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Court of Appeal Confirms that Real Property Limitations Act Applies to all Limitation Periods Affecting Land

By Doug Smith*

In the recent decision of the Court of Appeal in *Equitable Trust v. Marsing*, 2012 ONCA 235 the Court confirmed that the limitation period in respect of the commencement of a proceeding regarding a claim on a guarantee contained in a mortgage instrument was covered by s. 43(1) of the *Real Property Limitations Act* (“RPLA”) rather than the *Limitations Act, 2002*. In so deciding, the Court also clarified that its prior decision in *The Bank of Nova Scotia v. Williamson*, 2009 ONCA 754 should not be read as stating that all demand obligations were governed by the *Limitations Act, 2002*.

Facts

In 2005 Marsing (and another) agreed on behalf of a corporate entity to mortgage certain property as security for a loan of about \$1.4M and in his personal capacity to be responsible for the corporation's obligations on the mortgage. The personal guarantee was included as part of the mortgage instrument in the form of a covenant which read as follows:

In consideration of the chargee advancing to the chargor the principal amount or any part thereof at the request of the covenantors, ... the covenantors hereby irrevocably and unconditionally, as principal debtors and not as surety, covenant to pay the principal amount and interest and any other monies secured by the charge as and when the same become due and payable and covenant to carry out and observe the provisions contained in the commitment, the charge and in any security collateral to the charge and agree to indemnify the chargee against and (sic) all losses, damages, costs, charges and expenses which the chargee may at any time or from time to time suffer, incur or become liable for by reason of, in connection with resulting from, or occasioned by any breach by the chargor of any of the provisions contained in this charge.

There was a default and Equitable Trust issued a demand for payment to the corporate borrower and the guarantors in December of 2007. Power of sale proceedings were commenced and the property was sold in June of 2008. There was a shortfall and Marsing was sued on his guarantee with the action being commenced in September of 2010.

Marsing took the position that the action was commenced out of time as the guarantee was a demand obligation and the limitation period governing the commencement of proceedings in respect of all demand obligations was the two year limitation period in the *Limitations Act, 2002*.

Equitable Trust took the position that the ten year limitation period contained in s. 43(1) of the RPLA applied instead. The section reads as follows:

43. (1) No action upon a covenant contained in an indenture of mortgage or any other instrument made on or after July 1, 1894 to repay the whole or part of any money secured by a mortgage shall be commenced after the later of,

(a) the expiry of 10 years after the day on which the cause of action arose; and

(b) the expiry of 10 years after the day on which the interest of the person liable on the covenant in the mortgaged lands was conveyed or transferred.

The Court Below

Marsing moved for summary judgment and the motion was dismissed. The motions judge dismissed the motion and found that the ten year limitation period contained in the *Real Property Limitations Act* applied. The Motions Judge found that the RPLA applied as the action arose from a covenant contained in an indenture of mortgage or any other instrument to repay the whole or part of any money secured by a mortgage.

The Court of Appeal

The Court of Appeal agreed with the motions judge and found that the limitation period governing the action on the covenant was the ten year limitation period in the *Real Property Limitations Act* and not the two year limitation period contained in the *Limitations Act, 2002*. In doing so, Perell J. (*ad hoc*) writing for the Court of Appeal commented as follows:

"A guarantee given in conjunction with a mortgage transaction affects real property law rights. Guarantors, if they have made payments toward the mortgage debt, need to be served in mortgage enforcement proceedings because they have an equity of redemption and an interest in the mortgaged property."

Comment

This case provides an important reminder that the limitation of actions involving land transactions are treated differently than the limitation of other actions. While the covenant in this case was contained within the mortgage instrument, the ten year limitation period in the RPLA should apply to any guarantee in respect of a mortgage obligation, including a guarantee or covenant contained in a separate instrument. The situation of a covenant or guarantee contained in a separate instrument would seem to be caught by the language in s. 43(1) of the RPLA of, " ... any other instrument made ... to repay the whole or any part of any money secured by a mortgage ..." Further, in *Equitable Trust v. Marsing*, the Court of Appeal stated that,

"It is my view that the Legislature intended that all limitation periods affecting land be governed by the *Real Property Limitations Act*."

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