

Case Name:

Bennett v. J.K. (Jim) Moore Ltd. (c.o.b. Jim Moore Petroleum)

Between

**Eliza Bennett, Plaintiff (Appellant), and
J.K. (Jim) Moore Ltd. (c.o.b. Jim Moore
Petroleum), Steve Haglund, John Doe,
John Doe Incorporated, Aultman's Heating
Ltd., Chris Heasman, Bechtel's Home
Heat and Terry Allan Bechtel, Defendants, and
David McComiskey and Monika McComiskey,
Respondents on Motion (Respondents)**

[2015] O.J. No. 1568

2015 ONCA 217

Docket: C58912

Ontario Court of Appeal

H.S. LaForme, D. Watt and G.J. Epstein JJ.A.

Heard: March 24, 2015.

Oral judgment: March 24, 2015.

Released: March 31, 2015.

(9 paras.)

Civil litigation -- Civil procedure -- Parties -- Adding or substituting -- After expiry of limitation period -- Appeal by Bennett from dismissal of motion to add McComiskys as defendants dismissed -- Action arose from 2009 oil spill -- Bennett aware by 2010 that McComiskys, former owners of property, had performed renovations that may have resulted in ruptured fuel lines -- 2014 motion to add McComiskys as defendants to action, commenced in 2011, statute barred -- Limitations Act, s. 5(1)(b).

Civil litigation -- Limitation of actions -- Time -- When time begins to run -- Appeal by Bennett from dismissal of motion to add McComiskys as defendants dismissed -- Action arose from 2009 oil spill -- Bennett aware by 2010 that McComiskys, former owners of property, had performed renovations that

may have resulted in ruptured fuel lines -- 2014 motion to add McComiskys as defendants to action, commenced in 2011, statute barred -- Limitations Act, s. 5(1)(b).

Statues, Regulations and Rules Cited:

Limitations Act, S.O. 2002, c. 24, Schedule B, s. 5(1)(b)

Appeal From:

On appeal from the order of Justice James A.S. Wilcox of the Superior Court of Justice, dated May 12, 2014.

Counsel:

Sean Dewart and Rebecca Liu, for the appellant.

Martin P. **Forget**, for the respondents David McComiskey and Monika McComiskey.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT (orally):-- The oil spill that forms the basis of this action took place on March 30, 2009. The action was commenced against several other defendants on March 7, 2011. The record demonstrates that in the two years following the triggering event, the appellant took no steps to pursue the possibility of a potential claim against the proposed defendants, the McComiskeys.

2 This inactivity is surprising. The background facts suggested a possible claim against the McComiskeys. The Flynn report potentially implicated them. But of particular significance, is the communication between Ms. Sinclair, a claims representative for the McComiskeys' insurer and Ms. Smith, a claims representative for the appellant's insurer. According to the unchallenged evidence of Ms. Sinclair, on June 5, 2010, Mr. McComiskey received a letter from Ms. Smith putting him on notice that the appellant's insurer held him responsible for the loss attributable to the spill. In a telephone conversation on July 29, 2010, Ms. Smith advised Ms. Sinclair that the claim against the McComiskeys was based on the fact that they previously owned the property and had performed renovations that may have resulted in the ruptured fuel lines that caused the spill. The McComiskeys' insurer followed up this conversation with a letter to Ms. Smith dated March 21, 2011 noting that the limitation period was about to expire on March 30, 2011.

3 The appellant failed to act on this information until April, 2014, when she moved to add the McComiskeys as defendants in the action commenced over three years earlier.

4 The appellant submits that the precise claim she seeks to advance against the McComiskeys, as pleaded in the proposed amended statement of claim, arises out of conduct that only came to her attention during an examination for discovery in May, 2013; namely, that renovations the McComiskeys made to their property in 2007 involved the relocation of the oil tank.

5 While the respondents claim that this particular argument was not advanced before the motion judge, we are prepared to consider it. And we cannot accept it.

6 As noted above, the unchallenged evidence of Ms. Sinclair is that as early as July, 2010, the appellant was aware that she had a claim against the McComiskeyes, a claim that, at least in part, related to renovations the McComiskeyes had done to their property that involved the fuel line. According to s. 5(1)(b) of the *Limitations Act*, the limitation period starts to run when a reasonable person with the abilities and in the circumstances of the appellant, knew or ought to have known enough facts upon which to base an allegation of negligence.

7 On this record, the limitation period started to run at least in July, 2010, if not earlier.

8 The appellant's motion to add the McComiskeyes as defendants is statute-barred. We agree with the motion judge's conclusion to this effect and therefore dismiss the appeal.

9 As agreed, costs are fixed at \$15,000 inclusive of disbursements and all applicable taxes.

H.S. LaFORME J.A.

D. WATT J.A.

G.J. EPSTEIN J.A.