WeirFoulds LLP

Kinectrics v. FCL Fisker et al.: Novel Limitation Period Arguments for Subrogation Insurers

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WeirFoulds' subrogation team successfully opposed a motion for summary judgment recently, reported at *Kinectrics Inc.* v. *FCL Fisker Customs & Logistics Inc*., 2020 ONSC 6748. In that decision, Justice Sanfilippo recognized that different limitation periods can apply to different causes of action, such that a negligence claim can be advanced in relation to a cargo loss, in which case the discoverability principle may apply. Justice Sanfilippo also suggested a novel limitation period argument which could benefit subrogated insurers.

Factual Overview:

In August 2016, the Plaintiff Kinectrics Inc. ("**Kinectrics**") hired the defendant FCL Fisker Logistics ("**FCL**") to transport an AC Resonant Test System Unit (the "**RTS Unit**"), mounted on its specialized trailer (the "**Trailer**"). FCL subcontracted the transport of the RTS Unit and Trailer to the defendant Don Anderson Haulage Limited ("**Anderson**").

Anderson took possession of the RTS Unit and Trailer from Kinectrics in Etobicoke, Ontario, and drove it to its destination in Churchill Falls, Newfoundland, arriving on or about August 30, 2016. Kinectrics used the RTS Unit on a project in Churchill Falls, and then asked for the RTS Unit to be brought back to Etobicoke. On September 9, 2016, while being hauled by Anderson from Newfoundland back to Ontario, the RTS Unit and the Trailer were damaged when a fire broke out during highway travel (the "**Fire**").

On September 15, 2016, Kinectrics sent letters to both FCL and Anderson, notifying them that Kinectrics was holding them responsible for the damages caused by the Fire.

On June 15, 2018, Kinectrics sued FCL and Anderson in a first action, claiming property damages to the RTS Unit and Trailer in the amount of $1,067,527.77 (the "**First Action**"). The First Action was a subrogated claim commenced by Kinectrics' cargo insurer.

On December 6, 2018, Kinectrics commenced a second action, this time claiming damages in the amount of $580,000 for business interruption loss (the "**Second Action**"). The Second Action was a subrogated claim commenced by Kinectrics' property insurer.

Both actions arose from the same factual matrix and were in substance symmetrical, except mostly that they plead different damage claims, covered by two different insurers. The First Action claimed property damage and the Second Action claimed business interruption loss.

Anderson brought a motion for summary judgment in the Second Action, arguing that it was statute barred, as it was issued after the second anniversary of the Fire. Anderson contended that Kinectrics knew of its claim on September 15, 2016, as it sent out notice letters to both FCL and Anderson on that date.

Justice Sanfilippo's Decision:

Kinectrics opposed the motion for summary judgment successfully. Indeed, Justice Sanfilippo held that Anderson did not meet its burden of persuading the court that there was no genuine issue requiring a trial for several reasons, including:

- Anderson argued that Ontario law governed the dispute, whereas Kinectrics argued that Newfoundland and Labrador Law did. Kinectrics advanced that the limitation period applicable to a bailment claim is six years under Newfoundland and Labrador law, versus two years in Ontario. Justice Sanfilippo held that Anderson did not provide the Court with the required evidence in order to adjudicate the choice of law issue.
- Granting summary judgment would have run the risk of duplicative proceedings or inconsistent findings of fact. In both actions, Kinectrics plead and relied upon the Newfoundland and Labrador law, which does not stipulate any limit to a carrier's liability. Anderson relied instead upon Ontario law, which limits the carrier's liability to $2/lbs. Deciding which law applies in the Second Action would have had the potential to affect the First Action.
- Kinectrics plead discoverability, as the cause of the fire was only determined on December 14, 2016. Kinectrics argued that Anderson's breach of the duty of care was only discovered on that date. The Second Action was commenced less than two years later, on December 9, 2016. In response, Anderson contended that a carrier is liable to the owner of goods in a cargo claim without proof of negligence, rendering unnecessary any analysis of Kinectrics' discoverability of its claim. Justice Sanfilippo dismissed Anderson's argument. He noted that Kinectrics plead several causes of action, including bailment, breach of contract and negligence, and held that different limitation periods can apply to different causes of action. Even if the cargo claim did not involve a discoverability analysis as contended by Anderson, the negligence and contract claims would give rise to such an assessment of discoverability.
- Justice Sanfilippo further held that the issue regarding when Kinectrics knew, or a reasonable person in its position would have known, that the damage from the Fire was caused or contributed to by an act or omission by Anderson was a genuine issue requiring a trial for determination, with oral evidence and a complete record.
- Lastly, the summary judgment motion did not serve the goals of efficiency and proportionality, as the First Kinectrics Action will proceed to trial, absent resolution, regardless of the determination of the motion.

Justice Sanfilippo noted that in his view, the efficient and correct procedure for Kinectrics to plead its claim for business interruption loss would have been for Kinectrics to amend the First Action in order to add the business interruption claim. The First Action had "the foundation of having been brought in time."[i]

While both claims were commenced under the name of the insured Kinectrics, both actions were in fact brought by two separate subrogated insurers. The property insurer could not compel the cargo insurer to amend the First Action in order to include the business interruption claim, as held by the Ontario Court of Appeal in *Tree-Techol Tree Technology and Research Company Inc. v. VIA Rail Canada Inc.*[ii] In that decision, Intact Insurance sought to intervene in an action commenced by its insureds. The action had been commenced within the limitation period by the insureds; however, when Intact Insurance sought to intervene, the limitation period had expired. The Superior Court dismissed Intact Insurance's motion, and the Court of Appeal affirmed this decision:

"The fact that the insurer missed the limitation period cannot be cured by an application for intervenor status. Intact had the right to commence a subrogated claim, but just as the motion judge put it, forgot to do so. Its claim was out of time and the appeal is dismissed."[iii]

Justice Sanfilippo suggested that ultimately, the Second Action may not be out of time at all, since Kinectrics had already commenced the First action in time. He made the distinction between pleading a "new cause of action" after expiry of the applicable limitation period, which will be statute-barred, and an amendment which does not assert a new cause of action, which is permissible.[iv] He noted: "(…) the real question is whether the relief sought by Kinectrics in the Second Kinectrics Action, brought separately as opposed to by amendment to the First Kinectrics Action is statute barred."[v]

This suggests that when an insured commenced an action in time, the subrogated insurer may then be able to commence another action even after the expiry of the two-year limitation period. It would be possible to amend the insured's action, as long as no new cause of action is pleaded. Consequently, it should be possible to advance the subrogated claim, based on the same causes of action, in a separate action and regardless of any limitation period issue.

Anderson is currently seeking leave to appeal to the Divisional Court.

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[i] *Ibid* at para. 9.

[ii] 2017 ONCA 876.

[iii] *Ibid* at para. 2.

[iv] 2020 ONSC 6748 at para. 90.

[v] *Ibid* at para. 89.

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