inference of liability. The issue was complex and required further professional investigation The raising of the "concern" that s. 75(2) "could" apply and any

consequential suspicion of possible liability on the part of Mr. Love in this case would only trigger a due diligence obligation given the technical nature of the subject matter of the potential claim. Until that diligence was undertaken to the point that a plausible inference of liability could be arrived at, the limitation period did not commence running.

The Background Facts

[9] The plaintiff David Hunt ("Mr. Hunt") is a party under a disability. His Litigation Guardians are two of his children, Catherine Acs ("Catherine") and Stuart Hunt ("Stuart"). Catherine and Stuart are also plaintiffs in the action along with their sister Pamela Sarracini. They are the current trustees of the Trust.

[10] Mr. Love is a tax, trust and estates lawyer licensed to practice in Ontario. He provided the Hunt family with estate planning and tax advice. Mr. Love is a partner with the defendant Love & Whalen. Mr. Love was also the President and CEO of the defendant Legacy Private Trust ("LPT"), a federally regulated trust company. LPT was the sole trustee of the Trust until December 31, 2015 when it was replaced by the current trustees.

[11] BDO is a firm of chartered accountants who provided tax and accounting advice to the Hunt family and the Trust. BDO has taken no position on the summary judgment motion.

[12] The Trust was settled on May 31, 2004 as part of Mr. Hunt's Estate Freeze for which Mr. Love gave legal advice. The plaintiffs allege that Mr. Love advised Mr. Hunt to establish the Trust with Mr. Hunt personally as the settlor. Mr. Hunt and the Hunt family retained Ms. McMullan to provide tax advice and accounting advice in relation to the Trust.

[13] On January 31, 2005 Ms. McMullan wrote the 2005 Memo to her file setting out her discussion with Mr. Love and her concerns about the possible application of s. 75(2) to the Trust. The 2005 Memo also states that Mr. Love's opinion was that s. 75(2) would not apply to the Trust. If s. 75(2) applies to the Trust it will result in an income tax liability of approximately $10M. The plaintiffs allege that a reasonably prudent solicitor would have given different advice in order to avoid this risk.

[14] In 2015 the plaintiffs engaged Torkin Manes LLP to assist them with the change of various trusts including the within Trust from LPT to other trustees. Mr. Bronstein is the Hunt family's corporate solicitor. He has a generalist corporate practice.

[15] On November 18, 2015 LPT resigned as the sole trustee of the Trust. This was required as the original Trust did not contain a provision authorizing the removal of LPT as trustee. Torkin Manes negotiated and drafted (with Mr. Love) the documents required to effect LPT's removal. Mr. Bronstein engaged Ms. Risa Awerbuck ("Ms. Awerbuck"), a trusts and estates lawyer at Torkin Manes to assist him. The intention was to move forward quickly with LPT's removal as the Trust's tax year-end was December 31.

[16] By December 29, 2015, the required documents were mostly ready including a release of LPT as trustee. As the release did not include a release of Mr. Love, Love & Whalen or LPT with respect to the establishment of the Trust, due diligence was undertaken by the

2023 ONSC 2357 (CanLII)

plaintiffs with BDO with respect to the administration of the Trust during the period that LPT had acted as trustee.

[17] As part of the due diligence process, Mr. Bronstein wrote to his clients on December 30, 2015 suggesting that they contact Ms. McMullen (a tax partner at BDO) to confirm there were no issues with the Trust's tax filings or previous tax positions that could create a risk to the new trustees. Catherine wrote to Ms. McMullen that same day to confirm that she had no such reservations.

[18] On December 31, 2015 Mr. Bronstein spoke to Ms. McMullen by phone. Ms. McMullen recalled that there had been an issue in 2005 when the Trust was established but could not recall the exact issue. She confirmed she would send a copy of the 2005 Memo to Mr. Bronstein. A copy of the 2005 Memo was sent to Mr. Bronstein on January 4, 2016. Mr. Bronstein reported to the Trustees about his call with Ms. McMullen later that same day but the contents of the 2005 Memo were not discussed with them.

[19] One of the issues on this motion is the content of the conversation on December 31, 2015, between Ms. McMullen and Mr. Bronstein and whether that call and the follow up email on January 4, 2016 represented a form of disagreement by Ms. McMullen with respect to Mr. Love's view that there was no tax issue at play or whether she had no opinion about Mr. Love's advice. Mr. Bronstein admitted that Ms. McMullen told him that she disagreed with Mr. Love's analysis. Ms. McMullen's evidence was that she took no position on the issue, she simply raised it and deferred to Mr. Love's view as an estates and trust specialist. The plaintiffs did not see the 2005 Memo until February 22, 2016 when a family meeting was held.

[20] On BDO's advice, further investigation was undertaken with respect to the s. 75(2) tax issue. At a meeting with the plaintiffs on February 24, 2017, BDO provided its written opinion that there was a risk that s. 75(2) would apply to the Trust because of the way Mr. Love had drafted the original Trust documents.

[21] The plaintiffs' claim was issued on February 21, 2018. The defendants claim that the 2005 Memo does not allege any material facts that would not have been known to Torkin Manes by December 31, 2015 or January 4, 2016 at the latest. The plaintiffs' claim was therefore issued outside the two-year limitation period under the *Limitations Act*.

[22] In contrast, the plaintiffs claim that the earliest date by which they could have reasonably discovered their claim was the date of the family meeting on February 22, 2016. Further, the claim would not have been crystallized until February 24, 2017 when BDO provided its written opinion. Either date is within the two-year limitation period.

The Positions of the Parties

The Moving Party Defendants

[23] The crux of the plaintiffs' claim lies in paragraph 24 of their Statement of Claim which sets out as follows:

2023 ONSC 2357 (CanLII)

24. There was a prudent way for Mr. Love to achieve Mr. Hunt's intentions when preparing the Trust deed and providing Mr. Hunt with professional advice -- one which a reasonably prudent tax, trusts or estates solicitor would have recommended to their client in 2004. Had Mr. Love advised Mr. Hunt to have a third party settle the Trust, Instead of Mr. Hunt himself, s. 75(2) of the ITA (and. by extension. ss. 107(2.1) and (4.1) of the ITA) would not apply to the Trust, and the assets could be rolled over during Mr. Hunt's lifetime to the beneficiaries of his choice at any time on a tax deferred basis. For this reason, the practice of a reasonably prudent solicitor at the time (as it remains today) was and is to advise that a third party should settle the trust.

[24] The issues raised in paragraph 24 of the Statement of Claim were the same issues raised in the 2005 Memo. BDO's professional opinion letter dated February 24, 2017 stated the same concerns. There was no new information available to the plaintiffs between Mr. Bronstein's receipt of the 2005 Memo on January 4, 2016 and any future events such as the family meeting in February 2016, the request for rectification or the February 2017 opinion from BDO. None of those events serve to toll the limitation period. Mr. Bronstein's knowledge of the issues in the 2005 Memo must be imputed to the plaintiffs as of January 4, 2016.

[25] In 2015 the plaintiffs retained Torkin Manes to change the Trustees of LPT to the plaintiff Trustees In exchange the defendants sought a release for any claims against the Trusts, Mr. Love and LPT.

[26] Many of the salient facts in the case arise in relation to the due diligence conducted by Mr. Bronstein in relation to the release sought by the defendants. In furtherance of the due diligence, Mr. Bronstein telephoned Ms. McMullen on December 31, 2015 and advised her of the change of Trustees. He requested that she inform him of whether there was anything he should be aware of in relation to the Trust. Specifically, he was concerned about tax filings or aggressive tax positions previously taken by the Trust.

[27] Mr. Bronstein took notes during the call. He noted that Ms. McMullen told him that there was an issue with the set up of the Trust. She further noted that there would be tax consequences as a result, that she disagreed with Mr. Love's analysis regarding s. 75(2), and that she had written a memo about this in 2005 which she would provide to Mr. Bronstein when she was back in the office after the holidays.

[28] A transcription of Mr. Bronstein's notes taken in relation to the December 31, 2015 call is set out below:

TCW (telephone call with) D. McMullen - Dec. 31, 2015:

Does not affect routine yearly filings. Only issue - on set up of trust - tax consequences on death of David Hunt - disagreed with Jim's analysis - she will send us a copy of her memo next week. [Redacted] Regular filings - routine; no aggressive positions taken, not aware of any other issues

Reported to family on December 31 conference call.

2023 ONSC 2357 (CanLII)

[29] As promised, on January 4, 2016 Ms. McMullen sent Mr. Bronstein a copy of the January 31, 2005 Memo. The contents of the 2005 Memo are set out below:

> The Hunt Family Growth Equity Trust was established on May 31, 2004. The settlor is David Hunt, the trustee is the Legacy Private Trust and the beneficiaries are the children, grandchildren, etc. of David and Jean Hunt. This trust is not an alter-ego trust.
>
> David settled the trust with $3 cash. The $3 was used to purchase the Class 6 shares of David Hunt Farms Ltd., Bailey-Hunt Ltd. and Glueckler Holdings Limited. The trust is discretionary before David's death and at the division date the assets will go as per David Hunt's will. **On January 27, 2005, I raised a concern with Jim Love that Subsection 75(2) could apply to the trust based on technical interpretation 2002-016535. This would have implications in terms of trying to distribute the shares prior to a deemed disposition in 21 years as subsection 107(4.1) would preclude a distribution at tax cost. When I raised the issue with Jim, he indicated that the technical would not apply to this trust because the technical talks about a general power of distribution exercisable by will whereas Jim indicated that a specific power was included in this trust.** When I asked Jim to elaborate on the difference, he indicated that he could not do so in a short period of time as this was a complex legal issue. He confirmed that it was his opinion that subsection 75(2) would not apply to the Hunt Family Growth Equity Trust. This is unlikely to have any implications until the 21-year deemed disposition rule applies or the assets are distributed from the trust [emphasis added].

[30] Mr. Bronstein admits receiving a copy of the 2005 Memo and reviewing it. However, he did not share a copy of the 2005 Memo with the plaintiffs. The first time they saw the 2005 Memo and learned of the tax issue was at the family meeting on February 22, 2016. The Moving Parties submit that Mr. Bronstein's knowledge gained from the December 31, 2015 call and the 2005 Memo must be imputed to the plaintiffs at the time the memo was received by Mr. Bronstein.

[31] While Mr. Bronstein admitted that he understood that Ms. McMullen did not agree with Mr. Love's position on the implications of s. 75(2), he claims that he did not report the issue to the plaintiffs because of Mr. Love's legal opinion which was that the section did not apply.

[32] The Moving Parties claim that the 2005 Memo raises exactly the same issue that is now claimed by the plaintiffs, that is, that should s. 75(2) apply to the Trust, there would be implications in terms of trying to distribute the shares without incurring significant tax liability. The Moving Parties submit that the Statement of Claim does not allege any material facts that would not have been known to the plaintiffs' lawyers by December 31, 2015 or January 4, 2016 by way of the telephone call, the 2005 Memo or by further due diligence.

2023 ONSC 2357 (CanLII)

[33] The *Limitations Act* codifies the common law rule that the knowledge of an agent is imputed to the principal for the purpose of calculating limitation periods where the agent has a duty to communicate knowledge of relevant matters to the principal. Clearly Mr. Bronstein had such a duty in this case. Mr. Bronstein's knowledge must be imputed to the plaintiffs, meaning the claim must have been commenced at least two years from January 4, 2016. It was not commenced until February 21, 2018.

[34] The plaintiffs are precluded from arguing that the Torkin Manes retainer was limited or that Mr. Bronstein was neither a tax or a trust expert and therefore did not have the necessary expertise to appreciate the significance of the 2005 Memo. The Moving Parties submit that this argument must fail as there was no written retainer agreement that would have limited Mr. Bronstein's mandate. In any event, Mr. Bronstein engaged Ms. Awerbuck, a partner at Torkin Manes who assisted him in negotiating and drafting the release documents. She is listed on the Torkin Manes website as being part of their tax group.

[35] In terms of discoverability, the Moving Parties argue that it was not necessary for Mr. Bronstein to have had knowledge of every constituent element of a potential claim or that the claim would likely succeed, it is only required that he have knowledge of a potential claim. Here, a plausible inference of liability was known to Mr. Bronstein on December 31, 2015 or at the latest by January 4, 2016. The 2005 Memo contains all of the relevant information to ground a claim. The contents of the plaintiffs' claim contains identical allegations.

[36] The plaintiffs' position is that they could not have discovered the claim until February 24, 2017 when they received a written opinion from BDO which concluded that there was a risk that s. 75(2) could apply to the Trust. The Moving Parties submit that this position should be rejected because the 2017 opinion is substantially the same as the 2005 Memo. It repeats the same information the plaintiffs already had in the 2005 Memo and thus does not change the date of discoverability.

[37] Further, the Moving Parties point out that in January 2017 (before the February 24, 2017 written opinion), the plaintiffs had already begun to mitigate their damages by undertaking a freeze of the fair market value of the shares. The freeze must therefore have been pursued based on the information in the 2005 Memo as the February 2017 opinion had not yet been received.

[38] The plaintiffs' further argument that the limitation period was tolled until Mr. Love declined to participate in a rectification of the Trust must also be rejected.

[39] Rectification was never available to the plaintiffs because Mr. Hunt had instructed Mr. Love that he did not want to use an accommodation settlor. For rectification to be pursued would have meant that Mr. Love would have had to swear a false affidavit claiming that an accommodation settlor was intended from the beginning.

2023 ONSC 2357 (CanLII)

[40] Further, in law, rectification is only available where an agreement between parties is not correctly recorded in the instrument that recorded their agreement. It is not available to undo unanticipated effects of an agreement.

[41] The plaintiffs never had any indication that Mr. Love would agree to a rectification and cannot now say that the limitation period only began when Mr. Love gave an unequivocal refusal to participate in rectification.

The Position of the Plaintiffs

[42] The plaintiffs agree that in 2015 the plaintiffs engaged Mr. Bronstein of Torkin Manes to oversee a change in the Trustees of the Trust from LPT to the current trustee plaintiffs. Mr. Bronstein was the family solicitor. He was not a tax or estates specialist. He was a generalist corporate advisor. Mr. Bronstein engaged another partner at Torkin Manes, Ms. Awerbuck to assist him.

[43] The plaintiffs deny that Mr. Bronstein's retainer included a broad due diligence mandate to examine the structure or establishment of the Trust. Mr. Bronstein's focus was on due diligence in relation to the administration of LPT during the time it had acted as Trustee as a release was sought by LPT relating to any claims arising out of the administration of the Trust.

[44] Catherine contacted Ms. McMullen and Mr. Barltrop, two partners at BDO who were familiar with LPT. Mr. Barltrop had no concerns with the reporting or the performance of funds held by LPT during the relevant period. Mr. Bronstein emailed his clients on December 30, 2015 and suggested they reach out to Ms. McMullen as follows:

> ... I suggest that someone from the family reach out to BDO/Dianne McMullen to confirm that they are not aware of any tax issues with the tax filings by the trusts or any aggressive tax positions taken by the trusts that might pose a risk to the new trustees - i.e. are there any areas that they think LPT has taken an aggressive tax filing position.

[45] Catherine wrote to Ms. McMullen the same day to request the assurances sought by Mr. Bronstein. Ms. McMullen responded to her on January 4, 2016 confirming she had no concerns with respect to the issues raised in the December 30, 2015 email. She did not attach a copy of the 2005 Memo to her email to Catherine.

[46] On December 31, 2015 Mr. Bronstein called Ms. McMullen. His notes taken from that call are transcribed above. On January 4, 2016 Mr. Bronstein received the 2005 Memo from Ms. McMullen. His evidence was that, as he was not a tax or estates specialist, he had no reason to doubt Mr. Love's opinion that there were no issues with the establishment of the Trust. Further, Ms. McMullen did not tell Mr. Bronstein in their December 31, 2015 call or in her January 4, 2016 email that she had any doubts about Mr. Love's opinion. Her January 4, 2016 email simply attached a copy of the 2005 Memo. She did not provide any further context or commentary about the 2005 Memo.

2023 ONSC 2357 (CanLII)

2023 ONSC 2357 (CanLII)

[47] Mr. Bronstein's evidence was that during the December 31, 2015 call, Ms. McMullen vaguely recalled disagreeing with Mr. Love about an issue related to the set up of the Trust and that she had written a memo about it. She did not indicate that it remained her view that she disagreed with Mr. Love. Her evidence on examination was that she had simply raised the issue but did not have an opinion as to whether s. 75(2) applied. There is no evidence that Ms. McMullen followed up with Mr. Love after their conversation about the Memo in 2005 nor did she perform any further due diligence. She accepted Mr. Love's opinion as a legal professional.

[48] Mr. Bronstein does not recall or have any record of a discussion with Ms. Awerbuck about a potential tax issue nor does he recall sending her the 2005 Memo. Mr. Bronstein did not send the 2005 Memo to his clients. The first time his clients saw the 2005 Memo was at the February 22, 2016 family meeting.

[49] The February 22, 2016 meeting was scheduled for the purpose of discussing family business matters. BDO attended the meeting and brought a binder of documents. One of those documents was the 2005 Memo. For the first time, BDO advised the plaintiffs of the issue raised in the memo and Mr. Love's opinion regarding the tax liability. Ms. McMullen's evidence was that her position continued to be that she did not have an opinion on the issue, however, she agreed that it was an issue that required further investigation.

[50] As a result, Torkin Manes and BDO began to investigate whether there was a tax issue related to LPT and what could be done if such issues existed. Those investigations took a year.

[51] In July 2016 Torkin Manes requested that BDO explore the possibility of gaining Mr. Love's cooperation to rectify the LPT. A meeting took place with Mr. Love, Ms. McMullen and another representative of BDO on October 4, 2016. Mr. Love refused to participate in the rectification of the Trust and maintained his position that the concerns raised in the 2005 Memo were unfounded.

[52] Given Mr. Love's refusal to participate in rectification, BDO and Torkin Manes continued with their investigation. On February 24, 2017, BDO provided a written opinion confirming the risk that s. 75(2) would apply to LPT based on the manner in which the Trust had been established.

[53] The opinion is lengthy and detailed, however, a summary of both the potential tax consequences and the conclusion of BDO is set out below:

Potential Tax liability

> The potential of 107(4.1) will result in an income tax liability on the 21st anniversary of the Trust. Without the ability to roll the trust property on a tax deferred basis to the capital beneficiaries the trust will be required to pay tax on the deemed disposition. The current adjusted cost base of the trust property is $3. With an estimate FMV of $40 million the potential tax liability is $10.5 Million.

> In our professional opinion CRA could apply 75(2). We would recommend contacting legal counsel and Legacy Trust to determine if a course of action should be done, if any. If you have any questions, please do not hesitate to contact Shaun Power at 905-633-4904 or spower@bdo.ca.

2023 ONSC 2357 (CanLII)

[54] The plaintiff's position is that the earliest date on which the limitation period began to run was February 22, 2016 when the decision to undertake further investigation of the issue arose. Prior to that, the plaintiffs lacked the requisite knowledge and information from professional advisors to substantiate their claim. As the claim was commenced on February 21, 2018, it is not outside the limitation period.

[55] The information given to the plaintiffs at the February 22, 2016 meeting raised a mere suspicion which led to the requisite due diligence and investigation into the possible claim. Simply raising the issue, as Ms. McMullen did, is insufficient where there is a conflicting professional opinion and confirmation is needed that the professional is or may be wrong.

[56] Further, while the plaintiffs do not disagree that rules of discoverability in the *Limitations Act* impute knowledge by an agent to its principal, the abilities of the agent are not irrelevant. Mr. Bronstein was not a tax nor an estates expert. There was no reason for him not to accept Mr. Love's opinion as an estates and trust specialist. The discussion and issues raised in the 2017 opinion letter from BDO were far beyond Mr. Bronstein's expertise.

[57] Further, the Torkin Manes mandate cannot be ignored. They were not retained to analyse the structure of the Trust or whether there were any flaws in that structure. They were retained to ensure that tax filings were in order and that no previous tax positions taken by the Trust would create future problems for the new Trustees. These enquiries related to the release requested by Mr. Love on behalf of LPT. As such, the December 31, 2015 call to Ms. McMullen was not for tax advice. It was related solely to the narrow issues described above.

[58] The fact that Ms. McMullen recalled an historic issue going back to 2005 in the course of her call with Mr. Bronstein did not change her view that there were no concerns. If she had any ongoing disagreement with Mr. Love or felt strongly about the s. 75(2) issue, surely she would have raised it at that time. Indeed the 2005 Memo remained in her file for over a decade without a concern being raised.

Legal Issues and Analysis

1. The Law on Summary Judgment

[59] The parties agree that summary judgment is an appropriate procedure with which to deal with this single-issue motion – is the plaintiffs' action time barred by the *Limitations Act*? The Love defendants therefore have the onus of establishing that the limitations defence does not raise a genuine issue requiring a trial.

[60] The two-part test in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 is well known and applies in this case. First, this Court is able to reach a fair and just determination on the within motion. Such a determination can be made based on an ample record which includes affidavit evidence and the transcript of out of court examinations. The expansive record is sufficient to allow this Court to make the necessary findings of fact and apply the law to the facts. As such, summary judgment is an efficient and expeditious way to achieve a fair result without the necessity of a trial.

2023 ONSC 2357 (CanLII)

2. Is the Plaintiffs' Claim Time Barred?

[61] Section 4 of the *Limitations Act* requires that a proceeding must be commenced within two years of the day the claim is discovered. With respect to discovery, s. 5 of the *Limitations Act* sets out as follows:

> **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). 2002, c. 24, Sched. B, s. 5 (1).

[62] The context of the term "discovery" has been interpreted extensively in the courts. The findings of those cases may be summarized as follows:

a. A limitation period is triggered by reasonable discovery as opposed to the mere possibility of discovery;

b. A claim is discovered when a plaintiff has actual or constructive knowledge of the material facts upon which a plausible inference of liability on the part of the defendant can be drawn;

c. The degree of knowledge required to reach the threshold of a plausible inference of liability is more than mere speculation or speculation but short of certainty. Suspicion of a claim may trigger a due diligence obligation.

d. Where the claim is technical in nature, expert advice may be needed before a reasonable person would be aware that a claim would be necessary to remedy the perceived wrong.

[63] In *Van Allen v. Vos*, 2014 ONCA 552, 121 O.R. (3d) 72, the Court of Appeal dealt with a claim arising out of a misallocation of profits in a dental practice. The Appellant appealed the trial judge's decision requiring him to pay the Respondent over $100,000 resulting from the misallocation. He claimed that the Respondent should have issued his claim prior to 2009 and the claim was therefore time barred.

[64] The Court held at paras. 33 and 34 that the Respondent could not have reasonably known of the misallocation and that the submission that he should have hired his accountant to review the relevant documents prior to the error being discovered was rejected. The Court made the following observation regarding discoverability:

> [34] That the respondent did not know and could not have reasonably known of the misallocation is fatal to the appellant's first three arguments. On the issue of the limitation period, the appellant submits, as he did at trial, that the respondent would have discovered the error had he retained his accountant to review the documentation supporting the financial statements. The observation, even if true, is immaterial. It is reasonable discoverability -- rather than the mere possibility of discovery -- that triggers a limitation period: *Lawless v. Anderson*, 2011 ONCA 102, at para. 22. To preclude the respondent from recovery because of his failure to review the underlying financial statements would, in the circumstances of this case, hold him to an unreasonably high standard.

[65] The leading case on discoverability is *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613. In that case the Province of New Brunswick commenced a claim against Grant Thornton LLP as the auditor of certain financial statements. The financial statements related to a company who sought loan guarantees from the Province for a $50M loan. The Province gave the guarantees based on the financial statements as audited by Grant Thornton LLP. Within four months, the company ran out of working capital and the bank called on the Province to pay out on the guarantees. The Province commenced a claim in negligence against Grant Thornton LLP as the auditors.

[66] Grant Thornton LLP brought a motion for summary judgment to have the claim dismissed as time barred under the New Brunswick *Limitations Act.* The Province's action was struck. The motion's judge decision was set aside on appeal. On appeal to the Supreme Court of Canada, the motion judge's opinion was restored, and the Court engaged in an extensive discussion of discoverability principles at paras. 42-45 of the decision.

[67] That relevant discussion is set out below [my emphasis]:

> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: **a claim is discovered**

2023 ONSC 2357 (CanLII)

when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 **of the** LAA**.**

[43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

[45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. Applying the law to the facts of this case, the question must be asked as to whether Mr. Bronstein had actual or constructive knowledge of the facts upon which a "plausible inference of liability on the defendant's part can be drawn."

[68] What did Mr. Bronstein know on December 31, 2015 and January 4, 2016? He knew of a possible disagreement on a tax issue between Mr. Love and Ms. McMullen, an issue which was not part of his mandate with respect to the Trustee changeover. His mandate related to ensuring that previous tax filings had been made on time and that tax positions taken by LPT were not going to create future problems for the new Trustees.

[69] It was not a broad mandate which included the entire history of the Trust or its structure, nor did it include tax advice. Mr. Bronstein was satisfied from his conversation with

2023 ONSC 2357 (CanLII)

Ms. McMullen and his exchange of emails with her that tax filings were up to date and that no previous tax positions taken by the Trust would be problematic in the future. He had the information he needed to satisfy his mandate.

[70] I do not think it can be the case that a conversation in which Ms. McMullen stated that she recalled an issue which arose over 10 years prior could ground the necessary plausible inference of liability on the part of the defendants. Further, the context of that conversation and the subsequent 2005 Memo was that Ms. McMullen simply referred to an issue, forwarded the memo and confirmed in her evidence that she took no position on the issue. Had she, for example, taken a more aggressive position in her memo or shared with Mr. Bronstein a serious concern about possible liability that may have been different. However, her position appears to have been a neutral one and one in which she accepted Mr. Love's opinion.

[71] Further, I do not find that a reasonable person with Mr. Bronstein's knowledge at the relevant time could have concluded that Mr. Love may have been negligent in the set up of the Trust. All he knew was that Ms. McMullen had raised an issue in 2005 which was not consistent with Mr. Love's opinion on that same issue. He was left with the conclusion in the 2005 Memo that there was no s. 75(2) issue. Even if Mr. Bronstein was left with a suspicion concerning the set up of the Trust (which I have already found was not part of his mandate), such a suspicion was not sufficient to trigger the commencement of the running of the limitation period without further expert advice. I agree with the plaintiffs' counsel that suspicion of a claim will advance one to the next step of due diligence (which the plaintiffs began as of the February 22, 2016 meeting) but does not yet trigger knowledge of the claim.

[72] Mr. Bronstein was not situated in circumstances where he would have known about a potential claim against the defendants without further advice on what Mr. Love described as a complex legal issue in the 2005 Memo. The knowledge gained at the family meeting in February 2016 when BDO presented the 2005 Memo to the family triggered a due diligence obligation with respect to a possible claim.

[73] The matters related to the set up of the Trust and the related tax consequences were technical in nature and beyond the scope of Mr. Bronstein's generalist mandate and experience. I therefore find that a reasonable person would not have been aware that a claim would be a reasonable means of proceeding without expert advice (see *Boniferro Mill Works ULC v. Ontario*, 2009 ONCA 75, 97 O.R. (3d) 745, at para. 54). The only expert advice that Mr. Bronstein had as of January 4, 2016 was that s. 75(2) was **not** an issue.

[74] As well, in *Nelson v. Lavoie*, 2019 ONCA 431, 47 C.C.P.B. (2nd) 1, the appellants appealed the motion judge's dismissal of their summary judgment to dismiss the respondent's claim on the grounds it was time barred. The Court of Appeal did not interfere with the motion judge's decision. The Court found that a proceeding was not appropriate until the respondent had had an opportunity to confirm with CRA that the Independent Pension Plan she had established on the appellant's advice did not comply with the relevant

2023 ONSC 2357 (CanLII)

provisions of the *Income Tax Act* (see para. 3). In that case, like the one at bar, it was reasonable to wait and resolve the uncertainty before commencing a claim.

[75] In *Joshi v. Chada*, 2022 ONSC 4910, the defendant doctors moved to dismiss the plaintiffs' claim on the grounds that it was time barred. The Court dismissed the motion. There was conflicting evidence concerning whether or not the plaintiff mother was advised that the ultrasound results were clear or whether the defendant doctor had explained that fetal abnormalities were present. The plaintiff relied on what she said was the doctor's assurance that the ultrasound was clear to toll the limitation period. The Court reviewed the surrounding facts and circumstances and determined that there was a genuine issue for trial. The mere asking of a question (as in the case at bar) is not sufficient to impute knowledge especially in the face of a professional advisor taking the position that there is no issue.

[76] The fact that Mr. Bronstein did not mention the 2005 Memo to the plaintiffs prior to the February 22, 2016 meeting does not change my conclusions in this case. The plaintiffs would have been faced with the same scenario as Mr. Bronstein – Ms. McMullen's view of a possible issue and Mr. Love's position that it was not an issue. Even if the plaintiffs had been aware of the 2005 Memo, I infer that they would not have been in any better position than Mr. Bronstein with the information in the 2005 Memo. That is, further due diligence would have been required before reasonable discovery of a claim could have been made.

[77] The extensive written opinion on the tax issue was not available until February 2017 as set out above. While it is true that taking a full year to obtain that opinion seemed somewhat long, I am not dissuaded that the 2017 opinion was the expert advice needed before the parties could reasonably assess whether a plausible inference of liability had been raised and a legal proceeding against the Love defendants should be commenced. Further, the 2017 opinion from BDO was not simply a replication of the 2005 Memo, it was an extensive professional opinion which considered all relevant issues. I find, therefore, that the limitation period began to run on the date the BDO opinion was shared with the family in February 2017. As the claim was commenced in February 2018, this is well within the limitation period.

[78] If I am wrong with respect to the plaintiffs' actual or constructive knowledge in February 2017, such knowledge may be imputed to the plaintiffs as early as February 22, 2016, when a decision was made to carry out further due diligence on the tax issue. This is also within the two-year limitation period.

[79] The Love defendants assert that Mr. Bronstein's knowledge of the 2005 Memo when it was received on January 4, 2016 must be imputed to the plaintiffs for the purpose of limitations. They rely on *HOOPP Realty Inc. v. Emery Jamieson LLP*, 2018 ABQB 276, 81 C.L.R. (4th) 42 ("*HOOPP*"), aff'd 2020 ABCA 159, Alta. L.R. (7th) 213, leave to appeal refused, 2020 CanLII 87112 (S.C.C.). In *HOOPP* the plaintiff realty company sued its contractor for a deficiently built floor in its building. The law firm it retained commenced a claim in the Court of Queen's Bench which was the wrong forum. The design-build agreement required mandatory arbitration but by the time HOOPP found out it was in the wrong

2023 ONSC 2357 (CanLII)

forum, the limitation period had run and its claim was struck. In the interim HOOPP had changed law firms. The new firm, Dentons, found out about the forum issue from the previous lawyers but waited a short period of time before advising its client HOOPP. The Court held that Dentons ought to have known of the error and knowledge of the issue was imputed to Dentons from the time it knew of the issue from previous counsel.

2023 ONSC 2357 (CanLII)

[80] However, I agree with the plaintiffs that HOOPP can be distinguished. In HOOPP, Dentons had actual knowledge that a claim had to be commenced within the limitation period. As I have already found, the fact that Mr. Bronstein received and reviewed the 2005 Memo on January 4, 2016 did not serve to impute actual or constructive knowledge of a claim to him because:

a. Ms. McMullen made no real comment about the issue. Even if Mr. Bronstein's notes are taken at their highest and Ms. McMullen told him that she disagreed with Mr. Love, I do not view that as sufficient to raise other than a mere suspicion of an issue which bore further investigation.

b. Mr. Bronstein knew that Mr. Love did not agree that s. 75(2) applied. At best he had a memo with differing opinions that was 10 years old. I do not see how that can be raised to the level of the requisite knowledge.

c. While I agree that Mr. Bronstein's knowledge can be imputed to the plaintiffs, the knowledge that he had on December 30, 2015 and January 4, 2016 was not the same knowledge that the solicitors in *HOOPP* had. Mr. Bronstein's knowledge was insufficient to meet the discoverability threshold and required further expert investigation and opinion before any plausible inference of liability could be raised

[81] In summary, I find that the information known to Mr. Bronstein as of December 30, 2015 and January 4, 2016 was insufficient to ground a plausible inference of liability. As described above, the limitation period began to run on either February 22, 2016 or February 24, 2017. Both dates are within the two-year limitation period.

3. The Rectification Issue

[82] In *Sosnowski v. MacEwan Petroleum Inc.*, 2019 ONCA 1005, the Court discusses the jurisprudence with respect to s. 5(1)(a)(iv) of the *Limitations Act*. Particularly, the Court sets out as follows:

> This court's jurisprudence has developed certain principles for the interpretation and application of s. 5(1)(a)(iv).
>
> First, the determination of whether a proceeding is an appropriate means to seek to remedy an injury, loss, or damage depends upon the specific factual and/or statutory setting of each case [citations omitted]
>
> Second, this court has observed that two circumstances most often delay the date on which a claim is discovered under this subsection. The first <u>is when the plaintiff</u>

> relied on the defendant's superior knowledge and expertise, especially where the defendant took steps to ameliorate the loss. The other situation is where an alternative dispute resolution process offers an adequate remedy, and it has not been completed [citation omitted].

[83] At the February 22, 2016 meeting, the possibility of rectification of the Trust with Mr. Love's cooperation was discussed. This was one of the avenues of investigation when it was still unclear as to whether s. 75(2) would apply. As part of its investigation mandate BDO met with Mr. Love in October 2016. It was hoped that if Mr. Love agreed to participate in a rectification of the Trust it would be an inexpensive way for the plaintiffs to remedy any potential loss.

2023 ONSC 2357 (CanLII)

[84] On October 3, 2016, Mr. Love declined to participate in any rectification. As such, the plaintiffs argue that that limitation period was tolled until Mr. Love's unequivocal refusal to participate was obtained.

[85] On this issue, I tend to agree with the Moving Parties. I do not accept that rectification was available to the plaintiffs on these facts for the following reasons:

a. Mr. Love had ceased acting as an advisor to the plaintiffs many years before;

b. Mr. Love maintained his position both in the 2005 Memo and at the October 2016 meeting that s. 75(2) did not apply;

c. The approach to Mr. Love in 2016 appears to be the first time that the issue of rectification was raised. There was no history of contact with Mr. Love conducive to an understanding that he would assist the plaintiffs.

d. Unlike in the case of *Presidential MSH Corporation v. Marr, Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321, where the defendant accountant continued to assist the plaintiff prepare its appeals to CRA, Mr. Love had ceased acting for the plaintiffs in any capacity by 2015.

e. As per *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, rectification is available only in narrow circumstances and is not available to undo the unintended consequences of an agreement.

[86] While I agree with the Moving Parties on this point, it does not change my finding that the limitation period began when the BDO opinion letter became available in February 2017. As such, the claim was commenced well with the required two-year period.

Orders and Costs

[87] Given all of the above, the motion for summary judgment is dismissed.

Costs

[88] The plaintiffs are entitled to their costs given the result of the motion. The plaintiffs' partial indemnity costs were $119,859.22. The plaintiffs note that while their costs were higher than those sought by the Moving Parties, the Moving Parties' counsel charged at LawPro rates and the plaintiffs overall hours were less.

[89] The Moving Parties sought $104,812.53 on a partial indemnity scale.

[90] I see no reason not to award the plaintiffs what the Moving Parties would have expected to pay given their own costs. As such, the Moving Parties shall pay the plaintiffs all-inclusive costs of $104,000.

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C. Gilmore, J.

Released: April 19, 2023

2023 ONSC 2357 (CanLII)

CITATION: Acs et al. v. Love et al., 2023 ONSC 2357
COURT FILE NO.: CV-22-00676422-00ES
DATE: 20230419

2023 ONSC 2357 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

ESTATES LIST

BETWEEN:

Catherine Acs, in her capacity as Trustee of the Hunt Family Growth Equity Trust, Stuart Hunt, in his capacity as Trustee of the Hunt Family Growth Equity Trust, Pamela Sarracini, in her capacity as Trustee of the Hunt Family Growth Equity Trust and David Hunt, by his Litigation Guardians Catherine Acs and Stuart Hunt.

Plaintiffs (Responding Parties to the Motion)

– and –

James B. Love, Love & Whalen, Legacy Private Trust and BDO Canada LLP

Defendants (Moving Parties)

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

C. Gilmore, J.

Released: April 19, 2023