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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

When Must a Plaintiff Sue for Corporate Oppression?

The Ontario Superior Court has held that a legal action for corporate oppression must be started within two years of the date it was discovered, regardless of whether the oppressive conduct is ongoing.

In *Maurice v. Alles*, 2015 ONSC 1671, per Pattillo J., the Applicants and Robert Maurice (“Robert”) were siblings and equal shareholders in Kirby Maurice Company Limited (“Kirby Maurice”). Kirby Maurice owned interests in an appliance store, Tasco. Kirby Maurice also owned interests in Marlba Investments Limited (“Marlba”), which owned the real estate for Tasco.

The Applicants started an application against Robert to appoint a valuator to determine the fair value of the issued and outstanding shares of Kirby Maurice on May 13, 2013. Shortly thereafter, on August 18, 2013, Robert commenced a cross-application against the Applicants claiming breach of contract and oppression under section 248 of the *Ontario Business Corporations Act*, R.S.O. 1990, c.B.16 (the “OBCA”).

The Facts Giving Rise to the Litigation

In June, 2007, the shareholders of Tasco and Marlba received notice from a third party concerning the purchase of their shares. The shareholders of Tasco and Marlba reached an agreement to sell their shares to the third party in July, 2008. On July 15, 2008, notice was sent to Robert of a shareholders’ meeting of Kirby Maurice to discuss the sale and to consider the passing of resolutions to complete it, including the sale by Kirby-Maurice of its preference shares of Tasco and its Class A shares in Marlba.

A meeting was held on July 25, 2008. At that meeting, Robert was told that the Respondent shareholders had sold their shares in Tasco and Marlba. When Robert asked for details, including the terms of the sale and the price, he was told that the purchaser was a numbered company, that the owner

of the company was unknown, that Kirby-Maurice's preferred shares in Tasco were being sold for redemption at face value and that Kirby-Maurice's nominees to Tasco and Marlba's board were resigning. No further information was disclosed by the Respondent shareholders.

Robert, who opposed the sale, claimed that proceeding with the sale without the unanimous consent of all the shareholders of Kirby-Maurice was a breach of Kirby-Maurice's Unanimous Shareholders Agreement. He then left the meeting and the sale of Kirby-Maurice's shares in Tasco and Marlba was ultimately approved by the Respondent shareholders.

There was no contact between Robert and the Respondent shareholders following the completion of the sale of the shares in Tasco and Marlba until March, 2009, when Robert's lawyer raised the requirement of Kirby-Maurice to purchase Robert's shares and appoint a valuator to determine the price.

Following the commencement of the litigation, both parties motions which were heard by Justice Newbould in the Ontario Superior Court (the "Newbould J. Order"). In the Newbould J. Order, dated October 1, 2013, Justice Newbould held that Robert's oppression and breach of contract claims be dealt with first, before any valuator was appointed.

After the Newbould J. Order, the Respondents provided to Robert for the first time a copy of the August 1, 2008 share purchase agreement which the Respondent shareholders had signed on behalf of Kirby-Maurice dealing with the sale of their shares in Tasco and Marlba. Robert learned at that time that the Respondent shareholders had negotiated with the third party purchaser for more than one year, that the purchase price increased over the negotiations, and that each Respondent shareholder received \$2,980,025 for their shares in Tasco and Marlba.

Robert's main argument for oppression in the Cross-Application was that his rights as a shareholder of Kirby-Maurice had been unfairly disregarded by the actions of his siblings when they sold their shares in Tasco and Marlba, causing Kirby-Maurice to redeem its preference shares in Tasco for the redemption value.

The Motion To Dismiss Robert's Oppression Claim

The Respondent shareholders brought a motion for summary judgment to have Robert's Cross-Application dismissed on the basis that it was statute-barred as having been commenced outside the two-year limitation period set out in section 4 of the *Limitations Act, 2002*, S.O. 2002, c.24 (the "*Limitations Act*").

In particular, the Respondents argued that Robert's Cross-Application arose out of the sale by Kirby-Maurice of its shares in Tasco,

which was dealt with by all of the Kirby-Maurice shareholders at the July 28, 2008 shareholders meeting. According to the Respondents, Robert was provided at that meeting with information regarding the sale of the Kirby-Maurice shares in Tasco. At that meeting, Robert objected to the share sale, but did nothing further. He did not bring his Cross-Application until August 18, 2013, more than two years after the July 28, 2008 shareholders meeting.

By comparison, Robert argued that his Cross-Application was not statute-barred. In particular, he asserted that the oppression claim he raised was continuous and ongoing; he relied on the information recently disclosed by the Respondents following the Newbould J. Order. Moreover, he relied on the Newbould J. order requiring his oppression claim to be tried before the main Application seeking the appointment of the valuator.

The Court's Ruling

The Court held that, with the limited exception of Robert's claim in the Cross-Application requiring the Respondents to reimburse Kirby-Maurice for legal fees, Robert's oppression claim was largely out of time and statute-barred.

In reaching this conclusion, the Court made a series of critical findings.

Continuation of Oppression Does not Extend the Limitation Period

First, the Court held that the continuation of the Respondents' oppressive conduct after the July 25, 2008 meeting did not extend the limitation period beyond two years from the date Robert first discovered the oppression claim. In doing so, the Court reconciled a debate about limitation periods in the case of ongoing oppression.

Robert relied on a passage from Markus Koehnen, *Oppression and Related Remedies*, to support his argument that if the corporate oppression is ongoing, the limitation period does not begin to run. The passage reads as follows:

A shareholder who sold his shares at a discount because of oppressive conduct, continues to be oppressed. The loss he suffered because of the defendants' conduct is a continuing one. Similarly, where false financial statements were issued or where money was taken wrongfully from the corporation, the oppression continues until the financial statements have been re-issued or the funds have been repaid. Courts following that approach have been willing to provide relief for conduct committed in the past even though the plaintiff did not object at that time. This recognizes that the failure to complain may simply be evidence of a relationship of trust and confidence.

However, the Court also observed that there was another passage in Markus Koehnen's textbook, as cited in the decision of *Fracassi v. Cascioli*,

2011 ONSC 178, per Pepall J., which held that the limitation period for an oppression claim begins two years after the oppression claim is discovered. The Court noted the following passage from Koehnen's book:

...Limitation periods begin when the cause of action arises, not when it is remedied...The idea that limitation periods begin to run when the oppression stops makes even less sense...once the oppression stops, the plaintiff has no cause of action.

The Court was able to reconcile these two seemingly contradictory passages by holding that where oppressive conduct is ongoing, the continuation of the oppressive conduct does not extend the limitation period beyond the two years from date of the plaintiff's discovery. The Court held:

...The examples in the excerpt relied upon by Robert presuppose that the aggrieved shareholder was not aware of the oppressive conduct giving rise to the damage until sometime later. In that regard, the conduct is continuing. While the act of oppression may be ongoing...such continuation does not operate to extend the limitation period beyond the time of two years from discovery. [emphasis added]

...

A claim for oppression can arise from many different factual situations. It is not until the plaintiff becomes aware of the material facts

upon which a claim for oppression can be based that the limitation period will begin to run in respect of the claim. Similarly, if at some later point the plaintiff learns of other oppressive conduct that he or she was not otherwise aware of, the limitation period in respect of a claim for oppression relating to that conduct would only begin to run from the time the material facts giving rise to that claim became known.

Accordingly, in the instant case, the Court held that Robert knew of the facts giving rise to breaches of the Kirby-Maurice Unanimous Shareholders' Agreement at the July 25, 2008 shareholders' meeting. His oppression claim was based largely on the argument that in agreeing to the sale of the Kirby-Maurice preference shares in Tasco for a value less than their fair market value, the Respondent shareholders disregarded his interests as a Kirby-Maurice shareholder. The reduced value of the preference shares in turn reduced the value of Robert's shares in Kirby-Maurice.

Robert maintained all these positions from the time of the Kirby-Maurice share sale. Any information disclosed to Robert following the Newbould J. Order did not support a new claim for oppression regarding the sale of the shares. All it did was support Robert's claim for oppression against the Respondents. Robert failed to take any steps beyond a few demand letters to obtain information before he started his Cross-Application.

According to the Court, he waited almost five years and only raised the Cross-Application once information was produced by the Respondents following the Newbould J. Order. The Court therefore held that Robert's claim was out of time.

Conclusion

The Court's decision in *Maurice v. Alles* has significant implications for

those pursuing actions in corporate oppression. Despite ongoing oppressive conduct, a plaintiff only has two years from the date of discovering the oppressive acts to begin litigation. The fact of ongoing oppression will not postpone the running of the limitation period, unless the ongoing nature of the conduct somehow prevents the plaintiff from discovering it until

a later time. The emphasis of the Court's analysis in *Maurice* remains on discoverability as the impetus for starting an oppression claim. A plaintiff cannot rely on ongoing oppression as a defence to the expiry of the limitation period where the plaintiff clearly discovered the oppression two years prior to starting a claim.

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