COURT OF APPEAL FOR ONTARIO

CITATION: Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited), 2017 ONCA 16
DATE: 20170111
DOCKET: C61311

Rouleau, van Rensburg and Miller JJ.A.

BETWEEN

Crombie Property Holdings Limited

Plaintiff (Appellant)

and

McColl-Frontenac Inc. (formerly known as Texaco Canada Limited), Imperial Oil Limited, 172965 Canada Limited, Avondale Stores Limited, Dimtsis Dentistry Professional Corporation, and John Doe

Defendants (Respondents)

Peter C. Wardle and James Gibson, for the appellant

Lana J. Finney and Alexi N. Wood, for the respondents McColl-Frontenac Inc. (formerly known as Texaco Canada Limited), Imperial Oil Limited and 172965 Canada Limited

Linda C. Phillips-Smith, for the respondent Avondale Stores Limited

Barry Weintraub and Conner Harris, for the respondent Dimtsis Dentistry Professional Corporation

Heard: October 25, 2016

On appeal from the judgment of Justice Kelly P. Wright of the Superior Court of Justice, dated October 22, 2015, with reasons reported at 2015 ONSC 6560.

van Rensburg J.A.:

A. OVERVIEW

[1] The appellant Crombie Property Holdings Limited ("Crombie") brought an action for damages resulting from the contamination by hydrocarbons of a property located at 150 Main Street East, Grimsby (the "Crombie Property"). The appellant became the owner of the Crombie Property on April 10, 2012. The contamination was alleged to have migrated from an adjacent property located at 146 Main Street East (the "Dimtsis Property"), which had been used as a gas station until 2004.

[2] The defendants to the action – the respondents in the appeal – are the owner (Dimtsis Dentistry Professional Corporation), former owners (McColl-Frontenac Inc., Imperial Oil Limited and 172965 Canada Limited) and former lessee (Avondale Stores Limited) of the Dimtsis Property.

[3] The action was commenced by notice of action issued on April 28, 2014. The parties exchanged pleadings. In its statement of claim the appellant asserted that it was not aware of soil and groundwater contamination at its property that had migrated from the Dimtsis Property until September 17, 2012. In their statements of defence the respondents pleaded that the claims asserted by the appellant had been discovered more than two years before the action was commenced and were therefore barred by the *Limitations Act, 2002*, S.O. 2002,

c. 24, Sched. B. The respondents moved for summary dismissal of the action based on the limitations defence.

[4] The motion judge granted the motion. She concluded that the appellant had become aware of sufficient material facts to form the basis of the action by March 9, 2012. In the alternative, she held that Crombie had more than a sufficient basis for an action by March 30, 2012 when soil and groundwater sampling laboratory results were "made available" to Crombie (and showed exceedences of regulatory criteria). In the further alternative the motion judge stated that, even if Crombie did not know about the drilling results until May 2012, when it received a draft Phase II environmental site assessment ("ESA") report that appended the results, the appellant ought to have known of its claim against the respondents, and did not exercise due diligence. Finally, the motion judge rejected the appellant's contention that there was a continuing tort that would suspend the operation of a limitation period, as there was no evidence from the appellant of ongoing damage or nuisance. As the claims asserted in the action were statute-barred, the motion judge granted the motion for summary judgment and dismissed the action.

[5] For the reasons that follow I would allow the appeal. The motion judge made two palpable and overriding errors when she found that Crombie knew or ought to have known of its claim in relation to the Crombie Property more than two years before it commenced the action. First, the motion judge equated

Crombie's knowledge of potential hydrocarbon contamination, or suspicion of such contamination (that was based on the information generated by a Phase I ESA) with actual knowledge that the Crombie Property was contaminated by hydrocarbons. Second, the motion judge erred in ignoring the relevant circumstances of Crombie's purchase of the property – its involvement in a multi-property transaction and its waiver of all conditions (not just an environmental condition for the Crombie Property) on March 8, 2012. These errors were material to her conclusion that Crombie had knowledge of its claim by March 9, 2012, based on its suspicions of contamination, and her alternative conclusion that Crombie knew or ought to have known of its claim when laboratory results from the Phase II subsurface investigations were "available" at the end of March 2012.

[6] As I would allow the appeal on this basis, it is unnecessary to consider the alternative argument that the motion judge erred in refusing to find evidence of continuing migration of contaminants that would extend the limitation period.

B. FACTS

[7] The Dimtsis Property was historically used as a gasoline service station. The site was decommissioned in 2004 and a substantial amount of contaminated soil was removed. Testing in 2007 confirmed that soil and groundwater conditions at the property met the applicable Ministry of the Environment ("MOE")

standards. The MOE acknowledged a Record of Site Condition in 2008. Under applicable law, the acknowledgment confirmed that the property complied with environmental regulations.

[8] The appellant offered to purchase the Crombie Property in 2012, as part of a transaction involving the acquisition of 22 commercial properties. The purchase was subject to various conditions, including that the purchaser be satisfied as to the environmental condition of the properties. Crombie hired Stantec Consulting Ltd. ("Stantec"), an environmental consulting firm, to assist with its environmental due diligence. Stantec completed a Phase I ESA for each property. A Phase I ESA consists of a review of available records, interviews with relevant persons and a site visit, but does not include any subsurface drilling or soil or groundwater sampling. Its purpose is to identify "evidence of potential or actual environmental contamination."[1]

[9] The Phase I ESA on the Crombie Property was conducted in February 2012. It included a review of five historical environmental reports. The reports (copies of which were provided to Crombie by February 29, 2012) described the results of Phase II ESAs (soil and groundwater sampling) carried out in 2003 and 2004; the results of a soil remediation program undertaken in 2004 (for

[1] Canadian Standards Association, Standard Z768-01 (R2006) (Phase I Environmental Site Assessments).

contamination by volatile organic compounds (“VOCs”)); and a review of the environmental status of the property in December 2005 (the “Pinchin Report”).

[10] The Pinchin Report stated that concentrations of PHC F1-F4 (petroleum hydrocarbon fractions) were relatively elevated in groundwater sampled in two monitoring wells, but generally showed marked decreases over the earlier sampling. Pinchin noted that there were no MOE standards for PHC, that the dissolved PHC concentrations were only marginally above the potable water standards and that the PHC concentrations appeared to be decreasing. Based on this, Pinchin’s opinion was that the remaining PHC concentrations were not considered a significant environmental concern, and that no further environmental assessment was warranted.

[11] Stantec’s Phase I ESA identified potential contamination of the property by the historic gas station at the adjacent property as well as potential contamination from an active dry cleaner located nearby. In its report (delivered March 20, 2012), Stantec summarized the historical reports. With respect to potential hydrocarbon contamination, the Phase I ESA report stated that levels of PHCs identified in the Pinchin Report would not have met 2012 site condition standards for benzene and PHC F1 and F4 fractions. However, as Stantec later stated in its draft Phase II report, due to changes in analytical methods, previously analyzed total petroleum hydrocarbon (TPH) concentrations could not be directly compared against the applicable site condition standards.

[12] Stantec recommended a Phase II ESA to evaluate soil and groundwater conditions at the Crombie Property for VOC and hydrocarbon contamination.

[13] On March 8, 2012 Crombie waived all conditions for the purchase transaction, including environmental conditions, such that it was required to complete the purchase of all 22 properties. Crombie completed its purchase of the properties, including the Crombie Property, on April 10, 2012.

[14] The subsurface work at the Crombie Property began on March 14, 2012. Crombie initially authorized analysis for VOCs only however, as Stantec reported in its draft Phase II ESA report, during the subsurface sampling, petroleum hydrocarbon odours were noted in a monitoring well near the property boundary. Stantec noted that following discussions with Crombie, soil and groundwater samples from this location were also analyzed for petroleum hydrocarbons.

[15] A draft Phase II ESA report was submitted to Crombie by Stantec on May 9, 2012. Attached to the report were laboratory test results dated March 23, 2012 for groundwater and March 30, 2012 for soil. The test results showed that petroleum hydrocarbons in certain soil and groundwater samples exceeded MOE site condition standards.

[16] The final Phase II ESA report was provided to Crombie on September 17, 2012.

[17] On April 28, 2014 Crombie commenced its action for damages for nuisance, strict liability, trespass, breach of statute and negligence as a result of the contamination by petroleum hydrocarbons of soil and groundwater at the Crombie Property.

[18] The respondents moved for summary judgment to dismiss the action on the basis that the appellant's claims were statute-barred pursuant to the *Limitations Act, 2002.*

[19] In support of the motion the respondents submitted the affidavit of Jeff Carson, an environmental engineer employed by Amec Foster Wheeler Environment & Infrastructure, and retained by Dimtsis, that attached his report (the "Carson Report").[2] The Carson Report reviewed and explained the various historical environmental reports and the Stantec Phase I and Phase II ESA reports, and the information that was available to Crombie and its consultant based on such documents. In relation to the soil and groundwater laboratory results, Mr. Carson noted that they were reported by the laboratory on March 23 and 30, 2012. He stated, "[I]t is common industry practice to update clients with field and analytical data once received, especially when critical deadlines, such as property transaction decisions, are imminent."

[2] Although Mr. Carson offered an opinion as to whether a reasonable person with the abilities and in the circumstances of Crombie ought to have known prior to April 28, 2012 all the facts alleged in the statement of claim, the motion judge during oral argument noted that this was a matter for the court and not for expert opinion and that she would disregard it. All counsel on appeal agreed this was the correct approach and the respondents did not seek to rely on this opinion.

[20] In response to the motion for summary judgment the appellant relied on the affidavit of Brady Landry, Crombie's Director of Acquisitions and Dispositions. Mr. Landry deposed that his department was responsible for due diligence for the 22 property transaction. He described how Crombie had a weekly telephone call in which environmental issues were discussed, and based on which due diligence summaries were prepared and updated. His affidavit attached copies of communications within Crombie and with Stantec. As of February 20, 2012, Stantec had informed Crombie that a gas station was located at the Dimtsis Property, which had been remediated, that a dry cleaner was present on another neighbouring property and that groundwater flow was not yet determined. As of February 27, 2012 the summary indicated a draft Phase II ESA was to be completed by April 9, 2012, with verbal results by March 23, 2012.

[21] Mr. Landry deposed that, in the next status call following the waiver of conditions, Stantec was advised that the Phase II ESA was no longer considered urgent. He explained that there was no reason to incur additional expense for rush laboratory analysis and report preparation. As a result, Crombie ceased to have Stantec provide regular updates. Mr. Landry deposed that the Crombie Property was not discussed with Stantec between March 13, 2012 and closing or afterwards. He also stated that it was only on receipt of the draft Phase II ESA report on May 9, 2012, that Crombie learned that there was hydrocarbon

contamination at the Crombie Property. Mr. Landry was not cross-examined on his affidavit.[3]

C. DECISION OF THE MOTION JUDGE

[22] The motion judge concluded that the appellant's claims were "readily available and discoverable" well before April 28, 2012, two years before its notice of action was issued. She found that Crombie was aware of Stantec's concerns outlined in its Phase I ESA report and its recommendation to conduct subsurface testing. She concluded that groundwater sampling results were available and showed exceedences on March 23, 2012, while soil sample results were available and showed exceedences on March 30, 2012.

[23] The motion judge concluded (at para. 31 of her reasons) that, "by March 9, 2012, when Crombie waived the environmental conditions, they had become aware of sufficient material facts to form the basis of an action."

[24] The motion judge went on to hold, that if she were wrong in that conclusion, Crombie had "more than a sufficient basis for an action" by March 30, 2012 (at para. 32). She stated that, while the draft Phase II report was dated May 9, 2012, the crucial part of that report was the findings from the groundwater and

[3] In their factums the respondents referred to their efforts to cross-examine Mr. Landry, who resides in Nova Scotia, and suggested that there had been a lack of co-operation by the appellant in facilitating the cross-examination in Ontario or by videoconference. However, there was no motion under rule 34.07 to determine the location of the examination or to conduct the examination by videoconference. In any event, in argument on the appeal counsel for the respondent Dimtsis stated that there had been no need to cross-examine Mr. Landry.

soil samples “all of which [were] made available to Crombie [by] March 30, 2012.” She concluded that “[i]t is difficult to believe that Crombie did not know about these results given that they were directing and presumably paying Stantec to go ahead with the further testing” (at para. 32). The motion judge rejected the evidence of Mr. Landry, that Crombie did not know of the test results until May 2012. She found that the subsurface test results would have been made available to Crombie during what she described as a “crucial time period”. The motion judge referred to the fact that Crombie had ongoing communication with Stantec and was verbally advised of the results of the Phase I ESA report well before its March 20, 2012 release date. From this, at para. 35, she inferred that:

> It only makes sense that they also had ongoing communication with Stantec prior to the Phase II report. Given the serious nature of the investigation and the results that flowed from it, it is difficult to believe they were not given that information by March 30, 2012. Even if they did not request it, one would think Stantec would have made it available to them.

[25] The motion judge concluded that, even if Crombie did not know about the sample results until May 2012, it ought to have known and did not exercise due diligence (at para. 40).

[26] As for the appellant’s argument that there was continuing environmental damage in respect of which the limitation period had not run, the motion judge rejected the claim as not supported by any evidence. She noted that none of the environmental reports that were generated spoke to the issue of ongoing

damage. Therefore, she was not prepared to attach a separate limitation period to any such claim (at paras. 41-47).

[27] The motion judge concluded that "[c]ertainly by the time [Crombie] acquired the property on April 10, 2012, [it] knew or ought to have known through reasonable diligence, all of the material facts needed to discover its alleged cause of action" (at para. 49). She therefore dismissed the action as statute-barred.

D. POSITIONS OF THE PARTIES

[28] The central issue on appeal is whether the motion judge made a palpable and overriding error, or erred in principle, when she concluded that the appellant knew or ought to have known it had a cause of action against the respondents more than two years before it commenced its action.

[29] The appellant says that the motion judge erred:

1. in finding that it knew of its claim by March 9, 2012, which was prior to its acquisition of the property and before it knew that there was contamination exceeding applicable standards;
2. in concluding in the alternative that it had a sufficient basis for an action by March 30, 2012, inferring without evidence, that Crombie had, by then, received the results of soil and groundwater testing;

3. in concluding in the further alternative that Crombie ought reasonably to have known that it had a cause of action, a finding that ignored the relevant circumstances of Crombie's purchase and environmental due diligence; and
4. in dismissing the claim based on continuing migration of contaminants where the moving parties had not provided any evidence to support this basis for the motion.

[30] The respondents assert that the motion judge's findings are entitled to deference. They argue that the finding of whether a claim has been discovered is a question of fact, or mixed fact and law, and that the evidence at the summary judgment motion supported the motion judge's decision in all respects.

E. ANALYSIS

(1) Standard of Review

[31] The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1. S.C.R. 87, at para. 81, established the standard of review on appeal of a summary judgment. The court stated that, "[w]hen the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law", reviewable only for a "palpable and overriding error", unless there is an "extricable error in principle". Further, the question whether a limitation period

expired prior to the commencement of an action is typically a question of mixed fact and law and therefore subject to review on a "palpable and overriding error" standard: *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, at para. 38. A "palpable and overriding error" is "an obvious error that is sufficiently significant to vitiate the challenged finding of fact": *Longo*, at para. 39.

[32] In my view, and as I will explain, the decision in this case reflects such errors.

(2) Framing the Limitations Issue

[33] In order to obtain a summary dismissal of the action, the moving parties were required to establish that there was no issue requiring a trial about their limitation defence. The specific issue was whether Crombie's claim in respect of the environmental contamination of its property was "discovered" within the meaning of s. 5 of the *Limitations Act, 2002* before April 28, 2012.

[34] Section 5(1) of the *Limitations Act, 2002* provides that a claim is discovered on the earlier of:

> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and

> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[35] The limitation period runs from when the plaintiff is actually aware of the matters referred to in s. 5(1)(a)(i) to (iv) or when a reasonable person with the abilities and in the circumstances of the plaintiff first ought to have known of all of those matters: *Longo*, at para. 41. The knowledge sufficient to commence the limitations clock has been described as “subjective” knowledge or “objective” knowledge. The prospective plaintiff must have known or ought reasonably to have known of the material facts necessary for a claim. It is “reasonable discoverability” and not “the mere possibility of discovery” that triggers a limitation period: *Van Allen v. Vos*, 2014 ONCA 552, 121 O.R. (3d) 72, at paras. 33 and 34.

[36] The central issue in this case, as framed by the parties, is when the appellant knew or ought reasonably to have known that the Crombie Property was contaminated by hydrocarbons, and in particular whether that occurred before April 28, 2012. This is how the injury, loss or damage component of s. 5(a)(i) was characterized. The fact that the appellant would have known that the source of the contamination was the prior use of the adjacent property as a gas station (the cause of the injury, loss or damage under s. 5(a)(ii)) was not

seriously challenged. Nor did the appellant assert that any delay in commencing the claim resulted from the need to determine the identity of the individual respondents in relation to the Dimtsis Property (s. 5(a)(iii)) or in not knowing that a proceeding would be an appropriate means to seek a remedy (s. 5(a)(iv)).

[37] As indicated, the motion judge decided to allow the motion and dismissed the claim as statute-barred after she concluded that the appellant's claims were "readily available and discoverable well before April 28, 2012."

[38] As I will explain, the motion judge, in concluding that Crombie knew about its claim by March 9, 2012, and knew or ought to have known about its claim by March 30, 2012, made two palpable and overriding errors.

(3) Equating Suspicion of Contamination with Actual Knowledge of Contamination

[39] The motion judge concluded that by March 9, 2012, when Crombie "waived the environmental clause",[4] (and before any subsurface testing had occurred) it knew of "sufficient material facts to form the basis of an action." As noted earlier, the material fact in question in this case was that the Crombie Property was contaminated by hydrocarbons.

[40] The motion judge did not point to any evidence that Crombie had actual knowledge of the hydrocarbon contamination at the Crombie Property at that

[4] The actual date of waiver of the conditions was March 8, 2012, as noted earlier in these reasons.

time. Rather, she referred to material that was available to Crombie from "a review of the property" (presumably the draft Phase I ESA results reported by Stantec) and the "compilation of material that was presented to them" (presumably the historical environmental reports Crombie received on February 29, 2012). Indeed, the motion judge's findings of fact at para. 29 of her reasons indicate only that, by early March 2012, Crombie was aware of Stantec's concerns of "potential contamination" by petroleum hydrocarbons related to the former gasoline station on the Dimtsis Property.

[41] Any information available to Crombie at that time about actual contamination at the Crombie Property, was historical. At its highest, in relation to hydrocarbon contamination, the Pinchin Report revealed the presence of hydrocarbons in groundwater in 2005 that were marginally above potable water standards and appeared to be decreasing, leading Pinchin to recommend no further investigation. It was not evidence of contamination of the property over six years later, nor was it interpreted as such by Stantec, Crombie's environmental consultant. Indeed, the purpose of the Phase II drilling and sampling program recommended and undertaken by Stantec, was to determine whether or not the soil or groundwater at the Crombie Property was contaminated.

[42] That the motion judge equated Crombie's knowledge of possible contamination with knowledge of actual contamination is apparent from her statement that "[a]ll the testing that followed simply confirmed [Crombie's]

suspicions about what had already been reported on" (at para. 31). It was not sufficient that Crombie had suspicions or that there was possible contamination. The issue under s. 5(1)(a) of the *Limitations Act, 2002* for when a claim is discovered, is the plaintiff's "actual" knowledge. The suspicion of certain facts or knowledge of a potential claim may be enough to put a plaintiff on inquiry and trigger a due diligence obligation, in which case the issue is whether a reasonable person with the abilities and in the circumstances of the plaintiff ought reasonably to have discovered the claim, under s. 5(1)(b). Here, while the suspicion of contamination was sufficient to give rise to a duty of inquiry, it was not sufficient to meet the requirement for actual knowledge. The subsurface testing, while confirmatory of the appellant's suspicions, was the mechanism by which the appellant acquired actual knowledge of the contamination.

[43] Finally, I note that the motion judge stated that the appellant's claims were "available and discoverable" well before April 28, 2012. While not determinative, this suggests that the motion judge adopted too low a threshold for discoverability and did not focus on what was necessary to her analysis: she was required to determine when the appellant had actual knowledge of the elements of its claim, and in particular that the property was contaminated by hydrocarbons, and when a reasonable person with the appellant's abilities and in its circumstances, ought to have known of the contamination. The fact that

contamination was there to be discovered was of course not sufficient to start the limitations clock.

[44] For these reasons, I conclude that it was a palpable and overriding error for the motion judge to equate knowledge of potential contamination with knowledge of actual contamination.

(4) Failing to Consider Relevant Circumstances: the Transaction Context

[45] The motion judge concluded in the alternative that Crombie had knowledge of the material facts sufficient for its claim when the subsurface test results were "available" to Stantec (which she assumed was by the end of March). The groundwater and soil sampling results from the laboratory were dated March 23 and 30, 2012.

[46] If the subsurface test results were sufficient to confirm that the Crombie Property was contaminated (which is a reasonable conclusion), it was not sufficient that the results were "available". The question was when Crombie had knowledge of the test results.

[47] First, the motion judge stated that, although the draft Phase II report containing the findings from the soil and groundwater sampling was not provided to Crombie until May 9, 2012, "[i]t is difficult to believe that Crombie did not know about these results given that they were directing and presumably paying Stantec to go ahead with the further testing" (at para. 32). The fact that Crombie

was directing and paying Stantec, however, was not sufficient to ground the conclusion that Crombie knew about the test results as soon as they were reported by the laboratory to Stantec.

[48] Second, the motion judge concluded that, because Stantec had verbally reported to Crombie the results of the Phase I ESA during the due diligence period it "only [made] sense" that they would have continued to do so when it received the laboratory results. In rejecting Mr. Landry's evidence that Crombie received no status updates from Stantec between March 13 and April 12, 2012, after the waiver of conditions, the motion judge stated that the suggestion that Crombie ceased to have communication with Stantec during this "crucial time period" made no sense and that she did not accept it:

> Given the serious nature of the investigation and the results that flowed from it, it is difficult to believe they were not given that information by March 30, 2012. Even if they did not request it, one would think Stantec would have made it available to them. (at para. 35)

[49] The problem with this reasoning is that it ignores completely the circumstances of the multi-property transaction Crombie was involved in, the due diligence process and the waiver of conditions. Nowhere in her reasons did the motion judge refer to the fact that Crombie was involved in purchasing 22 properties. This was part of the context in which Crombie's knowledge ought to have been assessed, and the failure to mention such circumstances was an important omission. Further, although the motion judge referred to March 9, 2012

as the date when Crombie waived conditions and proceeded with the purchase of the property (later she referred to this as a waiver of the "environmental condition"), she did not factor Crombie's waiver of conditions into her assessment of its conduct.

[50] That the motion judge ignored these circumstances is apparent in her reference to the "crucial time period" (presumably the period for due diligence in the transaction) as continuing even after the waiver of conditions. Once the conditions were waived, there was no urgency to confirming whether the Crombie Property was contaminated, as Crombie was required to close the purchase. It was unreasonable for the motion judge to draw an inference about Crombie's knowledge of the test results without considering such circumstances.

[51] This error also affected the motion judge's conclusion that Crombie ought reasonably to have known of its claim when the test results were available, and that the failure to ask for the results was inconsistent with reasonable diligent conduct. Section 5(1)(b) of the *Limitations Act, 2002* asks when "a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of" the elements of the claim; in this case the fact of the hydrocarbon contamination. Determining "whether the plaintiff has acted reasonably will include an analysis of not only the nature of the potential claim, but also the particular circumstances of the plaintiff": *Longo*, at para. 43.

[52] Again, in arriving at her conclusion that Crombie's claim was reasonably discoverable, the motion judge did not consider the relevant and important circumstances of the multi-property transaction and its waiver of conditions. What the motion judge ought to have considered, was whether, a reasonable person in Crombie's position, after the waiver of conditions, would have sought out and obtained the laboratory results before April 28, 2012.

[53] Accordingly, it was a palpable and overriding error for the motion judge to fail to take into consideration the multi-property transaction and Crombie's waiver of conditions, in her assessment of what Crombie knew or ought to have known about hydrocarbon contamination at the property two years before it commenced its action.

(5) The Conclusion that the Limitation Period Is Not Extended Because of a Continuing Tort

[54] In addition to asserting that the hydrocarbon contamination was not discovered until May 2012, the appellant argued that there was a continuing tort, in respect of which the limitation period would continue to run. The appellant contends that the motion judge erred in concluding that, because there was no evidence of continuing migration of hydrocarbons from the Dimtsis Property, no separate limitation period would attach to such claim. The appellant says that it was up to the moving party to put forward evidence that there was no continuing

migration of contaminants, before the appellant was required to respond. This was because the statement of claim alleged continuing migration. The appellant relies on *Sanzone v. Schechter*, 2016 ONCA 566, 402 D.L.R. (4th) 135, where this court noted that a moving party seeking summary judgment has the burden of persuading the court that there is no genuine issue for trial and it is only after the moving party discharges its evidentiary burden that the burden shifts to the responding party to prove that its claim has a real chance of success (at para. 30).

[55] In view of my conclusions with respect to the palpable and overriding errors that informed the motion judge's analysis of the limitations issues, it is unnecessary to address this issue, and I decline to do so.

F. DISPOSITION

[56] For these reasons, I would allow the appeal and set aside the dismissal of the appellant's action. I would award Crombie its costs of the appeal fixed at $29,194.19, inclusive of disbursements and applicable taxes and payable jointly and severally by all respondents.

Released: "P.R." January 11, 2017

"K. van Rensburg J.A."
"I agree Paul Rouleau J.A."
"I agree B.W. Miller J.A."