

Litigation - Canada

Court rules on limitation period for anticipatory breach of contract

Contributed by **Dentons**

February 04 2014

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Introduction

In *Ali v O-Two Medical Technologies Inc*⁽¹⁾ the Court of Appeal for Ontario addressed the issue of when the limitation period begins to run for an anticipatory breach of contract. The decision provides an answer to the ongoing debate of whether the limitation period will commence as soon as the defendant indicates that it will breach a future obligation under a contract or when it actually fails to perform the obligation. The case was decided in the context of an employee's claim for unpaid commissions where the employer unilaterally changed the terms for the calculation of commissions earned.

Facts

On December 5 2006 the plaintiff negotiated a large product sale for which he was entitled to a commission. Under the agreement, once the buyer accepted delivery and paid for the products, the plaintiff would be entitled to the commission as calculated in the agreement with his employer. On December 12 2006, one week after the contract was negotiated, the employer unilaterally amended the terms of the commission agreement and told the plaintiff that it would pay him a lower rate of commission. The plaintiff objected to the amended terms and continued to press for performance under the original commission agreement through a series of letters. In response the employer reiterated that it would pay based on the amended terms and on November 23 2007 paid the plaintiff his commission in accordance with the amended agreement.

On September 16 2009 – more than two years after he had been told of the new commission structure but within two years of payment of the reduced commission – the plaintiff commenced a claim against his employer alleging that he was entitled to the higher rate of commission. The defendant brought a summary judgment motion on the basis that the plaintiff's action was time barred under Section 4 of Ontario's Limitations Act, 2002.⁽²⁾

Motion judge's decision

The employer took the position that the plaintiff's claim, if he had one, arose when it changed the commission structure on December 12 2006, and that the plaintiff had not filed his action until more than two years later. The plaintiff took the position that, as the innocent party to an anticipatory breach, he refused to accept the repudiation, affirmed the contract and continued to press for performance.⁽³⁾ By choosing this option, the plaintiff argued that the breach did not occur until his employer tendered a deficient payment on November 23 2007.

The motion judge allowed the defendant's motion for summary judgment and dismissed the plaintiff's claim.⁽⁴⁾ She rejected the plaintiff's argument that the doctrine of anticipatory breach applied because the plaintiff was given the amended commission formula by his employer on December 12 2006 and the employer subsequently honoured it.⁽⁵⁾ She stated that the plaintiff did not need to know the precise extent of the alleged losses, but rather that there would simply be some damage.⁽⁶⁾ The motion judge held that the plaintiff's claim was discovered when the agreement was unilaterally changed or, at the very latest, in 2007 when his employer reiterated that he would be paid at the lower rate. Either way, the court found that the plaintiff commenced his action beyond the two-year limitation period.

Appellate court's decision

The Court of Appeal for Ontario reversed the motion judge's decision and held that the plaintiff's claim was not time barred. In the court's view, the employer's unilateral amendment of the commission terms constituted an anticipatory breach of the commission agreement. When faced with an anticipatory breach, the innocent party has two options:

- Accept the anticipatory breach and sue for damages; or
- Treat the initial contract as subsisting and continue to press for performance in accordance with the terms of the original contract.

In this case the plaintiff did not accept the breach; rather, he continued to press for performance through a series of letters written to his employer throughout 2007. Therefore, the court held that his actions kept the initial agreement intact until payment of his commission was due and his employer did not make full payment. Accordingly, he did not 'discover' his claim for the purposes of Section 5(1)(a) of the Limitations Act, 2002 until November 23 2007, because that was the day that he first knew that damage had occurred.⁽⁷⁾

Comment

Accordingly, where repudiation of the original contract is clearly rejected, the limitation period will be delayed until the date that the defendant actually fails to perform the obligation. However, where the innocent party accepts repudiation, the limitation period will begin to run on such acceptance. This decision is significant as it demonstrates that the running of the limitation period will depend on whether the innocent party accepts or rejects an anticipatory breach. It highlights the importance for the innocent party to be clear when it is not accepting the repudiation, and to continue to press for performance in accordance with the original contract in order to delay the running of the limitation period.

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Endnotes

(1) 2013 ONCA 733.

(2) SO 2002, c 24, Schedule B.

(3) See *Brown v Belleville (City)*, 2013 ONCA 148 at paragraphs 42-45.

(4) See 2013 ONSC 880.

(5) *Ibid* at paragraph 30.

(6) *Ibid* at paragraph 27, citing *Hamilton (City) v Metcalfe & Mansfield Capital Corp*, 2012 ONCA 156 at paragraph 6.

(7) *Supra* note 1 at paragraph 2.

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