CITATION: 1365 California Limited v. Moss Property Management Inc., 2019 ONSC 2411
COURT FILE NO.: CV-11-441746
MOTION HEARD: 20190403
REASONS RELEASED: 20190416

SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

1365 CALIFORNIA LIMITED, 333/335 CALIFORNIA LIMITED, 2211 PARKEDALE LIMITED, 2400 PARKEDALE LIMITED, 2479-2495 PARKEDALE LIMITED and JODAVILLE CORPORATION

Plaintiffs

- and-

MOSS PROPERTY MANAGEMENT INC. and ROY MURAD

Defendants

BEFORE: MASTER M.P. McGRAW

COUNSEL: J. Robinson
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-for the Plaintiffs

M. Simaan
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-for the Proposed Defendants, Mere Investments Inc., Media 2 Go International Inc., Monica Murad, Aaron Murad, Noah Murad and Moss Development Ltd.

REASONS RELEASED: April 16, 2019

Reasons For Endorsement

I. Background

Introduction

[1] This is a motion by the Plaintiffs for leave to amend their Statement of Claim issued December 12, 2011 (the "Original Claim") to add Mere Investments Inc. ("Mere"), Media 2 Go International Inc. ("Media"), Monica Murad ("Monica"), Aaron Murad ("Aaron"), Noah Murad ("Noah"), Moss Development Ltd ("MDL"), John Doe and John Doe Ltd. as Defendants

(collectively, the "Proposed Defendants") and to seek tracing remedies and advance claims against the Proposed Defendants for unjust enrichment and conversion (the "Proposed Amendments").

The Parties, the Action, the Forensic Accounting and the History of the Proceedings

[2] The Plaintiffs are the owners of 6 retail commercial properties located in Belleville, Ontario (the "Properties"). The Defendant Moss Property Management Inc. ("Moss") was the property manager for the Properties. The Defendant Roy Murad ("Roy", together with Moss, the "Original Defendants") is the sole director of Moss.

[3] Monica is Roy's wife. Aaron and Noah are Roy and Monica's sons. Mere is a corporation owned and controlled by Roy and Aaron (who is Mere's sole director) and Media and MDL are owned and controlled by Roy.

[4] The Plaintiffs state in the Original Claim that pursuant to an interim oral property management agreement Moss and Roy began acting as de facto property managers of the Properties (the "Property Managers"). The Plaintiffs allege that, among other things, Roy did not provide information and documentation regarding the Properties to the Plaintiffs including rent rolls, accounting information and leases and made himself a signing authority on and diverted funds from the Plaintiffs' bank accounts (the "Plaintiffs' Accounts").

[5] The Plaintiffs seek, among other things: an interim mandatory injunction requiring the Original Defendants to deliver bank and other business documentation and barring them from communicating with tenants and accessing the Plaintiffs' Accounts. The Plaintiffs' also request a declaration that the Original Defendants hold all funds received on behalf of the Plaintiffs and any property obtained with such funds as constructive trustees together with an accounting of all business transacted while acting as Property Managers. The Plaintiffs claim damages for breach of fiduciary duty, interference with contractual relations and conversion ($1,000,000 for each cause of action) and punitive damages of $500,000.

[6] At mandatory mediation on November 12, 2014 the parties entered into an interim agreement to jointly retain a forensic accountant (the "Accounting Agreement"). Paragraphs 2-4 of the Accounting Agreement state:

> "2.) The accountant shall be retained to conduct a forensic audit of monies received in relation to the Brockville properties and expended by Moss Properties during its tenure as Property Manager for the purposes of ascertaining all proper expenses for the benefit of the buildings paid by Moss Properties or paid by others including Mere Investments on Moss Properties' behalf, with the goal of determining any monies which remain unaccounted for ("missing monies").
>
> 3.) The accountant's determination of the amount, if any, of missing money shall be final and binding.

> 4.) In the process of the forensic audit the accountant shall make determinations and findings on how and where money was taken in and spent. The parties reserve their right to argue/negotiate over all contested money, which is money the whereabouts or destination of which has been determined but about which the parties do not agree."

[7] The parties were unable to agree on an independent forensic accountant. Pursuant to the Accounting Agreement, Arbitrator Michael Silver appointed Smith Forensic Inc. ("SFI") to be jointly retained by the parties. SFI's engagement was confirmed by letter dated February 11, 2015 (the "Engagement Letter") which provides that SFI's assignment includes paragraph 2 of the Accounting Agreement and to "make determinations and findings on how and where money was taken in".

[8] There have been ongoing disputes between the parties and between the Original Defendants and SFI regarding the scope of SFI's engagement, the production of documents and payment of SFI's fees. The Plaintiffs claim that they have paid some of the Original Defendants' share of SFI's fees to ensure that SFI has continued to work under the Engagement Letter. Many of these disputes appear to remain unresolved.

[9] By letter to counsel dated October 9, 2015, SFI provided a 2-page draft initial report (the "First Report) the stated purpose of which was to assist counsel "in determining the next level(s) of analyses that are to be completed". Among other things, the First Report states that payments to related parties totaled $1,730,615 of which $1,624,560 was paid to Mere. By email to counsel dated October 26, 2015, SFI requested supporting documentation for a number of transactions involving Mere, MDL and unknown parties. These requests were refused and by letter to Moss and Mere via its counsel dated April 22, 2016, SFI purported to order the production of the documentation on the basis that the Accounting Agreement provided SFI with authority under the *Arbitration Act* (Ontario) to compel the production of documents in the care, control or power of Moss.

[10] The Original Defendants continued to dispute SFI's document request and Arbitrator Silver was engaged to decide the issue. By decision dated February 10, 2016, Arbitrator Silver ordered Moss and Mere to produce the documents requested by SFI. The Original Defendants appealed Arbitrator Silver's decision by Application to the Court. As set out in the Endorsement of Justice Lederer dated May 2, 2016, the parties agreed that the Plaintiffs would bring a motion pursuant to Rule 30.10 for the production of non-party records. Costs were awarded to the Original Defendants.

[11] By Order dated September 30, 2016, Justice Kristjanson ordered Moss, Roy, Mere and and/or MDL to produce and disclose any of the documents requested and ordered by SFI in their possession or control. Justice Kristjanson also ordered HSBC Bank of Canada ("HSBC") to produce, among other things, bank statements, cheque copies and related documents from accounts held by Mere and MDL at HSBC (the "HSBC Documents") and ordered Mere and MDL to produce certain supporting documentation.

[12] On November 4, 2016, HSBC provided Plaintiffs' counsel with the HSBC Documents.

Plaintiffs' counsel provided the HSBC Documents to SFI and Original Defendants' counsel. The Plaintiffs state that the HSBC Documents reveal payments to the Proposed Defendants from bank accounts operated by the Original Defendants to receive and deposit rental payments for the Plaintiffs.

[13] By letter December 5, 2017, SFI provided an 11-page report (the "Second Report"). The stated purpose of the Second Report was to conduct the forensic audit provided for the Interim Agreement. The Second Report states that $912,000 in disbursements are unaccounted for and that SFI was not provided with the supporting documentation for a significant portion of the payments which Moss stated were for the benefit of the Properties. The Second Report also repeated its conclusion from the First Report regarding the amount of total disbursements to related parties and the amount to Mere, adding that $1,198,679 of the payments to Mere "were referred to as relating to monthly budget charges" for which no supporting documentation was provided.

[14] One day later, on December 6, 2017, the parties attended before Justice Firestone who scheduled a 12-day trial commencing December 2, 2019. The Plaintiffs brought this motion on December 17, 2018.

[15] In their proposed Amended Statement of Claim (the "Amended Claim"), the Plaintiffs claim a tracing order with respect to all funds or assets of the Plaintiffs transferred to any person or corporation including the Proposed Defendants and any corporation or person directly or indirectly related to or controlled by the Original Defendants; an order that the Proposed Defendants produce any information or documents in their possession or control related to the receipt of funds from the Original Defendants; a declaration that the Proposed Defendants hold any property and assets received in trust for the Plaintiffs; and Judgment for any amount due and owing and traceable to the Plaintiffs (the "New Claims").

II. The Law and Analysis

[16] Rule 26.01 states:

> "On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."

[17] Sections 4 and 5 of the *Limitations Act* provide as follows:

> "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.
> 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).
(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."

[18] Amendments should be presumptively approved unless they would result in prejudice that cannot be compensated by costs or an adjournment; they are shown to be scandalous, frivolous, vexatious or an abuse of the court's process; or they disclose no reasonable cause of action (*Andersen Consulting* v. *Canada (Attorney General)*, 2001 CarswellOnt 3139 (C.A.) at para. 37; *Schembri* v. *Way*, 2012 ONCA 620 at paras. 25 and 44).

[19] Master MacLeod (as he then was) summarized the test for leave to amend pleadings under Rule 26.01 at paragraphs 19-22 of *Plante* v. *Industrial Alliance Life Insurance Co.*, 2003 CarswellOnt 296:

…

"(a) The amendments must not result in irremediable prejudice. The onus of proving prejudice is on the party alleging it unless a limitation period has expired. In the latter case, the onus shifts and the party seeking the amendment must lead evidence to explain the delay and to displace the presumption of prejudice: [citations omitted]

(b) The amended pleading must be legally tenable. It is not necessary to tender evidence to support the claims nor is it necessary for the court to consider whether the amending party is able to prove its amended claim. The court must assume that the facts pleaded in the proposed amendment (unless patently ridiculous or incapable of proof) are true, and the only question is whether they disclose a cause of action. Amendments are to be granted unless the claim is clearly impossible of success. For this purpose amendments are to be read generously with allowance for deficiencies in drafting: [citations omitted].

(c) The proposed amendments must otherwise comply with the rules of pleading. For example, the proposed amendments must contain a "concise statement of material facts" relied on "but not the evidence by which those facts are to be proved" (rule 25.06(1)), the proposed amendments are not "scandalous, frivolous or vexatious" (rule 25.11(b)), the proposed amendments are not "an abuse of the process of the court" (rule 25.11(c)), the proposed

amendments contain sufficient particulars -- for example, of fraud and misrepresentation (rule 25.06(8)).”

[20] Master MacLeod also summarized the test to amend a pleading to add a party under Rule 5.04(2):

> …
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> “(a) The proposed amendment must meet all of the tests under rule 26.01.
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> (b) Joinder should be appropriate under rule 5.02(2) or required under rule 5.03. The addition of the parties should arise out of the same transaction or occurrence (rule 5.02(2)(a)), should have a question of law or fact in common (rule 5.02(2)(b)), or the addition of the party should promote the convenient administration of justice (rule 5.02(2)(e)). Adding a party will be particularly appropriate if it is unclear which of the original defendant or the proposed defendant may be liable (rules 5.02(2)(c) or (d)), or if it is necessary that the proposed defendant be bound by the outcome of the proceeding or his or her participation is otherwise necessary to allow the court to adjudicate effectively (rule 5.03(1)).
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> (c) Joinder should not be inappropriate under rule 5.03(6) or 5.05. The addition of a party should not unduly delay or complicate a hearing or cause undue prejudice to the other party. In a case-managed proceeding, it may also be appropriate to withhold consent if it will cause significant disruption to the court-ordered schedule: [citations omitted].
>
> (d) Addition of a party will not be permitted if it is shown to be an abuse of process. Abuse of process will exist where the addition of a party is for an improper purpose such as solely to obtain discovery from them, to put unfair pressure on the other side to settle, to harass the other party or for purely tactical reasons. [citations omitted].” (*Plante* at para. 26)

[21] Prejudice is presumed where a claim is brought beyond the expiry of a limitation period, however, where there is an issue of fact or credibility relating to the discoverability of the proposed claim, the matter will usually be left to the trial judge to determine (*Skrobacky (Litigation Guardian of) v. Frymer*, 2014 ONSC 4544 at paras. 9-26; *Oppendisano v. Vitullo Bros. Plumbing Co. Ltd.*, 2015 ONSC 4021).

[22] Where an amendment is sought after the expiration of a limitation period, prejudice is presumed and the party seeking the amendment must lead some evidence to explain the delay and rebut the presumption of prejudice (*Skrobacky* at parsa. 14; *Robinnson Motorcycle Ltd.* v. *Fred Deeley Imports Ltd.*, [2009] O.J. No. 401 (S.C.J.) at para. 10; *Deaville* v. *Boegeman*, (1984) 48 O.R. 2(d) 725 (C.A.) at p. 5). The prejudice referred to under Rule 26.01 is prejudice to a party’s rights in prosecuting the action (*Godoy* v. *475920 Ontario Ltd.* (2007), 52 C.P.C. (6th) 149).

[23] The Court of Appeal has provided the following guidance with respect to non-

compensable prejudice:

i.) there must be a causal connection between the non-compensable prejudice and the amendment such that the prejudice must flow from the amendments and not somewhere else;

ii.) the non-compensable prejudice must be actual prejudice, ie. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment and specific details must be provided;

iii.) non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial (*1588444 Ontario Ltd.* v. *State Farm Fire and Casualty Co.*, 2017 CarswellOnt 369 (C.A.) at para. 25; *Andersen* at paras. 34 and 37).

[24] The Court of Appeal recently summarized the law with respect to actual knowledge and discoverability in *Har Jo Management Services Canada Ltd.* v. *York (Regional Municipality)*, 2018 ONCA 469:

> "A claim is discovered on the earlier of two dates: when the plaintiff actually knew of its claim, or when a reasonable person, with the plaintiff's abilities and in its circumstances, would have discovered the claim. If a plaintiff fails to exercise the diligence a reasonable person would, the claim is potentially discoverable earlier than the date the plaintiff had actual knowledge of the claim. Due diligence is therefore only relevant to the period of time preceding a plaintiff's actual knowledge of its claim, not the period after. Once a claim has been discovered, there is no ongoing duty on a plaintiff to further investigate the claim. Once the plaintiff has knowledge of its claim, then the limitation clock has begun running, and all the plaintiff is required to do is commence an action before the limitation period expires."(*Har Jo* at para. 42)

[25] Section 5(2) of the *Limitations Act* creates a presumption that a person had actual knowledge of its claim on the day the acts or omissions took place under s. 5(1)(a), however this presumption does not apply to the inquiry under s.5(1)(b) which asks when the claim ought reasonably to have been discovered (*Har Jo* at para. 39; *Fennell* v. *Deol*, 2016 ONCA 249 at paras. 21 and 26). A plaintiff rebuts the presumption under s. 5(2) by demonstrating when it gained actual knowledge of its claim and does not need to show that it exercised due diligence in order to rebut this presumption because it is only relevant to the objective inquiry under s. 5(1)(b), not the inquiry into subjective knowledge under s. 5(1)(a) (*Har Jo* at para. 40; *Fennell* at paras. 23-24).

[26] It is not sufficient that a plaintiff has a suspicion of a potential claim to conclude that the plaintiff has actual knowledge under s. 5(1)(a) of the *Limitations Act*, though it may be sufficient to put a plaintiff on inquiry and trigger due diligence obligations in which the issue under s. 5(1)(b) where the test is whether a reasonable person with the abilities and in the circumstances ought reasonably to have discovered the claim (*Crombie Property Holdings Ltd.* v. *McColl-*

Frontenac Inc., 2017 ONCA at para 42).

[27] In *Colin* v. *Tan*, 2016 ONSC 1187, relied on by the Proposed Defendants, Perell J. held at paragraphs 58-59 and 65:

> "58 ……. it is correct that at the pleadings amendment stage, the plaintiff will not require much evidence to establish that there is a triable issue that a proposed defendant could not have been identified with due diligence within the limitation period and that it is rare that the applicability of the discoverability principle based on due diligence will be determined on a motion to add a party. See: *Fanshawe College of Applied Arts and Technology v. Sony Optiarc Inc.*, 2013 ONSC 1477; *Wakelin v. Gourley* (2005), 76 O.R. (3d) 272 (Master), aff'd [2006] O.J. No. 1442 (Div. Ct.); *Tomescu v. Sarhan*, 2013 ONSC 1358.
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> 59 However, if the plaintiff does not show that there is an issue to be decided about whether he or she was unaware of the claim despite due diligence, and it is clear that the claim was discovered or ought to have been discovered, then the amendment will and should be refused. In other words, if there is no issue requiring a trial, and it is established that the limitation period defence is available to the defendant, the court will refuse the amendment. See: *Wong v. Adler*, *supra*; *Pepper v. Zellers Inc.*, *supra*; *Leighton v. Goodyear Canada Inc.*, [2008] O.J. No. 1870 (S.C.J.); *Pooran v. 2029301 Ontario Ltd.*, [2008] O.J. No. 2812 (Master); *Madden v. Holy Cross Catholic Secondary School*, 2015 ONSC 1773; *Wakelin v. Gourley*, *supra.*
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> …
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> 65 When a limitation period defence is raised, the onus is on the plaintiff to show that its claim is not statute-barred and that it behaved as a reasonable person in the same or similar circumstances using reasonable diligence in discovering the facts relating to the limitation issue: *Durham (Regional Municipality) v. Oshawa (City)*, 2012 ONSC 5803 at paras. 35-41; *Bolton Oak Inc. v. McColl-Frontenac Inc.*, 2011 ONSC 6657 at paras. 12-14; *Bhaduria v. Persaud* (1985), 40 O.R. (3d) 140 (Gen. Div.). That the onus is on the plaintiff accords with the presumption in s. 5(2) of the *Act* that a person with a claim shall be presumed to have discovered the claim on the day the act or omission on which the claim is based took place, unless the contrary is proved."

[28] Master Dash stated the following at paragraph 36 of *1194388 Ontario Inc.* v. *Toronto Dominion Bank*, 2014 ONSC 215 (cited in *Skrobacky* at para. 26):

> "…. If the plaintiffs provide a reasonable explanation on proper evidence as to why the essential facts were not known or obtainable with due diligence within two years of moving to amend the statement of claim, such that the court determines there is a triable issue of fact or credibility on the discoverability allegations, the court will normally permit the amendments with leave to plead a limitations defence..."

[29] The Court of Appeal recently provided clarification and guidance for opposed pleadings amendment motions to add defendants after the apparent expiry of a limitation period in *Mancinelli* v. *Royal Bank of Canada,* 2018 ONCA 544:

i.) the motion judge is entitled to assess the record to determine, as a question of fact, if there is a reasonable explanation on proper evidence as to why the plaintiff could not have discovered its claim through the exercise of reasonable diligence. If a plaintiff does not raise any credibility issue or issue of fact about when its claim was discovered that would merit consideration on a summary judgment motion or a trial and there is no reasonable explanation on the evidence as to why the plaintiff could not have discovered the claim by exercising reasonable diligence, the motion judge may deny the motion (para. 23);

ii.) the evidentiary threshold to be met by a plaintiff is low and whether the plaintiff and its counsel acted with reasonable diligence must be considered in context (para. 24);

iii.) in considering whether the plaintiff has provided a reasonable explanation as to why they could not have identified the party (or cause of action), the explanation is to be given a generous, contextual reading (para. 27);

iv.) a plaintiff's failure to take reasonable steps to investigate a claim is not a stand-alone or independent ground to find a claim out of time, rather, the reasonable steps a plaintiff ought to take is a relevant consideration in deciding when a claim is discoverable under s. 5(1)(b)(para. 30);

v.) where the issue is due diligence, the motion judge will not be in a position to dismiss the plaintiff's motion in the absence of evidence that the plaintiff could have obtained the requisite information with due diligence, and by when the plaintiff could have obtained such information, such that there is no issue of credibility or fact warranting a trial or summary judgment motion (paras. 28 and 31);

vi.) the same approach and the same low threshold is warranted where the motion is opposed based on the apparent expiry of any statutory limitation period subject to the discoverability principle (para. 25).

[30] This action has been set down and scheduled for trial. Therefore, the Plaintiffs require leave pursuant to Rule 48.04(1) to bring this motion. Other than a passing mention in their Factum, the Proposed Defendants made no submissions and raised no opposition in this regard. Therefore, I am satisfied that it is appropriate in the circumstances to grant leave to bring this motion notwithstanding that the matter has been set down for trial.

[31] The Proposed Defendants submit that the Plaintiffs had actual knowledge of the New Claims as against Mere when they received the First Report on October 9, 2015 and that the Plaintiffs failed to exercise reasonable diligence with respect to the discovery of the New Claims against all the Proposed Defendants after they received the HSBC Documents on November 4, 2016. Accordingly, the Proposed Defendants argue that the limitation period with respect to Mere expired on October 9, 2017 and November 4, 2018 for all Proposed Defendants (including

Mere in the alternative), approximately 7 weeks before the Plaintiffs brought this motion on December 18, 2018. The Plaintiffs submit that they did not have actual knowledge of the New Claims until they received the Second Report on December 5, 2017 and acted with reasonable diligence in waiting to bring this motion until after they received the Second Report.

[32] Therefore, the issues on this motion are as follows:

i.) whether the Plaintiffs had actual knowledge of the New Claims as against Mere as of October 9, 2015; and

ii.) whether the Plaintiffs acted with reasonable diligence in discovering the New Claims as against all of the Proposed Defendants after November 4, 2016 and if there is a triable issue of fact or credibility with respect to when the Plaintiffs discovered or should have discovered the New Claims.

[33] Applying the relevant tests and factors, section 5(2) of the *Limitations Act* creates a presumption that the Plaintiffs had actual knowledge of the New Claims on the day they occurred. Although there is no suggestion that the Plaintiffs had actual knowledge of the New Claims when they occurred, the Proposed Defendants submit that the Plaintiffs had actual acknowledge of the New Claims as against Mere as of October 9, 2015 when they received the First Report. In particular, the Proposed Defendants assert that the Plaintiffs had actual knowledge because the First Report stated that Mere received payments of over $1.6 million. In my view, this ignores the timing, purpose and context of the First Report.

[34] The First Report was prepared pursuant to the terms of the Accounting Agreement and the Engagement Letter, agreed to by the parties, and explicitly states that it was a draft initial report delivered for the purpose of assisting counsel "in determining the next level(s) of analyses that are to be completed". As these qualifications suggest, the First Report was an initial step in the process contemplated by the Accounting Agreement which necessarily required the production and review of further documentation. Accordingly, less than 3 weeks later on October 26, 2015, SFI requested additional documentation related to Mere and other parties giving rise to the documentary production dispute which was not ultimately resolved until the Production Order was granted almost 11 months later.

[35] I also reject the Proposed Defendants' assertion that actual knowledge is established simply because the First Report stated that payments were made to Mere. At his examination for discovery on May 6, 2014 (Question 426), Roy deposed that there was an initial transition period before bank accounts were set up for Moss when payments were being made on behalf of the Plaintiffs. Roy stated that "…. the deposits were coming in and then Mere was acting as the intermediate account" and "rather they might have been – flowed through the Moss Property account to the Mere account, Mere paid it then gone (sic) forward". Roy deposed that this may have been for insurance purposes such that an existing account was required.

[36] Having considered the relevant factors and circumstances, I conclude that without the benefit of the substantial additional documents which were ultimately produced and the forensic analysis from SFI, and in the context of Roy's explanation, the Plaintiffs did not have actual

knowledge of the New Claims as against Mere as a result of receiving the First Report. I further conclude that in rebutting the presumption of actual knowledge, the Plaintiffs have demonstrated that they did not have actual knowledge of the New Claims as against Mere until they received the Second Report on December 7, 2017, the full report with a forensic accounting analysis based on the documents produced as provided for and contemplated by the Accounting Agreement and the Engagement Letter.

[37] I now turn to whether the Plaintiffs acted with reasonable diligence and if there is a triable issue with respect to the discoverability of the New Claims as against all the Proposed Defendants, including Mere. This requires a consideration of whether the Plaintiffs have provided a reasonable explanation as to why a reasonable party with the Plaintiffs' abilities and in the same circumstances could not have discovered the New Claims by exercising reasonable diligence at any time prior to December 18, 2016, 2 years before it brought this motion.

[38] The Proposed Defendants submit that the Plaintiffs' due diligence obligation was triggered when they received the HSBC Documents on November 4, 2016 while the Plaintiffs argue that it was not triggered until they received the Second Report on December 7, 2017. Among other things, the Proposed Defendants submit that the HSBC Documents are bank statements and cancelled cheques which are not complex and did not require a forensic accounting review by SFI. The Proposed Defendants argue that the Plaintiffs and/or their counsel were capable of reviewing the HSBC Documents and that it was unnecessary to consult SFI and wait for the Second Report.

[39] The Proposed Defendants also submit that the Plaintiffs' motion should fail because they have not provided any evidence to reasonably explain why they could not have discovered the New Claims sooner and to support their submission that they acted with reasonable diligence including no direct evidence from the Plaintiffs as opposed to their counsel. The Plaintiffs rely on the Affidavit of Mark Russell, an associate at Plaintiffs' counsel's Firm, sworn December 17, 2018 (the "Russell Affidavit"). There is no explanation in the Russell Affidavit as to why the Plaintiffs provided the HSBC Documents to SFI and waited for the Second Report. When questioned on cross-examination, Mr. Russell provided no explanation and all questions to produce correspondence between counsel and the Plaintiffs regarding what the Plaintiffs knew and when were refused. The only explanation as to why the Plaintiffs waited for the Second Report is set out in their Factum (para. 43) where they state that until the forensic audit could trace the unaccounted for funds, the Plaintiffs could not ascertain if it was appropriate to bring the New Claims or whether the funds had been used to pay legitimate expenses related to the Properties.

[40] I am satisfied that there is sufficient evidence on the record considered as a whole, including the Russell Affidavit and the numerous exhibits filed by both parties, to meet the low evidentiary threshold that the Plaintiffs have provided a reasonable explanation for why they could not have discovered the New Claims until after receiving the Second Report. Namely, I am satisfied that it was reasonable for the Plaintiffs to provide the HSBC Documents to SFI to have them complete the very forensic audit by way of the Second Report for which the parties retained them as set out in the terms of the Accounting Agreement and the Engagement Letter. This is the

same audit for which SFI sought the HSBC Documents. Further, the Second Report made additional findings regarding the lack of supporting documentation for payments to Mere.

[41] This conclusion is underlined in the context of the Plaintiffs' allegations of payments to related parties of over $1.7 million, over $900,000 of it unaccounted for, involving 4 family members and 4 family-held companies where the relevant documents were obtained based on an initial request by SFI under the Accounting Agreement to complete the audit. Given the context, circumstances and history, and considering the Plaintiffs' abilities, it was reasonable for the Plaintiffs to proceed in this manner and I conclude that a party in the same circumstances could not have reasonably discovered the New Claims sooner.

[42] In arriving at this conclusion, I decline to conclude that the HSBC Documents were not complex and that the Plaintiffs or their counsel could have reviewed them and discovered the New Claims without the assistance of SFI. In my view, these are issues of fact and/or credibility which warrant consideration by the trial Judge or a Judge on a summary judgment motion particularly in the context of the amounts involved, the number of related parties, the Accounting Agreement, the Engagement Letter and the history and circumstances surrounding documentary production. This includes the fact that SFI sought the HSBC Documents in order to complete the audit set out in the Second Report.

[43] The Proposed Defendants submit that the fact that the Original Defendants are parties to the Accounting Agreement should have no bearing on this court's consideration of discoverability. Specifically, the Proposed Defendants argue that they did not agree to toll their limitations periods therefore, the Plaintiffs cannot rely on the fact that the Original Defendants agreed to the terms of the Accounting Agreement in citing the time it took for SFI to deliver the Second Report. In my view, although Roy is a Defendant personally and a principal of the other Defendant and 3 Proposed Defendants, whether the Proposed Defendants agreed to the Accounting Agreement is not a relevant consideration. What is relevant is whether the Plaintiffs have demonstrated that it was reasonable in the circumstances to send the HSBC Documents to SFI and wait for the Second Report pursuant to the Accounting Agreement and raised issues of fact or credibility regarding discoverability. The fact that the Original Defendants are parties to the Accounting Agreement to jointly retain FSI is one consideration in this broader analysis of reasonable due diligence, as are the terms of the Accounting Agreement which led to the delivery of the Second Report.

[44] In addition, the Proposed Defendants' argument regarding the Plaintiffs' purported lack of evidence cuts both ways. The Proposed Defendants are required to provide evidence that the Plaintiffs could have obtained the requisite information with due diligence, and by when the plaintiff could have obtained such information, such that there is no issue of credibility or fact warranting a trial or summary judgment motion (*Mancinelli* paras. 28 and 31). However, the Proposed Defendants did not file a responding affidavit on this motion. All of the explanations advanced by the Proposed Defendants that the Plaintiffs should have discovered the New Claims sooner were made by reference to exhibits, by counsel during oral submissions or in their Factum. This includes the Proposed Defendants' primary argument that the Plaintiffs should have reviewed the HSBC Documents on their own and that waiting for FSI's review and the

Second Report was not necessary. This is the same basis upon which the Proposed Defendants ask me to reject the Plaintiffs' explanations and evidence.

[45] Having given the Plaintiffs' evidence and the record before me the necessary generous, contextual reading and applied the relevant factors, I conclude that the Plaintiffs have provided a reasonable explanation on the evidence and met the low threshold of demonstrating that they acted with reasonable diligence and have raised triable issues of credibility and fact regarding the discoverability of the New Claims that would merit consideration by a Judge on a summary judgment motion or at trial.

[46] Turning to a consideration of actual prejudice, the Proposed Amendments involve the apparent passage of a limitations period and therefore, raise a presumption of actual prejudice. The Defendants, citing the motions Judge in *State Farm*, submit that actual prejudice would result from the fact that the Proposed Amendments will have the effect of restarting the litigation process given the requirement for new and amended pleadings and additional discoveries. However, in *State Farm*, the Court of Appeal held that actual prejudice does not include an increase in the length and complexity of the trial. Further, given the involvement of SFI, and the steps taken in the litigation to date including the significant documentary productions and overlap of the Original Defendants and the Proposed Defendants, I cannot conclude that granting the Proposed Amendments will require a restart of the litigation process.

[47] Further, consistent with *State Farm*, I am not satisfied that allowing the Proposed Amendments would cause actual, non-compensable prejudice such that the Proposed Defendants would lose any opportunities in defending this action. In particular, the Proposed Defendants have provided no evidence of actual prejudice such as the loss of documents, the unavailability of witnesses or the fading of witnesses' memories. In fact, given the involvement of SFI and significant documentary productions, many of the relevant documents and records have been preserved and/or produced such that the Plaintiffs have rebutted the presumption or any actual prejudice.

[48] Finally, there is no evidence or suggestion that the Proposed Amendments are untenable or that allowing the amendments would constitute an abuse of process or disrupt these proceedings or that the proposed amendments are vexatious, scandalous or frivolous.

[49] Having considered all of the relevant factors and circumstances, I am satisfied that it is reasonable, appropriate and consistent with the case law that the Plaintiffs be granted leave to amend their Statement of Claim with the Original Defendants granted leave to amend to plead limitations defences, as necessary.

III. Disposition

[50] Order to go granting the Plaintiffs leave to amend the Original Claim in the form of the Amended Claim with the Original Defendants granted leave to plead limitations defences, as necessary. Counsel may file a form of order with me for my review and approval.

[51] The parties made no submissions with respect to the Plaintiffs' motion for expedited discoveries to be completed by April 30, 2019. Given my disposition on the pleadings amendment motion, this is untenable as amended and new pleadings and additional examinations for discovery will be required. The parties may contact me to schedule a telephone case conference if they wish to speak to a timetable for the remaining steps leading to trial or, alternatively, if the timetable may affect the fixed trial date, the parties shall attend at Civil Practice Court.

[52] If the parties are unable to agree on the costs of this motion, they may file written costs submissions not to exceed 3 pages (excluding costs outlines) with me through the Masters' Administration Office, the Plaintiffs by May 31, 2019 and the Proposed Defendants by June 17, 2019.

Released: April 16, 2019

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Master M.P. McGraw