CITATION: Mastronardi Produce Limited v. Rainbow Acres Inc., 2023 ONSC 2059
COURT FILE NO.: CV-14-20916
DATE: 2023-03-31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
MASTRONARDI PRODUCE LIMITED Plaintiff	)	Brendan Brammall and Tycho Manson, for the Plaintiff
– and –	)	
RAINBOW ACRES INC. Defendant	)	Rodney Godard and Ioana Vacaru, for the Defendant
	)	**HEARD: October 5, 6, 7, and December 12 and 15, 2022**

REASONS FOR JUDGMENT

DUBÉ J.:

A. THE ACTION

[1] The plaintiff, Mastronardi Produce Limited ("MPL"), asserts by Statement of Claim, dated June 16, 2014, as amended on consent by King J., pursuant to an order dated November 9, 2021, the following claim against the defendant, Rainbow Acres Inc. ("RAI"):

a. The sum of $516,686.40 for seeds ($489,628.11) and packaging materials ($27,058.29) sold and delivered to RAI;

b. Pre-judgment and post-judgment interest at a rate of 18 percent per annum where so provided in the applicable invoices, or, in the alternative, at rates determined in accordance with the provisions of the *Courts of Justice Act*, R.S.O. 1990 c. C.34 ("*CJA*");

c. Costs of the action.

[2] In the Statement of Defence and Counterclaim, dated March 4, 2014, as amended on February 2, 2022, RAI states, among other things, that it had no obligation to MPL other than the costs associated with packaging materials. During final submissions, this position changed when counsel for RAI conceded that while RAI was obliged to pay the principal amounts for invoices related to purchasing both seeds and packaging materials, all but a small portion of the total claim, namely $21,321.85, is barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B ("*Limitations Act*").

[3] Additionally, RAI denies that it ever agreed to pay either expressly or implicitly an interest rate of 18 percent per annum on the outstanding invoice amounts.

[4] Finally, counsel advised in the Defendant's Reply Submissions that RAI was not pursuing their counterclaim against MPL.

B. THE TRIAL

[5] The trial of this claim was held in Windsor over five days. The court heard *viva voce* evidence from the following three witnesses called by the plaintiff:

a. Frank Mastronardi ("Mr. Mastronardi") – is a certified public accountant who has been employed at MPL for over 20 years. Since 2010, he has held the position of Vice President of Finance, Reporting and Controls. Between 2002 and 2010, he was Chief Financial Officer ("CFO"). He is not related to the Mastronardi family, including Paul Mastronardi, who owns MPL.

b. Paul Ziter ("Mr. Ziter") – was MPL's "grower liaison". This is an MPL employee tasked with attending to the needs of farmers contracted to grow produce for MPL. The grower liaison assesses how crops are developing and assists growers with respect to any issues that may arise during the growing season, such as packaging needs, delivering seeds, forecasting the production of crops, etc. During the relevant period, Mr. Ziter was MPL's grower liaison for RAI.

c. Steve Attridge (Mr. Attridge") – was MPL's Chief Financial Officer and responsible for managing the financial affairs of the corporation. In his capacity as CFO, Mr. Attridge's duties included reviewing the account receivable ledgers for growers that supplied MPL and, if necessary, taking steps to collect on outstanding balances. Mr. Attridge is no longer employed by MPL.

[6] The defendant called no witnesses and did not challenge the plaintiff's *viva voce* evidence.

[7] In addition to the *viva voce* evidence, the evidence at trial consisted of the following:

a. Exhibit #1A and B – The Joint Document Brief ("JDB") – although the defendant initially did not concede the admissibility and authenticity of certain documents in the JDB (see: Exhibit #2A and B), ultimately the content of all impugned documents was properly admitted at trial subject to the terms set out in Exhibit #2A and B.

b. Exhibit #2A and B – terms governing the documents in the JDB.

c. Exhibit #3 – Notice under the *Evidence Act* – covers various business records in the JDB including invoices, credit memos, grower's pay statements, ledger entries etc. – except for the following: (1) Tab 1 and 2 – the Agreements; (2) Tab 179 to 189 – email correspondence including those supporting RAI's AgriCorp application; (3) Tab 190 to 198 – copies of seed packages and invoices bearing the signature/writing of RAI officers/employees; (4) Tab 199 to 200 – RAI's AgriCorp application and related materials; (5) Tabs 201 to 203 – further email correspondence; (6) Tabs 204 to 213 – documents produced by MPL just prior to trial as requested by RAI.

d. Exhibit #4 – Agreed Stipulations Relating to Payment on Invoice #230218.

e. Exhibit #5A and B – Summary of Payments Made on Outstanding Invoices (#230218, #279474, #SI00016103, SI00023376, #SI00015271, and #SI00105388).

f. Exhibit #6A and B – Summary of Adjustment Invoices (twenty-seven invoices that contain the term "Adjustment").

g. Exhibit #7A and B – Summary of Calculations of Dollar Figures at Paragraph 7.A and 7.B of MPL's Amended Amended Amended Reply and Defence to the Counterclaim (Outstanding Amounts Owing on Invoices for Packaging Materials and Seeds (plus interest)).

h. Exhibit #8 – Read-In Brief (Read-Ins from the Examination for Discovery of Kurt Grass on February 25, 2016).

i. Exhibit #9 – Request to Admit by MPL – including certain facts, written agreements, and the authenticity of various documents etc.

j. Exhibit #10 – Response to Request to Admit by RAI (Subject to the admission ultimately made by RAI in Exhibit #2A and B).

[8] After reviewing the materials and hearing submissions from counsel, I order that:

1. Mastronardi Produce Limited is entitled to judgment against Rainbow Acres Inc. on the principal amount of $516,686.40 which is comprised of $489,628.11 for seeds and $27,058.29 for packaging materials that were sold and delivered to Rainbow Acres Inc.;

2. Rainbow Acres Inc. is to pay pre-judgment and post-judgment interest on the principal amount owed to Mastronardi Produce Limited at default rates prescribed under the *Courts of Justice Act*, R.S.O. 1990 c. C.34.

C. BACKGROUND

[9] My review of the background evidence is limited to those facts that are significant to the central issues, or that provide context necessary to appreciate and determine the relevant issues.

[10] As indicated, the evidence from Frank Mastronardi, Paul Ziter and Steve Attridge remained fundamentally unchallenged at trial and is set out below.

[11] The plaintiff, MPL, is a corporation incorporated pursuant to the laws of Ontario having its head office in Kingsville, Ontario. It carries on business as a distributor of tomatoes, cucumbers, peppers and, more recently, berries throughout Canada and the United States.

[12] Depending on the year, MPL purchases produce from between 100 and 200 growers located all over Canada, the United States, Mexico, and Central America, including local grower RAI, who grew cucumbers, tomatoes, and peppers for MPL.

[13] The defendant, RAI, is a duly constituted Ontario corporation with its head office in Leamington, Ontario, and carries on the business of farming in or around the County of Essex. RAI grows its produce in two greenhouses located in Essex County, one on Albuna Townline ("Albuna Greenhouse") and the other on Seacliff Drive ("Seacliff Greenhouse").

[14] MPL and RAI had a marketer/grower relationship. The commercial relationship began in December 2003 and continued until 2013. The sole shareholders, directors and officers of RAI are Kurt and Lina Grass ("Kurt Grass or Mr. Grass" and "Lina Grass or Mrs. Grass").

[15] Until 2008, the commercial relationship between MPL and RAI was based on oral agreements. MPL and RAI then entered into four written agreements dated January 2, 2008, October 22, 2008, December 8, 2009, and October 28, 2011, which I will refer to as "Distributor Agreements". Except for the one-year January 2, 2008 agreement, these were two-year written agreements, signed by Kurt Grass and Paul Mastronardi, all of which were in essentially the same form. Each agreement provided that RAI would produce, pack, and deliver specified produce to MPL and that MPL would be the exclusive seller and distributor of that produce.

[16] In addition to the above agreements, Mr. Grass and Paul Mastronardi signed two-year "Grower Agreements" dated January 2, 2008, December 11, 2008, February 11, 2010, March 31, 2011, October 26, 2011, and October 10, 2012 – although copies of two of the agreements in the JDB, including the one from October 10, 2012, did not contain Paul Mastronardi's signature. In any event, in each Grower Agreement, all of which were in essentially the same form, RAI devoted a certain area in the greenhouses for growing tomatoes and peppers from seeds provided by MPL.

[17] The tomatoes were grown from Santalina seeds and sourced from an entity called "De Ruiter". De Ruiter provided Santalina seeds exclusively to MPL in this region, which in turn supplied the seeds to their growers, such as RAI, to be grown and marketed exclusively by MPL. RAI grew Santalina seeds for MPL in 2004, and from 2009 to 2013, which MPL

marketed under the "Splendido" tomatoes trademark name and packaged under the "Sunset" label. MPL also had exclusive rights to the pepper seeds, labelled as "Ancient Hot Peppers", which RAI grew for MPL in 2008, and mini sweet peppers, which RAI grew for MPL in 2009.

[18] When RAI grew mini cucumbers for MPL, this did not attract an exclusive Grower's Agreement as the seeds were sourced from other suppliers in the open market.

[19] There were two methods that RAI could use to pay for the seeds and packaging materials:

a. By cheque; or

b. By deductions from the amounts that MPL owed to the growers, such as RAI, for the produce supplied by the grower, which is referred to as a "grower's pay".

[20] During a typical growing season, RAI would plant anywhere from December/January to March and would start harvesting and supplying produce to MPL on a weekly basis through the remainder of the year up to November or December. MPL typically paid for the produce three weeks after it was received from RAI and, at the time of making payment, would provide a "grower's pay statement" to RAI.

[21] Each grower's pay statement sets out: (1) a summary of the amount paid by MPL for produce provided by RAI each week, and (2) whether any amount was being deducted to pay for seeds or packaging materials sold to RAI by MPL. The standard practice was for MPL to include grower's pay statements together with their cheque in the package that local growers, including RAI, would pick up from MPL's office after 3:00 p.m. each week on Fridays.

[22] Any expense incurred by RAI, and noted on the grower's pay statement, would have generated a corresponding invoice from MPL. Invoices generated under MPL's accounting system, Microsoft Navision, issued after November 30, 2010, begin with "SI" whereas, invoices issued under MPL's old accounting system, Famous Software, are all numerical.

MPL Packaging Material Invoices

[23] The cost of packaging materials, such as cardboard boxes, reusable plastic containers, labels etc., were regularly deducted from RAI's weekly grower's pay. The invoices were prepared by its packaging department after the packaging materials were delivered. Bills of lading or packing slips would be signed by the growers for receipt of the packaging. The documents would be brought to MPL's accounting department who would create an invoice. The invoice for packaging materials was then either mailed or delivered in the package to RAI with the grower's weekly cheque and pay statement.

MPL Packaging Material Invoices that Remain Outstanding

[24] Prior to December 1, 2010, Mastron Enterprises Ltd. ("MEL"), a wholly owned subsidiary of MPL, supplied packaging materials to RAI. Afterwards, between 2011 and 2013, MPL

supplied the packaging materials. A total of 38 invoices issued to RAI by either MEL or MPL currently remains outstanding in amounts, and during the years as follows:

a. 2011 - $15,709.78

b. 2012 - $8,743.07

c. 2013 - $2,605.44

MPL Seed Invoices

[25] The costs of seeds could also be deducted from the grower's pay statement. Usually, seeds were purchased by RAI late in the year for the next growing season, although additional seeds would on occasion be purchased during the next growing season. RAI would either pick up seeds from MPL's head office or Mr. Ziter, RAI's grower liaison, would deliver seeds directly to RAI for the growing season.

[26] If the seeds were delivered, Mr. Grass, on behalf of RAI, would usually sign the seed package confirming the delivery of the seeds, and a photocopy of the seed package would then be forwarded to MPL's accounting department. The accounting department would be advised accordingly as to the type and quantity of seeds required by RAI and bill RAI based on a dollar rate per square meter used to grow the particular seed product. Mr. Mastronardi, or one of his associates, would then prepare the invoice and issue it out to the RAI. The invoice for seeds was normally prepared within a week of the delivery of the seed to the grower and delivered in the same manner as the package material invoices.

Samples of MPL Seed Invoices that Initially or Currently Remain Outstanding

[27] The history with respect to some of the seed invoices referred to by MPL during the trial is outlined as follows:

a. **2008** – On December 18, 2008, MPL issued invoice #230218 to RAI in the amount of $112,250 for Santalina tomato and sweet pepper seeds, which initially remained unpaid. Of this amount, $75,000 was applied to it by a series of nine deductions from RAI's grower's pay between July 16, 2010, and October 22, 2010, leaving a balance of $37,250 at that time.

b. **2009** – On December 9, 2009, MPL issued invoice #272122 to RAI in the amount of $45,200 for Santalina tomato seeds. The entire amount remains outstanding and is part of MPL's claim.

c. **2010** – On February 11, 2010, MPL issued invoice #279474 to RAI in the amount of $111,600 for Santalina tomato seeds, which initially remained unpaid.

d. **2011** – On June 8, 2011, MPL issued invoice #SI00015271 to RAI in the amount of $144,000 for Santalina tomato seeds, which initially remained unpaid.

e. **2012** – See the three seed invoices below:

i. On January 25, 2012, MPL issued invoice #S100045382 in the amount of $144,000 for Santalina tomato seeds. The entire amount remains outstanding and is part of MPL's claim.

ii. On October 31, 2012, MPL issued invoice #SI00103245 in the amount of $110,000 for Santalina tomato seeds, which initially remained unpaid.

iii. On November 15, 2012, MPL issued invoice #S100105388 to RAI in the amount of $32,400 for Santalina tomato seeds which initially remained unpaid.

Re-allocation of debt after June 16, 2012, including adjustment invoices applied to Invoice #SI00103245

[28] On November 2, 2012, two deductions from RAI's grower's pay in the amount of $6,402 and $6,586 were applied to seed invoice #230218, dated December 18, 2008. This reduced the outstanding balance on this invoice from $37,250 to $24,262, which currently remains outstanding and is part of MPL's claim.

[29] After a meeting with Mr. Grass, Mr. Attridge instructed Mr. Mastronardi to re-allocate a series of 2013 grower's pay deductions to seed invoice #SI00103245, dated October 31, 2012, which he did on September 1, 2013. Mr. Mastronardi re-allocated the payments by way of twenty-seven separate sale invoices, known as "adjustment" invoices, in the amount of $71,833.89, which reduced the balance left owing on seed invoice #SI00103245 from $110,000 to $38,166.11. These deductions were initially applied against other seed invoices as follows:

a. **Seed Invoice #279474, dated February 11, 2010** – On April 26, 2013, and September 13, 2013, deductions from RAI's grower's pay in the amounts of $1,896.20 and $2,481.80 respectively, were applied to seed invoice #279474, dated February 11, 2010. Of the total amount invoiced, $107,222 remained outstanding until these two deductions were re-allocated against another seed invoice, #SI00103245. As a result, the entire amount on this invoice, $111,600, remains outstanding and is part of MPL's claim.

b. **Seed invoice #SI00015271, dated June 8, 2011 –** Between March 22, 2013, and September 13, 2013, deductions from RAI's grower's pay in the amount of $65,707.90 reduced the outstanding balance on this invoice to $78,292.10. However, the initial deductions were subsequently re-allocated against seed invoice #SI00103245 leaving the entire amount of $144,000 outstanding and is part of MPL's claim.

c. Packaging material invoices #SI00120566, #SI00123791, and #SI00129653.

[30] In addition to the re-allocation of deductions against seed invoice #SI00103245, RAI also provided two cheques, both in the amounts of $25,000 and dated November 6, 2013, and December 10, 2013, respectively, which paid off the remaining balance of $38,166.11 and therefore this invoice is not part of MPL's claim.

[31] The $11,833.89 that remained from the second cheque, dated December 10, 2013, was then applied to seed invoice #SI00105388, dated November 15, 2012. The payment brought the amount owing on that invoice from $32,400 to $20,566.11 and is part of MPL's claim.

[32] The series of adjustment invoices were created to ensure that each of the initial deductions were accounted for and properly tracked when the individual deductions were subsequently applied against seed invoice #SI00103245 from October 31, 2012.

[33] In relation to MPL's claim, of the 70 invoices that remained outstanding when the Statement of Claim was issued, the amount owing on account of seed invoices is $489,628.11 and $27,058.29 for packaging materials, totalling $516,686.40. This is an increase from September 20, 2010, when RAI owed $293,374.39.

[34] After deductions from grower's pay and the two cheques, the defendant claims that the balance owed by RAI is only $21,321.85, which is comprised of the $20,566.11 that remains on invoice #SI00105388 and four other smaller outstanding invoices due and payable after June 16, 2012 (I however calculated the claim to be $21,736.15 based on seven outstanding invoices due and payable after June 16, 2012). Since the rest of indebtedness in the amount of $495,364.55 was incurred by RAI more than two years before the commencement of the claim, the defendant submits that this balance is statute-barred (in the Defendant's Trial Submission, the calculation is $496,210.29, which appears to be an error – my calculation is $494,950.25).

[35] Each invoice issued by MPL to RAI, other than the first three, stipulates that if the outstanding balance is not paid within 21 days of the delivery date, interest at the rate of 18 percent per annum is payable.

[36] Every payment made by RAI on account of invoices generated from the sale of product by MPL, whether by cheque or grower's pay deductions, was applied by MPL to specific invoices.

[37] In June 2010, a tornado caused damage to RAI's Seacliff farm. Shortly afterwards, MPL agreed to a request by RAI to suspend deductions from RAI's grower's pay – although the initial request was only for a few weeks, deductions were ultimately deferred for over two years. RAI subsequently applied for financial relief from AgriCorp, which is an agency of the Government of Ontario. The application was dated June 30, 2011 and was for relief in respect of the 2010 fiscal year.

D. ISSUES AND ANALYSIS

[38] I have carefully reviewed counsels' positions and I am satisfied that I can properly dispose of this matter after considering the following issue:

1. Is all but $21,321.85 ($21,736.15) of MPL's claim against RAI barred by the *Limitations Act* because of the following:

a. Did MPL discover its claim against RAI more than two years before the Statement of Claim was issued?

b. Did RAI have a running account with MPL? If so, did RAI acknowledge its indebtedness within two years from the issuance of the Statement of Claim for money owed to MPL in accordance with s. 13 of the *Limitation Act*, thereby postponing the start of the limitation period?

2. What are the applicable pre-judgment and post-judgment interest rates on the seventy outstanding invoices?

1. a) Did MPL discover the claim against RAI before June 16, 2012?

1) Theory of the Plaintiff

[39] The plaintiff concedes that MPL is presumed to have discovered a claim on the day the act on which the claim is based took place, but the threshold to displace the presumption is relatively low. Further, the discoverability analysis is fact-specific and based on the parties' legal relationship and business dealings. In this regard, prior to 2014, the parties were in an established and longstanding commercial relationship, and there is no evidence that RAI would refuse or be unable to pay the outstanding invoices. As a result, it made no commercial sense for MPL to commence a claim against RAI before 2014, which is well within the applicable limitation period, and to do so would have only resulted in unnecessary litigation.

2) Theory of the Defendant

[40] Section 5(2) of the *Limitations Act* sets out a rebuttable presumption that MPL shall be presumed to have discovered the claim, including that a proceeding would be an appropriate means to seek to remedy it, on the day the omission on which the claim is based took place. The defendant argues that every sale of seeds and packaging materials by MPL from December 18, 2008, to November 15, 2013, resulted in an invoice specifying that the invoice amount was due "21 days from the delivery date". As a result, the claim by MPL in relation to each of the seventy outstanding invoices is presumed to have been discovered when it was not paid by RAI 21 days after the invoice date. This is particularly so because a payment due date infuses a degree of certainty when determining the date on which a claim is discovered and that a legal proceeding would be the appropriate means to remedy a loss.

[41] In any event, by late summer/early fall 2010, MPL would have been aware that RAI was in substantial arrears of payment for both seed and packaging invoices even after significant re-occurring deductions had been taken from their grower's pay. The defendant submits that once the Grower's Agreement expired at the end of the 2010 growing season, MPL should have clearly known that RAI was a demonstrable credit risk and proceedings ought properly to have commenced. Instead, without a solid assurance from RAI to pay the debt prior to signing the seed package in 2011, and an inexplicable failure on behalf of

MPL to take payroll deductions for approximately two years, MPL took on an unreasonable risk to conduct further business with RAI rather than bring a claim.

[42] In conclusion, based on the evidence, MPL is unable to rebut the presumption in s. 5(2) of the *Limitations Act*. As a result, MPL discovered its claim within the meaning s. 5(1)(a) and is only entitled to claim for invoice amounts due on or after June 16, 2012, which the defendant refers to as "New Debt". Accordingly, any invoice amounts due before June 16, 2012, or "Old Debt", is statute-barred pursuant to s. 4 of the *Limitations Act* and unrecoverable.

3) Analysis

[43] The following sections of the *Limitations Act* are applicable:

> SECTION 4
>
> *Basic limitation period*
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> SECTION 5
>
> *Discovery*
>
> 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).
>
> Presumption

> (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.

[44] Perell J. in *Mundell v. Whit*e, 2022 ONSC 5994, succinctly summarized the applicable law on discoverability, as follows at para. 76:

> Pursuant to s. 5(2) of the *Limitations Act, 2002*, unless the contrary is proven, it is presumed that a claimant will know of the matters of his or her claim on the day that the act or omission took place. When a limitation period defence is raised, the onus is on the plaintiff to provide evidence to show that its claim is not statute-barred and that he or she behaved as a reasonable person in the same or similar circumstances using reasonable diligence in discovering the facts relating to the limitation issue.

[45] Section 5(1)(a)(iv) of the *Limitations Act* requires the court to examine "the nature of the…loss" before determining if it is an appropriate time to initiate a proceeding to remedy it. Further, under s. 5(1)(b), the court is required to not only determine if an action has ripened but also whether, based on the circumstances and interests of the "person with the claim", it was a proper time to commence a proceeding. On this point, Laskin J.A. in *407 ETR Concession Company Limited v. Day*, 2016 ONCA 709 ("*407 ETR*") applied the comments of McLachlin J. in relation to s. 6(4)(*b*) of British Columbia's *Limitation Act*, in *Novak v. Bond*, [1999] 1 S.C.R. 808 ("*Novak*") when he stated the following regarding s. 5(1)(a)(iv) of the *Ontario Limitation Act* at para. 45:

> …An important case on the significance of a plaintiff's "circumstances" is the majority judgment in *Novak v. Bond*, [1999] 1 S.C.R. 808, [1999] S.C.J. No. 26. In that case, McLachlin J. considered s. 6(4)(b) of British Columbia's *Limitation Act*, R.S.B.C. 1996, c. 266, which provided that time did not begin to run against a plaintiff until "the person whose means of knowledge is in question ought, in *the person's own interests and taking the person's circumstances into account*, to be able to bring an action" (emphasis added). At para. 85 of her reasons, McLachlin J. discussed "interests and circumstances" and cautioned against the potential unfairness of requiring a plaintiff to bring an action at the time a claim first materializes:
>
> > Litigation is never a process to be embarked upon casually and sometimes a plaintiff's individual circumstances and interests may mean that he or she cannot reasonably bring an action at the time it first materializes. This approach makes good policy sense. To force a plaintiff to sue without having regard to his or her own circumstances may be unfair to the plaintiff and may also disserve the defendant by forcing him or her to meet an action pressed into court prematurely.

[46] The inquiry under s. 5 of the *Limitations Act* requires a close examination of the legal and commercial relationship that existed between MPL and RAI, with particular emphasis on ensuring that "a more contextual view of the parties' actual circumstances" are considered, including the plaintiff's specific circumstances: *Novak,* at paras. 65 and 66.

[47] I note that appropriateness must be assessed on the facts of each case and case law applying s. 5(1)(a)(iv) is of limited assistance: *407 ETR*, at para. 34; *Independence Plaza 1 Associates, L.L.C. v. Figliolini,* 2017 ONCA 44, at para. 76.

[48] Finally, the threshold to displace the presumption in s. 5(2) is relatively low: *Presley v. Van Dusen,* 2019 ONCA 66 ("*Presley*"), at paras. 14 and 24.

[49] As indicated, the defendant argues that MPL's claim for the outstanding debt held by RAI, or at least most of it, is statute-barred as it was discovered or ought to have been discovered more than two years before the issuance of the Statement of Claim on June 16, 2014.

[50] The defendant submits that each invoice issued by MPL was discovered, and a claim was certain and appropriate when it was not paid by the date specified on the invoice, namely, 21 days after the delivery date of seeds or packaging materials. In this regard, MPL knew of the claim 21 days after the delivery date, knew by then it had suffered a loss, and knew that RAI failed to pay the outstanding amount. Further, the two-year limitation period allowed sufficient time for the parties to attempt to resolve the outstanding balance in relation to each invoice before resorting to litigation.

[51] After carefully considering the defendant's submissions, I find that while the date to pay the outstanding balance on each invoice added a degree of certainty with respect to the discoverability analysis, overall, this approach ignores the nature of the commercial relationship that developed between the parties and how that influenced the timing with respect to when a proceeding against RAI ought to have properly commenced. I will explain.

[52] During the growing seasons, RAI incurred ongoing costs associated with seeds and packaging materials provided by MPL. With each sale, MPL generated an invoice. As noted previously, each invoice included a term that the balance be paid 21 days from the product's delivery date, otherwise the amount owed would be subject to interest at a rate of 18 percent. However, with the issuance of each new invoices, RAI regularly failed to pay the amount owing, causing the debt to grow**.** This practice, which continued for years, attracted no interest or penalties and MPL continued to provide RAI with new product and invoices. As a result, an integral part of the commercial relationship that developed was MPL allowing RAI to accumulate and carry over debt from year to year. By November 30, 2010, the outstanding balance owed by RAI on invoices for seeds and packaging materials totalled $293,374.39 (Exhibit #1B, Tab 180). As of 2014, that debt, which is the subject matter of this claim, had grown to $516,686.40**.**

[53] The defendant argues that as early as fall 2010, MPL ought to have known that RAI was potentially unable to pay what it refers to as "substantial arrears." Even after significant

deductions ($85,759.05) taken earlier that year "did not come close to paying the unpaid invoices," MPL should have commenced a claim once the Grower's Agreement expired at the end of 2010: see Defendant's Reply to MPL Trial Submissions, at para. 19**.**

[54] While RAI owed $293,374.39 on outstanding balances in September 2010, I am unable to say, based on the evidence, whether MPL considered the arrears to be substantial or not. Without knowing what MPL knew at the time, MPL may have considered the outstanding debt owed by RAI to be more than manageable and in line with other growers of similar size. As a result, I have insufficient evidence to be satisfied, based solely on the amount of arrears accumulated by RAI in September 2010, to determine whether it would have been appropriate, in the circumstances, for MPL to commence a proceeding.

[55] The defendant also suggests that in the discoverability analysis, I consider whether MPL ought to have targeted each invoice for possible recovery once RAI failed to pay by the due date – even though this would have been completely foreign to the parties longstanding commercial relationship. At no time before the relationship ultimately broke down did MPL attempt to track each invoice for the specific purpose of determining if a proceeding to collect on the overdue amount should properly commence. In other words, MPL neither treated or threatened to treat an overdue invoice as a potential legal claim – nor did it appear that RAI expected MPL to do this. While in hindsight**,** MPL perhaps could have taken earlier, more proactive steps to rein in RAI's debt, that is a far cry from expecting MPL to have essentially placed RAI on notice of a possible lawsuit whenever an invoice had not been paid on time. Had it been MPL practice to approach RAI's debt in this manner, the nature of the business relationship that existed for years would have been fundamentally different. Instead, "a contextual view of the parties' actual circumstances" suggests that until 2014, MPL freely allowed RAI to carry a balance on each invoice well beyond the 21-day due date without any hint of a possible lawsuit: see *Novak*, at para. 65.

[56] I also find it "impracticable and unnecessary" to expect MPL to have kept track of individual invoices to assess whether an overdue payment had not been received on time and whether an action ought to commence: see *407 ETR*, at para. 50. While certainly a far cry from the over one million invoices generated in a month by 407 ETR, I believe it would still place an unnecessary burden on MPL to identify each expense invoiced for the specific purpose of determining if a proceeding against RAI or any of its other growers were appropriate. MPL invoiced RAI numerous times during the growing season with many left unpaid by the due date. For instance, between August 11, 2009, and September 6, 2010, RAI was issued approximately 92 invoices with the vast majority unpaid after 30 days: see Exhibit #1B, Tab 180. Many of these invoices, as well as the 70 outstanding invoices that are the subject matter of this claim, were relatively small, often under $500. If MPL pursued each overdue account, no matter how small, then the different limitation periods on the individual invoices would have, in theory, resulted in a significant number of separate legal proceedings thereby resulting in unnecessary and needless litigation: see *407 ETR*, at para. 48.

[57] Other than Mr. Grass promising on October 28, 2011, to pay for 100,000 Santalina seeds at a future date, which was written on a seed package, I have scant evidence with respect

to what occurred during that period from September 2012 until November 2012 when costly deductions from RAI's grower's pay were suspended. On this point, I am also unsure why the deduction lasted over two years, and not the "few weeks" requested by Mr. Grass. Further, I am uncertain as to the extent and length of time that production at RAI's greenhouse was negatively affected by the tornado, which was the reason why the deductions were deferred in the first place. What I do know is that on September 10, 2012, an internal MPL email sent to Mr. Attridge stated that 10 percent would be taken from RAI's grower's pay that week and then another internal MPL email circulated on November 2, 2012, confirmed that "full deductions" were in place. Finally, an email sent from Mr. Attridge to Mr. Mastronardi on November 27, 2012, indicated that Mr. Attridge intended to meet with RAI and get them started on a payment plan. According to Mr. Attridge's testimony at trial, it was during this period that he became aware of RAI's "significant balance" on outstanding invoices. While I am not certain, RAI's debt may have come to Mr. Attridge's attention at this time as part of a broader campaign designed by MPL to clean up "old advances" held by its affiliated growers or to get "them signed up on [payment] plans": see Exhibit #1B, Tabs 183 to 185, Grower Payment Letter, dated November 2, 2012.

[58] In any event, Mr. Attridge eventually met with Kurt and Lina Grass to attempt to reduce RAI's outstanding balance, especially for seed invoices. When they met, Mr. Attridge explored whether RAI could pay the outstanding balance in a single payment, which he likely would not have done if he believed the company was unable to pay the debt off all at once. When Kurt and Lina Grass indicated they were unable or "uncomfortable" to pay off the balance in this manner, the parties and Mr. Ziter developed a payment plan. As a result, in November 2012, lump-sum amounts were deducted from several of RAI's grower's pay and then either 10 or 15 percent was deducted from RAI's total grower's pay between March 2013 and September 2013. According to Mr. Attridge's evidence at trial, the plan would take into consideration the seasonal nature of the business, and payments would fluctuate according to the strength of RAI's cash flow.

[59] The defendant argues that the courts prefer certainty rather than engaging in the difficult task of attempting to determine "when settlement discussions had become fruitless" and a claim becomes actionable: see *407 ETR*, at para. 47. In the case at hand, I have no evidence to suggest that RAI resisted efforts to reduce their debt or that at any time during negotiations RAI believed the lump-sum deduction, payment plan, and/or the payment by two cheques were excessive or unreasonable. Accordingly, there is no evidence to indicate that these discussions produced any uncertainty as to when MPL's claim against RAI became reasonably discoverable.

[60] The defendant further submits that ongoing communications, investigations, or negotiations for voluntary payment of overdue invoices does not postpone the commencement of the limitation period. I agree. However, in cases that fall under s. 5(1)(a)(iv), such as this one, the limitation period may be delayed "where the plaintiff was making efforts not to settle a known claim but rather to remedy the problem so as to make a claim and litigation unnecessary:" see *Presley*, at para. 25. As in *Presley*, I am also

satisfied that negotiations to reduce RAI's debt had occurred well before any potential claim ripened and a proceeding became appropriate.

[61] The issue with respect to whether negotiations between parties to remedy a problem amounts to a legally appropriate reason to delay bringing a claim was dealt with in *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325 ("*Presidential*"). In *Presidential*, Pardu J. stated at para. 26: "[t]he defendant's ameliorative efforts and the plaintiff's reasonable reliance on such efforts to remedy its loss are what may render the proceedings premature." I find, based on the evidence, that anything resembling negotiations between MPL and RAI in relation to reducing the outstanding debt did not commence until late summer or fall 2012, which was well within the limitation period.

[62] At some point, Mr. Attridge apparently agreed to follow through on a request by RAI to re-allocate a series of 2013 grower's pay deductions that were initially applied against seed invoices #279474 and #SI00015271, and several 2013 packaging material invoices, and re-allocate those deductions against seed invoice #SI00103245, dated October 31, 2012**.** The re-allocation coupled with RAI's further payment by two cheques in November and December 2013, each in the amount of $25,000, paid off the $110,000 balance on seed invoice #SI00103245 and reduced the balance on seed invoice #SI00105388, dated November 15, 2012, from $32,400 to $20,566. The defendant argues that the balance on seed invoice #SI00105388 and several other smaller invoices, amounting to $21,321.85 ($21,736.15) in total, represents the only debt that is captured by the two-year limitation period, and therefore the only balance for which RAI is liable. I disagree.

[63] Based on the above, and in the absence of evidence-based concerns that MPL had with respect to RAI's ability to pay its outstanding debt, I am satisfied that it would not have been appropriate for MPL to commence legal proceedings against RAI at this or any earlier time. Although Mr. Attridge described the debt as significant in late 2012, as indicated previously, that was probably in reference to MPL's desire, due to its size, to earmark the debt for recovery as opposed to any concerns regarding RAI's ability to pay. The defendant also suggests that because of the accumulation of substantial arrears in September 2010, MPL ought properly to have commenced proceedings at that time against RAI. However, since I have no evidence that either MPL or RAI expressed concerns regarding the sustainability of the debt in November 2013, I find that there was no reason why MPL would have a similar concern in September 2010, when the debt was approximately half the size. In sum, I am satisfied that by the time funds were reallocated from older to new debt, a legal proceeding against RAI was still premature and the limitation period had not yet started running.

[64] With that said, when RAI stopped making payment on the remaining debt in the early part of 2014, the parties' commercial relationship did break down and proceedings were commenced by MPL to recover on the outstanding $516,686.14. Even though I am unaware of exactly when that happened or what specifically triggered the breakdown, I am satisfied that only at this time did the claim become actionable and the limitation period began to run. Prior to this point, there is no evidence to suggest that RAI ever disputed, refused to pay or was unable to pay at least a good part of the outstanding invoices – except

perhaps for those few weeks after RAI suffered the tornado damage – and I have no indication that MPL knew or ought to have known that RAI's debt load was unmanageable or that the plan to reduce the debt load would have caused RAI's unreasonable financial distress.

[65] I am also satisfied that, under the circumstances, MPL did not fail to exercise reasonable diligence, sit idle, or take insufficient steps to determine if they had a viable claim against RAI: see *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, at para. 42. In this regard, between January 2, 2008, and October 10, 2012, MPL and RAI entered into a series of 10 individual written agreements that included four Distributor Agreements and six Grower's Agreements that covered the production of Ancient Hot Peppers or Splendido tomatoes. The agreement also stipulated that during the growing season, MPL had the right to maintain a member of its organization at RAI's facilities – referred to at trial as the grower liaison, which was Mr. Ziter. The six Grower's Agreements were renewed yearly from 2008 (although there were two agreements in 2011), with the last one covering the 2013 growing season, which ended on December 31, 2013. The agreements provided MPL with tight controls and oversight regarding the produce grown at RAI's greenhouses and established formal lines of communication between the parties.

[66] The grower liaison provided the parties with the means to discover early and deal promptly with any issues during the commercial relationship. At trial, Mr. Ziter confirmed the importance of his role as a grower liaison when he testified that "[a]nything Kurt [Grass] needed, he would call me, and I would either put him through to the right party or I would try and get it myself for him" (Transcript of Trial, April 7, 2022, pg. 103). If RAI would have advised Mr. Ziter at an earlier time about any issues regarding their growing debt, I see no reason why Mr. Ziter would not have been able to assist them. Presumably, resolving issues between grower and distributor before they develop into a larger problem would be one of the reasons why MPL created the role of grower liaison and included it as a specific term in the Grower's Agreement.

[67] Further, after deductions were deferred for a significant period, MPL took several deductions in October 2012 and then either 10 or 15 percent from RAI's total grower's pay during most of 2013 – without any evidence to suggest that these deductions were excessive or opposed by RAI or insufficient to ultimately get the outstanding balance under better control. Considering what appeared to be reasonable efforts to pare down the debt held by RAI, it would make no commercial sense and be inappropriate to suggest that proceedings to collect on outstanding invoices ought to have commenced at this or any earlier time.

[68] Accordingly, it is for all the above reasons that I am satisfied that MPL was able to rebut the presumption in s. 5(2) of the *Limitations Act* and demonstrate that the action against RAI was not discoverable until 2014, which was well within the prescribed two-year limitation period.

1.b) Did RAI have a running account with MPL, and acknowledge its indebtedness?

1) Theory of the Plaintiff

[69] MPL asserts that RAI's indebtedness constitutes a running account within the meaning of s. 13 of the *Limitations Act*. While conceding that MPL applied payments received to specific invoices issued against RAI, the debt was effectively a single debt that would increase or decrease depending on the amount of seed/packaging materials supplied and the frequency and size of payments made by RAI. The fact that each invoice stated a payment due date or that the MPL documented payment received on each invoice by way of a spreadsheet, does not preclude the finding of a running account. In sum, RAI's indebtedness constituted a single debt for which RAI made its most recent payment by cheque in late 2013 thereby starting the clock running again on the limitation period.

[70] Further, according to s. 13 of the *Limitations Act*, MPL submits that throughout their relationship, RAI both acknowledged and made part payment of its indebtedness which also had the effect of restarting the limitation period. The acknowledgement of indebtedness by RAI included emails exchanged between Kurt Grass and Mr. Mastronardi, and photocopies of seed packets and seed invoices signed by Kurt Grass. While conceding that part payments, the last of which occurred on December 10, 2013, were applied against specific invoices, MPL submits that this must be viewed within the context of the parties long-standing commercial relationship. In this regard, it would be commercially unreasonable and unfair for RAI to assert that a part payment only constituted an acknowledgement in respect to a specific invoice in which payment was made, rather than the entire debt.

2) Theory of the Defendant

[71] The defendant claims that, within the context of the parties legal and business relationship, there is no evidence that the amounts due from RAI were ever treated by MPL as being on a running account. To the contrary, every seed or packaging material sold resulted in a specific invoice and every payment made by RAI was allocated by MPL to a specific invoice. MPL never included a global amount in the invoices nor did MPL ever provide a statement of accounts setting out the global amount due. If the relationship was based on a running account, then the two cheques provided by RAI would have paid down the then current balance, instead of being specifically allocated to two 2012 seed invoices and leaving other more recent invoices unpaid. Further, it would not have been necessary for MPL to go through the complicated reallocation of $71,833.89 in grower's pay deductions from a 2011 invoice to a 2012 invoice if the deductions were simply used to pay down the entire outstanding amount.

[72] Further, an acknowledgement of liability for the debt claimed must be clear and unequivocal before it has the effect of resetting the limitation start date. The plaintiff asserts that RAI's debt can be divided between that due and payable before June 16, 2012, totalling $496,120.29 ($494,950.25) ("Old Debt") and after that date, which totalled $21,321.85 ($21,736.15) ("New Debt"). Of the different sources of payment from RAI to MPL, most

were applied to specific invoices that constituted Old Debt. While part payment by RAI acknowledged this debt, since most was statute-barred, the limitation period for all but a small portion was not reset. In that regard, payments applied to New Debt or re-allocated from Old Debt to New Debt, did not reset the limitation period on the Old Debt.

3) Analysis

[73] The following section of the *Limitations Act* is applicable:

> SECTION 13
>
> 13. (1) If a person acknowledges liability in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made.
>
> *Liquidated sum*
>
> (8) Subject to subsections (9) and (10), this section applies to an acknowledgment of liability in respect of a claim for payment of a liquidated sum even though the person making the acknowledgment refuses or does not promise to pay the sum or the balance of the sum still owing.
>
> *Restricted application*
>
> (9) This section does not apply unless the acknowledgment is made to the person with the claim, the person's agent or an official receiver or trustee acting under the Bankruptcy and Insolvency Act (Canada) before the expiry of the limitation period applicable to the claim.
>
> *Same*
>
> (10) Subsections (1), (2), (3), (6) and (7) do not apply unless the acknowledgment is in writing and signed by the person making it or the person's agent.
>
> *Same*
>
> (11) In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is made or by the person's agent has the same effect as the acknowledgment referred to in subsection (10).

[74] The significance of a running account and payments made against that debt within the meaning of s. 13(11) of the *Limitations Act* is outlined by Di Luca J. in *Ryu Electric v. Sam Bung Hong*, 2017 ONSC 5109 ("*Ryu Electric*"), who stated at para. 50:

> In cases where a debtor makes periodic payments on a running account, the court will treat the balance as a single debt and the periodic payment as being made in respect of the entire balance, see Justice Graeme Mew et al., *The Law of Limitations*, 3d ed. (Toronto: LexisNexis, 2016) at p. 226-227. As such, a periodic payment in relation to the entire balance owing on account has the effect of an acknowledgment of the debt and serves to re-set the limitation period.

[75] Further, an acknowledgement in writing and signed by the debtor can also have the effect of resetting the limitation period pursuant to s. 13(10) of the *Limitations Act*.

[76] The case law in this area suggests that "the determination of whether a claim for a series of debts is a single claim or multiple claims is totally dependent on the facts": *Soler & Palau Canada Inc. v. Meyer's Sheet Metal Ltd.*, 2012 ABQB 496, at para. 28.

[77] Finally, the "general practice" and "context of the nature of the business relationship" between the parties plays an important part with respect to determining whether various invoices are treated as discrete debts or a running account: see *Ryu Electric*, at para. 46.

[78] Even though invoices were billed separately, contained no global amount owing, and spreadsheets created by MPL identified payments applied against individual invoices, I am satisfied that when the nature of the business relationship between MPL and RAI is properly viewed in context, the invoices were not treated as separate or discrete debts, but rather as a larger running account.

[79] While invoices generated in other commercial relationships are often treated as separate and discrete expenses, this did not occur in the grower/distributor operation that existed between MPL and RAI. Expenses incurred by RAI and invoices issued by MPL were allowed to accumulate, and then seamlessly carried over from season to season. The debt from outstanding individual invoices would then fluctuate based on expenses incurred by RAI and payments received by MPL. Even though, for accounting purposes, MPL tracked and allocated payments received from RAI against the balance owing on specific invoices, functionally, the total indebtedness was treated by both parties as a running account. In sum, the parties focused less on the status of individual invoices, and more on the larger accumulated debt. This is how the parties conducted business until late summer/early fall 2012 when additional steps were taken by MPL to rein in RAI's debt.

[80] The historic treatment of invoices was unaffected by agreements that the parties signed each growing season. All agreements were essentially the same. The primary purpose of the agreements was to protect MPL's proprietary interests in Splendido tomatoes and Ancient Hot Peppers. The agreements did not differentiate, in any material way, an expense invoice that was issued by MPL in one growing season from that of another. Similarly,

invoices issued by MPL did not apply to stand-alone projects or business ventures that had a defined start and finish date. Instead, invoices were issued during a continuing commercial operation that involved the same parties growing and distributing similar types of produce from year to year.

[81] The defendant argues that in contrast to a running account, two cheques from RAI on November 6 and December 10, 2013, were not used to pay down the then outstanding balance but instead, were specifically allocated towards two 2012 seed invoices, leaving more recent invoices unpaid. While this is true, it appears that MPL re-allocated the funds in the above manner at the behest of RAI, for reasons that are still unknown to me. I am not surprised that MPL took its cue from RAI and engaged in a relatively complicated accounting reallocation of funds to specifically pay these two seed invoices. What MPL did was consistent with the type of relationship that the parties developed over the years. For instance, in the past, MPL allowed RAI to carry over its debt from year to year without interest or penalties, and to suspend costly deductions from its grower's pay for over two years.

[82] I am also satisfied, based on the evidence, that the two cheques provided by RAI in 2013 demonstrated that payment primarily targeted the larger debt rather than specific invoices: see *Ryu Electric*, at para. 39. The quantum of both cheques was in round numbers ($25,000) and different from the balance owing on the invoices they were applied against ($38,166.11 outstanding on seed invoice #SI00103245 and $32,400 outstanding on seed invoice #SI00105388). The dates also do not correspond to the dates of the invoices (seed invoice #SI00103245, dated October 31, 2012, and seed invoice #SI00105388, dated November 15, 2012), nor is there evidence that the cheques have a written notation in relation to any specific invoice.

[83] Likewise, the 10 and 15 percent taken from the total of each weekly grower's pay during most of 2013 was clearly directed, as noted on the grower's pay statement, to reducing the large outstanding balance associated with the costs of seeds. Overall, I find that while payments received were applied to specific invoices, the invoices issued were not reasonably understood by MPL as constituting separate and discrete debt, but instead, as being part of a running account whereby reoccurring payments by cheque or deductions from grower's pay were credited against that larger debt.

[84] Further, there are also a series of written and signed acknowledgements by Kurt Grass on certain invoices and copies of seed packages that are associated with the delivery of Santalina seeds. Pursuant to s. 13(10) of the *Limitations Act*, a written and signed acknowledgement of debt owed against part of what I found to be a larger running account, has the effect of resetting the limitation period. In this regard, together with an invoice for 100,000 Santalina seeds signed by Kurt Grass on October 28, 2011, there are other signed invoices and copies of seed packages which include the following:

a. Invoice #SI00102345 dated October 31, 2012 for 45,000 Santalina seeds in the amount of $110,000 – signed by Kurt Grass, who also acknowledged receipt of the seeds (Exhibit #1B, Tab 191).

b. Invoice #SI00105388 dated November 15, 2012 for 8,100 Santalina seeds in the amount of $32,400 – signed by Kurt Grass (Exhibit #1B, Tab 192).

c. A seed package for 1000 Santalina seeds. The package indicates "75x1000" and contains Mr. Grass' signature as well as the date "11-15-2012" (Exhibit #1B, Tab 196).

[85] At trial, Mr. Mastronardi identified what appeared to be the signature of Kurt Grass on seed invoices #SI00102345 and #SI00105388. Mr. Ziter also testified that Mr. Grass, in his presence, signed copies of two packages of Santalina seeds on October 28, 2011, and November 15, 2012, which confirmed the delivery of seeds for the upcoming growing season. I note that invoice #SI00105388 and a copy of one of the two Santalina seed packages signed by Kurt Grass, have the same date, November 15, 2012. It appears that the invoice and the copy of the seed package are connected and that the invoice acknowledges the costs associated with 45,000 of the "75x1000", or 75,000 of Santalina seeds that were delivered to RAI.

[86] In conclusion, I am satisfied that the various invoices issued by MPL were treated by the parties as a running account and that deductions from RAI's grower's pay in November 2012 as well as regular deductions between September and March 2013 and the two cheques by RAI in the amounts of $25,000 each, on November 6 and December 10, 2013, represented partial payments made on that account. Further, I am also satisfied that the two signed invoices from October 31 and November 15, 2012, coupled with the signed copy of the seed package on November 15, 2012, was RAI acknowledging the debt on that running account. Accordingly, in the circumstances, the partial payments, and signed invoices/copy of the seed package, either separately or taken together, constituted a clear and unequivocal acknowledgement by RAI of the entire ongoing debt within the meaning of s. 13(10) and (11) of the *Limitations Act*. This then had the effect of restarting the limitation period on each of those dates.

The Payment Plan Constituted a New Agreement-Failure to Plead in the Amended Statement of Claim

[87] Considering my findings with respect to the discoverability of MPL's claim, the outstanding debt being in the nature of a running account and the acknowledgement by RAI of its indebtedness to MPL, I make no findings with respect to whether the payment plan was pleaded in the plaintiff's Amended Statement of Claim or Amended Amended Amended Reply and Defence to Counterclaim or whether, if pleaded, the evidence established a payment plan which constituted a new agreement thereby having the effect of resetting the limitation period.

2. Pre-judgment and Post-judgment Interest Claim

1) Theory of the Plaintiff

[88] MPL submits that in accordance with s. 128(4) and 129(5) of the *CJA*, it is appropriate in the circumstances to depart from the default pre-judgment and post-judgment interest otherwise prescribed under the *CJA* and apply an interest rate of 18 percent per year on all

outstanding invoices subject to the action. The plaintiff acknowledges that this interest rate was not stipulated in any agreements between the parties, and that this alone is not a basis for the court to decline making an interest award. MPL submits that the interest rate was expressly stated on all but the first three of the 70 outstanding invoices, and that RAI- a sophisticated party- never objected or questioned the rate. There was a longstanding commercial relationship between the parties, and there was an implied contractual agreement between the parties that the interest rate would accrue per the invoices.

[89] Further, MPL submits that the three invoices that do not have the 18 percent interest rate on it should also be subject to the rate, since it was provided on the other invoices, without objection from RAI, and ought to be considered as an agreed term of the business relationship between the parties.

[90] MPL pleads in the alternative that if the court disagrees with MPL's submission, the pre-and-post-judgment interest in accordance with the *CJA* should be awarded.

2) Theory of the Defendant

[91] The defendant submits that there is no evidence that RAI agreed or that either party's conduct supported the existence of an implied contractual agreement that RAI should pay interest on any of the invoices in the amount of 18 percent. Accordingly, the default pre-judgment and post-judgment interest prescribed in the *CJA* ought to apply.

3) Analysis

[92] The sole issue in this analysis is whether there exists an implied contract that the rate of 18 percent interest should be applied against RAI on all, or at least 67 of the 70 outstanding invoices issued by MPL.

[93] In *Royal Group v. Core Precision*, 2011 ONSC 5019, aff'd 2012 ONCA 228 ("*Royal Group*") Campbell J. found that even though each invoice sent by the plaintiff to the defendant expressed that an interest rate of 1.5 percent per month (18 percent annum) will be charged on overdue accounts, he nonetheless concluded that there was no implied contract between the parties to pay interest at that rate.

[94] Before arriving at this conclusion, Campbell J. summarized the applicable case law on the existence of an implied contract at para. 43:

> It seems well-settled that the mere inclusion of such an interest rate provision in an invoice for goods sold will not, in all circumstances, obligate the purchaser to pay interest at that stated rate, unless he or she has agreed to pay interest at that rate. See: *Prince Albert Co-Operative Association Ltd. v. Rybka*, [2007] 4 W.W.R. 23 (Sask. C.A.) at para. 16-17. However, where the parties have an established business relationship, the circumstances of that relationship may establish that the parties agreed, at least impliedly, to be bound by the interest rates expressly provided on a series of invoices. See: *Salit Steel v. Mondiale Development Ltd.* (2009), 78 C.L.R. (3d) 54

> (Ont. Master) at para. 77-81; *Mackin Mailey Advertising Ltd. v. Budget Brake & Muffler Distributors Ltd.*, [1987] B.C.J. No. 2268 (C.A.); *Irving Oil v. Whynot* (1978), 33 N.S.R. (2d) 92. Of course, this will not always be the case. Even where there is an established business relationship between the parties, it may not be appropriate to infer the existence of an agreement between the parties to the application of any particular interest rate. See: *Kindersley and District Co-operative Ltd. v. Bowman*, (1983), 25 Sask.R. 213 (Q.B.) at para. 5-6; *Marcel Baril Ltee v. 929454 Ontario Limited*, [2008] O.J. No. 4506 (S.C.J.) at para. 21-22. Whether or not a contractual agreement on the issue of interest rates will be implied will, it seems, turn on the individual circumstances of each case and the nature of the particular business relationship between the parties.

[95] In *Royal Group*, Campbell J. relied on several factors to conclude that no implied contract existed between the parties, including the absence of: (1) an interest rate being mentioned in the contract; (2) discussions of interest rates between the parties; and (3) evidence of historical practices of accepting that interest rate.

[96] In *Mount Royal Painting Inc. v. Unifor Canada Inc*., 2022 ONSC 6316 ("*Mount Royal Painting*"), which involved a review of several findings made by an associate justice who presided over a lengthy trial on a reference under the *Construction Act*, R.S.O. 1990, c. C.30, Centa J. upheld the trial judge's decision to decline awarding pre-judgment interest in the amount of 24 percent per annum, a rate which appeared on invoices rendered by the plaintiff. In coming to this conclusion, Centa J. relied heavily on *Royal Group* and found as follows at para. 64:

> Even if Associate Justice Wiebe erred in considering the discovery evidence of Mr. Hildebrand, that does not change the correctness of his conclusion: there was no evidence before him that the parties ever expressly discussed or agreed upon this interest rate. I see no error in Associate Justice Wiebe declining to imply the 24% interest rate into the contract between the parties: *Royal Group Inc.; Nortrax Canada Inc. v. Atlantis Marine Construction Inc.*, 2010 ONSC 4097, at paras. 23-30; *DC Electric Ltd. v. Brauer*, [2009] O.J. No. 2022 (S.C.), at paras. 51-53; *Hardwoods Specialty Products LP Inc. v. Rite Style Manufacturing Ltd.*, 2006 BCCA 139, 266 D.L.R. (4th) 485.

[97] Most invoices in Exhibit #1A and 1B appear to use a template that is generic, mass produced and issued not only to RAI, but other growers affiliated with MPL both within and outside the United States. I say this because at the bottom of the 67 invoices that expressly provide the 18 percent interest payment on overdue accounts, it states:

> PAYMENT TERMS: U.S.A – PACA TERMS OUTSIDE U.S.A – 21 DAYS FROM DELIVERY DATE
>
> U.S. Customers Only: Remit to Mastronardi Produce Limited

P.O. Box 71227

Chicago, IL, 60694-1227

[98] As a result, it does not appear that those parts in common among the outstanding invoices, such as the "Buyer agrees to pay interest at 18%...", were based on an understanding or commercial practice developed between MPL and RAI. More specifically, I have no evidence that this interest rate was ever included in any contract, discussed at any time by one or both of the parties, or ever intended by MPL or accepted by RAI to apply to outstanding invoices. Further, at no time did MPL ever allocate deductions from grower's pay or other payments to interest on outstanding and overdue invoices during the commercial relationship. Accordingly, to imply such an onerous rate of interest for outstanding invoices, without evidence to suggest that RAI in some way agreed to that rate, would be unreasonable and unfair.

[99] In conclusion, after assessing the nature of the commercial relationship between the parties, there is no evidence to suggest there was ever an implied agreement that outstanding invoices should be subject to 18 percent interest, even though that rate is clearly visible on the front of virtually all the invoices.

[100] With that being said, the plaintiff is nonetheless entitled to some interest on the outstanding arrears that RAI had accumulated since 2008. Accordingly, in the circumstances, it seems only fair and appropriate that pre-judgment and post-judgment interest should be charged to the defendant at rates determined in accordance with the provisions of the *CJA*.

E. JUDGMENT

[101] In conclusion, I make the following order:

a. That Rainbow Acres Inc. is required to pay the principal amount owing to Mastronardi Produce Limited in the amount of $516,686.40 as claimed in paragraph 1(a) of the Amended Statement of Claim which is comprised of $489,628.11 for seeds and $27,058.29 for packaging materials that were sold and delivered to Rainbow Acres Inc;

b. That Rainbow Acres Inc. is required to pay pre-judgment and post-judgment interest on the principal amount owing to Mastronardi Produce Limited at the default rates prescribed under the *Courts of Justice Act*, R.S.O. 1990 C. c.34.

F. COSTS

[102] I urge counsel to resolve the question of costs.

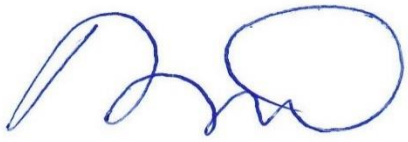
[103] If the parties are unable to do so, they may file brief written submissions with the court, of no more than five (5) double-spaced pages (exclusive of any costs outline, bill of costs, dockets, offers to settle, or authorities), in accordance with the formatting standards of r. 4.01 and the following schedule:

a. MPL shall deliver its submissions within thirty (30) days following the release of these reasons.

b. RAI shall deliver its submissions within twenty (20) days following service of MPL's submissions.

c. MPL shall deliver its reply submissions, if any, which shall be limited to no more than three (3) double-spaced pages, within five (5) days following service of the submissions.

[104] If either party fails to deliver their submissions in accordance with this schedule, they shall be deemed to have waived their rights with respect to the issue of costs, and the court may proceed to make its determination in the absence of their input or give such directions as the court considers necessary or advisable.



Brian D. Dubé
Justice

Released: March 31, 2023

CITATION: Mastronardi Produce Limited v. Rainbow Acres Inc., 2023 ONSC 2059
COURT FILE NO. CR-14-20916
DATE: 2023-03-31

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Mastronardi Produce Limited

Plaintiff

- and -

Rainbow Acres Inc.

Defendant

REASONS FOR JUDGMENT

Dubé J.

Released: March 31, 2023