

Take it to the Limit[ation]

Francis N.J. Taman and Ksena J. Court

It has long been known in Alberta that once a mortgagor fails to make a mortgage payment, the limitation period for bringing a foreclosure action begins to run¹. Recently, the Court of Queen's Bench considered how the *Limitations Act*² applies to a second mortgage in a situation where a first mortgagee has already started a foreclosure action.

Under the *Limitations Act*, there is a two-year limitation period, during which a plaintiff must commence its claim in the court. If it does not do so and the defendant pleads the failure to sue within the limitation period, the plaintiff's claim will not be enforceable.

In *Toronto Dominion Bank v. Letendre*³, the Toronto Dominion Bank ("TD Bank") commenced an action to enforce its first mortgage. After the property was sold, there were excess funds left over to pay subsequent encumbrancers on title. As there was not enough money available to pay out all of the charges on title, a battle quickly developed between the subsequent encumbrancers.

Community Futures Slave Lake Region ("CFSL") was the second mortgagee on the property. The defendant had defaulted on the second mortgage on November 1, 2007 by missing a payment. The two-year limitation period for suing under the mortgage in Alberta would have ended on October 31, 2009. CFSL never commenced an action to enforce its mortgage because the TD Bank had already started its foreclosure action on February 21, 2009.

It took until August 2010 to sell the property and the sale closed November 5, 2010. After the first mortgagee was paid in full (including its legal costs), there remained \$74,197.30 which was paid into Court (the "Fund").

Alberta Indian Investment Corporation ("AIIC") and the Canada Revenue Agency ("CRA") each had writs against the title to the lands that were registered after CFSL's second mortgage. If CFSL was paid in full, there were

not enough funds left over to fully pay out their writs. When CFSL brought an application to have the balance of the funds paid out to it, AIIC argued that CFSL should not receive any funds as its claim to the funds was statute barred by the *Limitations Act*.

The Master who heard the application held that CFSL did not have an enforceable claim to the funds because CFSL had never commenced an action to enforce its mortgage and the limitation period to enforce that mortgage had passed. CFSL appealed.

Justice Manderscheid reviewed the law surrounding limitation periods for mortgages and noted that the limitation period begins to run once a payment was missed. However, there were three issues that needed to be resolved:

Could AIIC, a subsequent encumbrancer, use the *Limitations Act* as a basis for asking the Court to deny CFSL the right to a share of the Fund?

Had the limitation period begun to run yet?

Did the fact that the limitation period had lapsed mean that CFSL no longer had an enforceable claim to the Fund?

1. Could AIIC, a subsequent encumbrancer, use the *Limitations Act* as a basis for asking the Court to deny CFSL the right to a share of the Fund?

His Lordship held that the answer to this question was no. Only a defendant could rely upon the *Limitations Act* and only if they plead it as part of their defence. In Alberta, subsequent encumbrancers are not defendants in a foreclosure action except in very limited circumstances. Justice Manderscheid also ruled that an application to pay out the balance of the funds did not fit in the definition of a remedial order in the *Limitations Act*.

This is an interesting ruling, as it runs counter to the perspective of many practitioners. It is also inconsistent with another recent Justice level decision, *David M. Gottlieb, Professional Corporation v. Tymkow*⁴. In *Tymkow*,

Justice Macleod held that it was open to a subsequent encumbrancer to raise the *Limitations Act* against another subsequent encumbrancer even though it was not a defendant.

Apparently, neither Justice was aware of the decision of the other. So it would appear that this particular question remains very much up in the air.

2. Had the limitation period begun to run yet?

Justice Manderscheid noted that if CFSL had commenced an independent foreclosure action, it would have to comply with the *Limitations Act* and file its claim within two years of default under the mortgage. However, since the TD Bank had commenced its action within CFSL's limitation period, the situation no longer warranted CFSL, as a subsequent encumbrancer, bringing a separate proceeding respecting the same mortgaged lands. CFSL could, in essence, "ride the coattails" of TD Bank.

This portion of the decision is intriguing but raises risks for mortgagees. The wording suggests that the bringing of a proceeding by the first mortgagee means that the limitation period for the subsequent mortgagees and writholders ceases to run.

What is not clear is what would have happened if the TD Bank mortgage had been paid out and the mortgage discharged. Would CFSL have had an additional eight months (the amount of their limitation period that had remained when TD Bank had filed their action) or would the limitation period start anew? Would CFSL's limitation period simply be deemed to have expired, leaving CFSL at risk of not being able to recover under its mortgage? In the absence of clear answers from the Court to these questions, it is best for mortgagees who hold subordinate positions to err on the side of caution and at a bare minimum file a Statement of Claim within two years of the first default.

Did the fact that the limitation period had lapsed mean that CFSL no longer had an enforceable claim to the Fund?

The Court held that the present law was that the Court cannot give effect to a limitation period that the defendant had not pled nor tried to plead. Unless there was a challenge that the mortgage itself was invalid or that the registration on title was invalid, CFSL did not have to prove that it had an enforceable claim. It merely had to prove that its charge was registered on title.

It would appear that subsequent encumbrancers are still entitled to share in the proceeds of a sale under a foreclosure if they miss a limitation period after a prior mortgagee has started their action. The wording of the *Letendre* decision would suggest this might also be the case if the limitation period expired prior to the first mortgagee filing. However, given all the remaining ambiguities of the case and the contradictory decisions of the Court on whether subsequent encumbrancers can rely upon a limitations defence that has not been plead by a defendant, it would be prudent for mortgagees to file statements of claim within two years of the first default to protect their position should the prior mortgagee's action be discontinued for any reason.

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1 For a summary of the law under the prior *Limitations of Actions Act (Alberta)* and an analysis under the current *Limitations Act (Alberta)*, see *R. P Choma Financial and Associates Inc. v. McDougall*, 2008 ABQB 359.

2 RSA 2000, c. L-12 (the "*Limitations Act*").

3 2012 ABQB 323 ("*Letendre*").

4 2012 ABQB 262 ("*Tymkow*").