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**Family Law Newsletters**
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**— Franks & Zalev - This Week in Family Law**

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## Just in Case You Thought Limitations Periods Were Now Wholly Without Complications . . .

***Gomes v. Da Silva*, 2024 CarswellOnt 16720 (C.A.) — Hourigan, Madsen and Pomerance JJ.A.**

***Ingram v. Kulynych Estate*, 2024 CarswellOnt 13710 (C.A.) — Roberts, Miller and Gomery JJ.A.**

**Issues:** Ontario — Trust Claim — Limitation Period

It seems there are different limitations periods for making trust claims against real property depending on whether the claim is made against a person (10-years) or against an estate (two-years). So that's both confusing and worth bearing in mind.

### *Gomes v. Da Silva*

In *Gomes*, the parties were three siblings and the estate of the fourth sibling. Two of the siblings and the estate of the deceased sibling were the Respondents on appeal (the plaintiffs below). The Appellant (the defendant below) was the fourth sibling. After their mother passed away in 2019, the siblings found themselves in a not-so-friendly "discussion" over who got to keep the family home and what should happen to it.

The family home ("the property") was purchased in 1974. At that time, the parties' parents together held an undivided 50% interest in title as joint tenants, and the Appellant sibling held the other 50%. When the parties' father died, title was then (by survivorship) held by their mother (50%) and the Appellant (50%) as tenants in common. In 2012, the parties' mother transferred her 50% interest equally to the four siblings, including the Appellant. When the mother died, the Appellant held title to 62.5% of the property, with the Respondent siblings each holding a 12.5% interest.

After the mother died, the three Respondents brought an application in July 2019, seeking an order for the partition and sale of the property under the *Partition Act,* R.S.O. 1990, c. P.4. The Appellant countered with a claim alleging a resulting trust, asserting that he was the sole beneficial owner of the property. He also claimed "credit" for services he provided in relation to the property.

The trial judge dismissed the Appellant's claims for a resulting trust and "credit" in relation to work undertaken on the property between 1974 and 2012 and granted the Respondents' claim for partition and sale. The Appellant appealed (as that is what Appellants do).

*Resulting Trust*

The trial judge found that the Appellant had not established his claim for a resulting trust and further determined that the claim was statute-barred by way of s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (the "*RPLA*") as interpreted by

the Court of Appeal in *McConnell v. Huxtable* (2013), 42 R.F.L. (7th) 93 (Ont. S.C.J.), aff'd (2014), 42 R.F.L. (7th) 157 (Ont. C.A.). The Court of Appeal found no error in the analysis or conclusions of the trial judge.

In 2008, when legal title to the property was held equally between the parties' mother and the Appellant as tenants in common, the Appellant, on the advice of his financial advisor, contacted his mother in writing seeking her consent to borrow against his share of the property. He told his mother that, if she did not consent, he would be "forced to take appropriate action" to obtain credit against "[his] part of the ownership of the property." The parties' mother responded making clear her view that she was the beneficial owner of 50% of the property, that she did not consent to a financing, and she proposed that either she or the Appellant purchase the other's half interest or that the property be sold. The trial judge rejected the Appellant's oral evidence that his mother told him in 2008 that it was "his house."

Section 4 of the *RPLA* states:

> **Limitation where the subject interested**
>
> 4. No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

The trial judge correctly found that s. 4 of the *RPLA* creates a 10-year limitation period for "an action to recover any land" — and this includes an action claiming an interest in land advanced by way of resulting or constructive trust. The trial judge held that even if the parties' mother had held her interest in the property on resulting trust for the Appellant, the limitation period to make that claim expired in 2018, 10-years after her correspondence that put the Appellant on notice regarding her view of the ownership of the home, and long before the Appellant filed his claim for the beneficial interest in the property. The Appellant knew — at the very latest by 2008, that his mother had no intention of "honouring" such a trust, if there was one. The Appellant's choice to not take steps in 2008 to assert his property claim did not stop the limitations clock from running.

The Appellant tried to suggest that s. 5(2) of the *RPLA* applied so as to postpone the start of the limitation period to the date of the death of the parties' mother. Section 5(2) of the *RPLA* states:

> **On death**
>
> (2) Where the person claiming such land or rent claims the estate or interest of a deceased person who continued in such possession or receipt, in respect of the same estate or interest, until the time of his or her death, and was the last person entitled to such estate or interest who was in such possession or receipt, the right shall be deemed to have first accrued at the time of such death.

The Appellant argued that the recent case of *Bradshaw v. Hougassian*, 2023 CarswellOnt 10237 (Ont. S.C.J.) supported his argument that the *RPLA* limitation period only started to run when his mother died. However, in *Bradshaw*, the estate trustees were *claiming* a resulting trust *on behalf of*the estate of the deceased person, rather than claiming against the estate. Here, the Appellant was advancing a claim *against* a deceased person and her interest in the property *not on behalf of* or through a deceased person. There is a difference — the difference may not be so clear given the archaic wording of s. 5(2), but there is a difference nonetheless, and an important one at that. It is a trap for the unwary.

The trial judge also found that the Appellant lacked material corroboration for his narrative as required under s. 13 of the Ontario *Evidence Act*, R.S.O. 1990, c. E.23, regarding his evidence that he paid 100% of the purchase price for the property. Section 13 of the Ontario *Evidence Act* states:

> **Actions by or against heirs, etc.**

  

> 13 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

Even if the Appellant's assertion that he had advanced substantial funds towards the purchase was established, the evidence actually supported an inference that he *gifted* those funds, rebutting any presumption of resulting trust. No documentary evidence, as required by s. 13, confirmed such payment, and the trial judge found the Appellant's oral evidence to be lacking in credibility, "vague" and "unsupported."

*Claim for Compensation for Work Done and Equitable Set-Off*

This, then, brings us to the Appellant's claim that the trial judge erred in dismissing his claim for equitable set-off arising from work allegedly done on the property between 1974 and 2012. The trial judge found that the defense of equitable set-off was inapplicable on the facts of the case, as the Appellant's claim did not arise out of the same contract, transaction or series of events that gave rise to the Respondents' claim, nor was it closely connected with it. See *Canaccord Genuity Corp. v. Pilot*, 2015 CarswellOnt 16345 (C.A.), at para. 57.

To succeed in claiming equitable set-off, the following requirements must be met:

> 1. The party claiming equitable set-off must show some equitable ground for being protected against his adversary's demands;
>
> 2. The equitable ground must go to the very root of the claim before a set-off will be allowed;
>
> 3. A claim for equitable set-off must be so clearly connected with the demand of the plaintiff that it would be "manifestly unjust" to allow the plaintiff to enforce payment without taking into consideration the cross-claim; and
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract, but it must be part of the same transaction or chain of events

[See *Canaccord Genuity Corp. v. Pilot*, 2015 CarswellOnt 16345 (C.A.); *Holt v. Telford*, 1987 CarswellAlta 188 (S.C.C.); *Ang v. Premium Staffing Ltd.*, 2015 CarswellOnt 18054 (C.A.); *OLA Staffing Inc. v. D'Angelo Brands* (2018), 2018 CarswellOnt 19187 (C.A.).]

Here, the Appellant's claim related to work allegedly undertaken *before* the Respondents were even on title, work for which the Appellant had never previously sought compensation. The claim for work done before 2012 had nothing to do with the Respondents' right to ask for partition and sale. Furthermore, the two-year limitation period for the claim had expired.

### *Ingram v. Kulynych Estate*

In *Ingram*, the Court of Appeal had to decide whether the 10-year limitation period in s. 4 of the *RPLA* or the two-year limitation period in s. 38(3) the *Trustee Act*, R.S.O. 1990, c. T.23 (the "*Trustee Act*"), applied to the Respondent's claim for constructive trust and unjust enrichment against the estate of the late Henry Kulynych.

Mr. Kulynych died in February 2017, leaving a will that he had prepared in 1989. His daughter, the Appellant, was appointed as the Estate Trustee pursuant to a Certificate of Appointment in July 2018. The Estate Trustee distributed most of the balance of the estate to the beneficiaries in March 2020, with a small holdback distributed to the Estate Trustee in July 2021.

The will left nothing to the Respondent. She was... not happy. The Respondent claimed that she had been in a common law relationship with Mr. Kulynych from 1999 to his death. In March 2018, the Respondent, through her counsel, sent correspondence to the Estate Trustee and her counsel asserting that she was entitled to receive one-third of the total value of the estate, to recover "some of the money that she spent in caring for and providing for [Mr. Kulynych] over the years".

 

On March 10, 2021, more than four years after Mr. Kulynych's death, the Respondent commenced an application against Mr. Kulynych's estate for dependant's relief under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "*SLRA*"). She also brought an equitable trust claim for a share of the estate. She claimed that the Estate Trustee was personally liable for having distributed the estate despite her claims.

The Appellants brought a motion (in writing) before the motion judge seeking to have the Respondent's application against them dismissed on the grounds that it was statute-barred. The motion judge treated the Appellants' motion as being brought under Rule 21(1)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 — a motion for the determination of a question of law before trial.

The motion judge was of the view that the 10-year limitation period in s. 4 of the *RPLA* applied such that the Respondent could proceed with her claim. This view was not shared by the Court of Appeal. On appeal, the court overturned the lower court's decision and held that the two-year limitation period in the *Trustee Act* applied to the Respondent's equitable trust claim. Therefore, the Respondent's claim was statute-barred.

*Appellate Court's Analysis*

The Court of Appeal began with the assumption that — for the purposes of determining which limitation period applied — the Respondent's equitable trust claim was properly pleaded and that there was a purely legal issue to be determined.

A claim can only be subject to one limitation period, and cases under s. 38(3) of the *Trustee Act* are exempt from the *Limitations Act, 2002* S.O. 2002, c. 24, Sched. B (the "*Limitations Act*"): *Bikur Cholim Jewish Volunteer Services v. Penna Estate*, 2009 CarswellOnt 1105 (C.A.). And whereas the Discoverability Doctrine applies to s. 3 of the *Limitations Act*, the start of the limitation period under s. 38(3) of the *Trustee Act* is (save for situations of fraudulent concealment) keyed only to the date of death of the deceased: *Zachariadis Estate v. Giannopoulos Estate*, 2021 CarswellOnt 3285 (C.A.).

Therefore, the Court of Appeal first considered the analytical framework developed by the court in *Bank of Montreal v. Iskenderov*, 2023 CarswellOnt 12093 (C.A.). In *Iskenderov*, the Court of Appeal adopted an analytical path to follow when considering which of two potentially applicable limitation periods applied in the context of a fraudulent conveyance actions. The factors to be considered include: the historical approach to the limitation periods in issue, including the legislative purpose of the relevant statutory limitation periods; the judicial approach to interpreting the limitation periods in issue; the nature of relief sought in the action; and the language of the statutory limitation provisions.

At the time of the original motion, the motions judge and the parties did not have the benefit of *Iskenderov*. The motion judge can, therefore, hardly be blamed for not undertaking a mandated analysis that did not yet exist. As a result, the motion judge did not engage in a thorough review of the legislative history and purposes and the historic judicial treatment of s. 38 of the *Trustee Act*, nor of the relationship between related estate and family law statutory provisions. Rather, the parties' submissions and the motion judge's analysis focused primarily on the plain wording of the statutory provisions in issue as well as the application of *McConnell v. Huxtable* (2014), 42 R.F.L. (7th) 157 (Ont. C.A.).

As a reminder, s. 38(3) of the *Trustee Act* states:

> **Limitation of actions**
>
> (3) An action under this section [an action by or against Executors for torts] shall not be brought after the expiration of **two years from the death of the deceased**. [**emphasis** added]

In applying its own analytical framework from *Iskenderov*, the Court of Appeal examined the legislative history and purpose of the two-year limitation period in s. 38(3) of the *Trustee Act* and judicial treatment of claims against estates. The Court of Appeal agreed with the Appellants that the shorter, two-year limitation period for estate matters was meant to reflect the long-established duty of estate trustees to administer estates promptly and diligently, including ascertaining the estate's liabilities and

 

debts as quickly as possible, as the expeditious administration of estates is in the interests of justice: *Appleyard v. Zealand*, 2022 CarswellOnt 10948 (C.A.) at para. 60; *Omiciuolo Estate v. Pasco*, 2008 CarswellOnt 1780 (C.A.) at para. 25.

As the Supreme Court observed in *Ryan v. Moore*, 2005 CarswellNfld 158 (S.C.C.):

> [33] A further reason for the non-application of the discoverability rule is the evident impact such a rule would have on the distribution of assets to the beneficiaries. **Without a time limit, an executor or an administrator would not feel free to distribute the assets of an estate until all reasonable possibilities of claim had been addressed.** This would be cumbersome and unrealistic. 'An estate should not be held to ransom interminably by the advancement of claims which are not proceeded with in a timely manner'. [**emphasis** added]

In *Levesque v. Crampton Estate*, 2017 CarswellOnt 8319 (Ont. C.A.) at para. 22, the Court of Appeal affirmed the legislative rationale behind the *Trustee Act* limitation period, stating that: "The purpose of the *Trustee Act* . . . is to provide a remedy for a limited time, without indefinite fiscal vulnerability to the estate."

The court also noted that the Respondent's claim for unjust enrichment fell "neatly" within s. 38(2) of the *Trustee Act*. The "wrong" envisaged under s. 38(2) of the *Trustee Act* encompasses more than just tort claims against an estate and is not determined by the framing of the action pleaded or remedy claimed — but by the nature of the claimed injury, regardless of how it is pleaded. The elements of unjust enrichment are a benefit, a corresponding deprivation and the absence of juristic reason for the benefit and the loss. As the Supreme Court explained in *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) at para. 31: "At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain".

The court also considered whether the Respondent's equitable trust claim fell within s. 4 of the *RPLA*. In circumstances of an apparent conflict between the specific provisions of s. 38 of the *Trustee Act* and the general provisions of s. 4 of the *RPLA* as to which limitation period applies, the well-recognized principle of statutory interpretation *generalia specialibus non derogant* applies: the specific overrides the general. This principle provides that special or more specific legislation overrides general legislation in the case of a conflict so that the two statutes are brought into harmony: *R. v. Greenwood*, 1992 CarswellOnt 67 (C.A.); *Schnarr v. Blue Mountain Resorts Limited*, 2018 CarswellOnt 4786 (C.A.) at paras. 62-64.

Applying this test, not only did the legislative history and purpose and past judicial treatment support the idea that the limitation period in s. 38(3) of the *Trustee Act* applied, but the provisions of ss. 38(2) and (3) of the *Trustee Act* are clearly more specific than s. 4 of the *RPLA* and are intended to apply to equitable trust claims against estates. Interpreting s. 4 of the *RPLA* to include equitable trust claims against estates would ignore the clear language, legislative history, purpose, and judicial treatment of s. 38 of the *Trustee Act,* and would interfere with the legislative goal of the speedy resolution of estates.

Moreover, the Respondent's equitable trust claim against the Appellants was not considered an "action to recover any land" (as required by s. 4 of the *RPLA*) because the nature of the Respondent's equitable trust claim was in relation to the *estate assets* and not in relation to Mr. Kulynych's *real property*. The fact that the Respondent was claiming unjust enrichment to get an interest in all the estate's assets, beyond the deceased's real property, further indicated that this was an estate claim that clearly fell within s. 38(2) of the *Trustee Act*, and not a claim to recover property or money compensation in lieu of property.

The Court of Appeal decided that the two-year limitation period in s. 38(3) of the *Trustee Act* applied to the Respondent's equitable trust claim against the estate and the related claims against the Estate Trustee. The Respondent's claims, however, were statute-barred because her action was brought more than two years following Mr. Kulynych's death.

Get it? Good.

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