2016 ONCA 179
Ontario Court of Appeal

Pickering Square Inc. v. Trillium College Inc.

2016 CarswellOnt 2929, 2016 ONCA 179, [2016] O.J. No. 1118, 263 A.C.W.S. (3d) 217, 347 O.A.C. 124, 395 D.L.R. (4th) 679, 64 R.P.R. (5th) 175, 84 C.P.C. (7th) 12

Pickering Square Inc., Plaintiff (Respondent by way of cross-appeal) and Trillium College Inc., Defendant (Appellant by way of cross-appeal)

G.R. Strathy C.J.O., H.S. LaForme, Grant Huscroft JJ.A.

Heard: November 24, 2015
Judgment: March 3, 2016
Docket: CA C58900

Proceedings: affirming *Pickering Square Inc. v. Trillium College Inc.* (2014), 44 R.P.R. (5th) 251, 2014 CarswellOnt 5557, 2014 ONSC 2629, Mew J. (Ont. S.C.J.); additional reasons at *Pickering Square Inc. v. Trillium College Inc.* (2014), 2014 CarswellOnt 6894, 2014 ONSC 3163, Graeme Mew J. (Ont. S.C.J.)

Counsel: Courtney Raphael, for Appellant, Trillium College Inc.
Alan B. Dryer, Orly Kahane-Rapport, for Respondent, Pickering Square Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Property

Headnote

Civil practice and procedure --- Limitation of actions — Actions in contract or debt — Statutory limitation periods — When statute commences to run — Miscellaneous

Continuing breach — Plaintiff landlord P Inc. brought claim for damages for defendant tenant college's breaches of covenants in lease on ground that tenant did not operate business continuously and failed to restore premises when lease ended — Motion judge partially granted tenant's motion for summary judgment on basis that landlord's claim was statute-barred — Landlord appealed but abandoned appeal — Tenant cross-appealed — Cross-appeal dismissed — Tenant's obligation to operate its business was ongoing, so its breach was of continuing obligation under lease — Motion judge properly concluded that fresh cause of action accrued every day that breach continued, and that each fresh cause of action set clock running for new two-year limitation period — Landlord's election to affirm lease did not postpone date for discovery of breach until expiry of lease — Landlord was entitled to claim damages for breach of covenant to operate business continuously for period going back two years from when action was commenced until lease expired — Motion judge was entitled to find that landlord made claim for breach of covenant to repair and restore at end of lease and that limitation period began to run when lease expired — Action was commenced within two years of discovery of claim.

CROSS-APPEAL by defendant tenant from judgment reported at *Pickering Square Inc. v. Trillium College Inc.* (2014), 2014 ONSC 2629, 2014 CarswellOnt 5557, 44 R.P.R. (5th) 251 (Ont. S.C.J.), partially granting tenant's motion for summary judgment to dismiss plaintiff landlord's action.

***Grant Huscroft J.A.*:**

Overview

1 The main question posed by this case is: When is a claim discovered for limitations purposes in the context of a continuing breach of contract?

2 Trillium College Inc. (Trillium) and Pickering Square Inc. (Pickering) were parties to a long-term lease of space in a shopping centre. Trillium covenanted not only to pay rent but also to occupy the premises and to operate its business as a vocational college continuously, and to restore the premises at the expiry of the lease.

3 Trillium paid rent for the duration of the lease but did not operate its business continuously and failed to restore the premises when the lease ended. Pickering brought a claim for damages for Trillium's breaches of its covenants following expiry of the lease.

4 Trillium brought a motion for summary judgment, arguing that Pickering's claim was brought outside the two-year limitation period under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The motion judge held that Trillium's breach of the covenant to occupy the premises and operate its business continuously was of a continuing nature, such that each day of the breach gave rise to a fresh cause of action. As a result, only a portion of Pickering's claim against Trillium for breach of its covenant — the portion concerning the breach that occurred more than two years prior to commencement of the action — was barred by the *Limitations Act*. The motion judge also held that Pickering's claim for damages for breach of the covenant to restore the premises was not time barred. (A claim for arrears of rent was resolved prior to the summary judgment motion and was dismissed by the motion judge.)

5 Pickering appealed against the judgment but did not pursue its appeal. At the hearing, Trillium abandoned its cross-appeal of an award of costs in favour of Pickering arising out of the dismissal of its claim for arrears of rent. As a result, this case is concerned solely with Trillium's cross-appeal of the partial summary judgment.

6 Trillium raises two issues on appeal:

> 1. Did the motion judge err by finding a continuing breach of the agreement giving rise to a new cause of action and a new limitation period each day that Trillium failed to carry on business at the leased premises?
>
> 2. Did the motion judge err by finding that the repair claim was not statute-barred because it concerned repairs at the end of the lease rather than during its term?

7 I would dismiss Trillium's cross-appeal for the reasons that follow.

Facts

8 Pickering entered into an agreement with Trillium to lease commercial space at a shopping centre for a five-year term, from June 1, 2006 to May 31, 2011. The agreement required Trillium to pay monthly rent and included covenants requiring Trillium to operate its vocational college business continuously, to maintain the premises throughout the term of the lease, and to restore the premises following the expiry of the lease. The relevant covenants are set out in Appendix A.

9 Trillium gave notice to Pickering and vacated the leased premises in December 2007. In June 2008, Pickering sued the appellant for rent arrears and payment under s. 16.08 of the lease for failing to occupy the premises and to conduct its business continuously. The suit was settled in August 2008 with Trillium agreeing to resume occupation of the leased premises by October 1, 2008 in accordance with the terms of the lease.

10 Although Trillium paid the rent for the remainder of the lease (with two deficiencies not relevant here), it failed to conduct its business continuously at the leased premises as required by the covenant.

11 The lease expired on May 31, 2011 and Pickering brought an action against Trillium on February 16, 2012 for arrears of rent; for failure to occupy the premises and conduct its business continuously from October 1, 2008 to May 31, 2011; and for breach of the covenant to restore the premises.

12 As noted earlier, Trillium brought a motion for summary judgment, arguing that Pickering's claims were time-barred. The parties agreed that this was an appropriate case for summary judgment under the principles enunciated in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.).

The motion judge's decision

13 The motion judge concluded that the two-year limitation period under the *Limitations Act* applied to Pickering's claim against Trillium for breach of the covenant to operate its business continuously. He rejected Pickering's argument that the longer limitation periods under the *Real Property Limitations Act*, R.S.O. 1990, c. L.15, applied. The motion judge found that Pickering discovered its claim once Trillium did not resume occupation of the leased premises on October 1, 2008. Thus, well before the lease expired, Pickering knew that it had suffered damage and knew that it could pursue a remedy in a legal proceeding (as it had done in 2008).

14 However, the motion judge also found that Trillium's failure to resume occupation of the premises and to carry on its business continuously from October 1, 2008 gave rise to a series of breaches rather than a single breach. Accordingly, Pickering acquired a new cause of action every day Trillium failed to operate its business in accordance with the covenant until expiration of the lease on May 31, 2011.

15 Pickering brought its action on February 16, 2012. The motion judge found that Pickering's claim for the period from October 1, 2008 to February 16, 2010 was statute-barred, but its claim for the period from February 16, 2010 to the expiry of the lease on May 31, 2011 was not.

16 The motion judge found, further, that Pickering sought to recover only for breach of the covenant to repair and restore the premises at the end of the lease (and not during its term). Accordingly, it was not necessary to determine whether the limitation period under the *Real Property Limitations Act* or the *Limitations Act* applied because the obligation to restore arose when the lease expired on May 31, 2011, and Pickering's February 16, 2012 action was brought within the two-year period under the *Limitations Act* — the shortest of the possible limitation periods under the two statutes.

Analysis

(1) The standard of review

17 The interpretation of the lease and application of the principles of contract law involve issues of mixed law and fact and the motion judge's decision is to be reviewed on a deferential basis: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.). In the absence of an extricable question of law, which attracts the correctness standard, the decision of the motion judge is reviewable on the standard of palpable and overriding error.

(2) When does the limitation period run in the context of a continuing breach?

18 Trillium argues that its breach of the covenant to operate its business continuously was complete on October 1, 2008, the first day it failed to resume occupation of the leased premises and operate its business, and that each subsequent day that it failed to operate its business was not a separate breach but, instead, an instance of additional damages.

19 Trillium submits that a continuing breach of contract requires a succession or repetition of separate acts, whereas this is a case of a single act with continuing consequences. Although s. 16.08 of the lease quantifies the damages payable for every day Trillium failed to carry on business, it does not give rise to a separate cause of action each and every day the failure continued. Consequently, Pickering's claim is statute-barred because it should have been brought within two years of the October 1, 2008 breach — on or before October 1, 2010.

20 I would reject this submission.

21 For purposes of s. 5(1) of the *Limitations Act*, a claim is discovered once a plaintiff knew or ought to have known of sufficient facts on which to base the claim. Under s. 5(2), a claimant is presumed to discover his or her claim on the day the act or omission giving rise to the claim occurs, unless the contrary is proven.

22 In order to determine the discovery date for the claim, the nature of the breach must first be determined.

23 Breaches of contract commonly involve a failure to perform a single obligation due at a specific time. This sort of breach is sometimes called a "once- and-for-all" breach: it occurs once and ordinarily gives rise to a claim from the date of the breach — the date performance of the obligation was due. Trillium's breach of s. 16.08 does not fall into this category because its obligation to operate its business was ongoing rather than single and time-specific.

24 A second form of breach of contract involves a failure to perform an obligation scheduled to be performed periodically — for example, a requirement to make quarterly deliveries or payments. A failure to perform any such obligation ordinarily gives rise to a breach and a claim as from the date of each individual breach: see e.g. *Smith v. Empire Life Insurance Co.* (1996), 19 C.C.E.L. (2d) 171 (Ont. Gen. Div.), leave to appeal refused, [1996] O.J. No. 3113 (Ont. C.A.). That is not this case.

25 As the motion judge found, this case falls into a third category of breach: breach of a continuing obligation under a contract. Trillium breached its covenant to operate its business continuously — "at all times" — for the duration of the lease.

26 The concept of a continuing breach is not novel. It was outlined by Dixon J. (as he then was) in *Larking v. Great Western (Nepean) Gravel Ltd. (in Liquidation)* 64 C.L.R. 221, at p. 236:

> If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being for ever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured, or the particular support unprovided.
>
> The distinction may be difficult of application in a given case, but it must be regarded as one depending upon the meaning of the covenant. It is well illustrated by the construction given to the ordinary covenant that premises will be insured and kept insured against fire. Such a covenant is interpreted as imposing a continuing obligation to see that the premises are insured, so that the covenant cannot be broken once for all, but, on the contrary, failure to insure involves a continuing breach until the omission is made good.

See the discussion in J.W. Carter, *Carter's Breach of Contract* (Lexis Nexis-Butterworths 2011), at ch. 11-64. See also *Bridgesoft Systems Corp. v. British Columbia*, 2000 BCCA 313, 74 B.C.L.R. (3d) 212 (B.C. C.A.).

27 Trillium's argument that breach of its covenant to operate its business continuously established a complete cause of action as of October 1, 2008 overlooks the consequences of its breach. In the face of Trillium's action — a serious breach or repudiation of the lease — Pickering had an option. It could either cancel the lease or affirm it and require performance: see *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562 (S.C.C.), at p. 570; *TNG Acquisition Inc., Re*, 2011 ONCA 535, 107 O.R. (3d) 304 (Ont. C.A.), at para. 33.

28 The election to cancel a contract as a result of a serious breach or repudiation brings a contract to an end and relieves the parties of any further obligations under it. The contract is not void *ab initio*: the innocent party may sue for damages for breach of the contract.

29 By contrast, if the innocent party elects to affirm the contract despite the serious breach or repudiation, the contract remains in effect and the parties are required to perform their obligations under it. The innocent party retains the right to sue for past and future breaches: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), at para. 40.

30 Pickering elected not to cancel the lease following Trillium's October 1, 2008 breach. It affirmed the lease and, as a result, the parties were required to perform their obligations under it as they fell due.

31 Trillium could have resumed performance of its obligations at any time prior to the end of the term of the lease by carrying on its business at the leased premises in accordance with the terms of the covenant. Had it done so, Pickering would have been required to accept Trillium's performance and would have been unable to terminate the lease in the absence of a further serious breach or repudiation. Trillium would have been liable for damages from the date of its October 1, 2008 breach until the date it resumed the performance of its covenant obligations, but would not have incurred liability for breach of the lease beyond that date.

32 Trillium chose not to resume its obligations at any point prior to the expiry of the lease. In these circumstances, when did the two-year limitation period begin to run?

33 It is clear that a cause of action accrues once damage has been incurred, even if the nature or the extent of the damages is not known: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), at para. 18; *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, 347 D.L.R. (4th) 657 (Ont. C.A.), at para. 61.

34 But accrual of a cause of action is not determinative for limitation purposes in the context of a continuing breach of contract and an election by the innocent party to affirm the contract. The motion judge properly concluded that a fresh cause of action accrued every day that breach continued — every day that Trillium failed to carry on its business in accordance with the covenant.

35 Nothing in *Highway Properties* precludes this approach. Laskin J.'s statement, at p. 576, that "the election to insist on the lease or to refuse further performance (and thus bring it to an end) goes simply to the measure and range of damages" does not speak to a situation of continuing breach or the application of the *Limitations Act*.

36 I agree with the motion judge that the proper approach to the calculation of the limitation period in the context of a continuing breach is set out in H.G. Beale, ed., *Chitty on Contracts*, 29th edn. (London, UK: Sweet & Maxwell, 2004), at para. 28-035 (the position is unchanged in the 32nd edition):

> [T]he breach may be a continuing one, e.g. of a covenant to keep in repair. In such a case the claimant will succeed in respect of so much of the series of breaches or the continuing breach as occurred within the [relevant limitation period] before action brought. If the breach consists in a failure to act, it may be held to continue *die in diem* until the obligation is performed or becomes impossible of performance or until the innocent part elects to treat the continued non-performance as a repudiation of the contract. ... [Footnotes omitted.]

37 The accrual of fresh causes of action has consequences for the innocent party as well as the party in breach of the contract. It sets the clock running for a new two-year limitation period. Pickering's election to affirm rather than cancel the lease does not have the effect of postponing the date for discovery of the breach until expiry of the lease.

38 The limitation period in this case applied on a "rolling" basis, a concept discussed in *Goorbarry v. Bank of Nova Scotia*, 2011 ONCA 793 (Ont. C.A.) at paras. 11-13 and *Wilson's Truck Lines Ltd. v. Pilot Insurance Co.* (1996), 31 O.R. (3d) 127 (Ont. C.A.) at para 58. The two-year limitation period commenced each day a fresh cause of action accrued and ran two years from that date. Thus, Pickering was entitled to claim damages for breach of the covenant for the period going back two years from the commencement of its action on February 16, 2012 — the period that ran from February 16, 2010 until the lease expired on May 31, 2011.

(3) Was the repair claim statute barred?

39 Trillium submits that Pickering's restoration claim was related to obligations during the lease rather than at its expiry. This claim was therefore discoverable as of October 1, 2008 and, as a result, is barred by the two-year limitation period under s. 4 of the *Limitations Act.* Trillium submits, further, that if Pickering's claim related to obligations at expiry of the lease, it failed to give notice under the lease that repairs were required.

40 This argument must also be rejected.

41 The motion judge was entitled to find that the respondent was claiming only for the breach of the covenant to repair and restore at the end of the lease. From this finding it followed that the limitation period for the claim began to run on May 31, 2011, and as a result the action was commenced within two years of discovery of the claim. Whether notice was provided was irrelevant to the nature of the claim and the *Limitations Act* issue.

Disposition

42 Accordingly, I would dismiss the cross-appeal.

43 I would order the appellant to pay the respondent costs fixed by agreement at $20,000, inclusive of disbursements and all applicable taxes.

***G.R. Strathy C.J.O.*:**

I agree

***H.S. LaForme J.A.*:**

I agree

Cross-appeal dismissed.

Appendix A

Section 16.08 Failure of the Tenant to Carry on Business

(a) The Tenant shall take possession of the Leased Premises upon the Commencement Date, and shall open the whole of the Leased Premises for business, fully fixtured, stocked and staffed upon the Commencement Date (but in no event prior to the Opening Date), and thereafter throughout the Term conduct its business operations continuously, diligently and actively on the whole of the Leased Premises at all times, duly and strictly in accordance with the terms, covenants and conditions of this Lease.

(b) If the Tenant fails to take possession of and to open or to reopen the Leased Premises for business, fully fixtured, stocked and staffed within the times and in the manner required pursuant to this Lease or to carry on business at all times during the Term duly and strictly in accordance with the terms, covenants and conditions contained in this Lease, the Landlord shall be entitled (i) to collect (in addition to the Minimum Rent, Additional Rent and all other charges payable hereunder), an additional charge at a daily rate of Ten Cents ($0.10) per square foot ($1.08 per square metre) of the Rentable Area of the Leased Premises or One Hundred Dollars ($100.00), whichever is the greater, for each and every day that the Tenant fails to commence to do or to carry on business as herein provided, the additional charge being a liquidated sum representing the minimum damages which the Landlord is deemed to have suffered as a result of the Tenant's default, and is without prejudice to the Landlord's right to claim a greater sum of damages; and (ii) to avail itself of any other remedies for the Tenant's breach hereunder, including obtaining an injunction or an order for specific performance in a court of competent jurisdiction to restrain the Tenant from breaching any of the provisions of this Section 16.08 and to compel the Tenant to comply with its obligations under this Section 16.08...

Section 11.05 Surrender of the Leased Premises

At the expiration or earlier termination of the Term, the Tenant shall peaceably surrender and yield up the Leased Premises to the Landlord in as good condition and repair as the Tenant is required to maintain the Leased Premises throughout the Term... The Tenant shall, however, remove all its trade fixtures and any alterations or improvements if requested by the Landlord as provided in Section 11.09 before surrendering the Leased Premises, and shall forthwith repair any damages to the Leased Premises caused by their installation or removal. The Tenant's obligation to observe and perform this covenant shall survive the expiration of the Term or earlier termination of this Lease.

Section 11.09 Removal and Restoration by the Tenant

[T]he Tenant shall, at the expiration of the Term, at its own cost, remove all its trade fixtures and such of its leasehold improvements and fixtures installed in the Leased Premises as the Landlord requires to be removed.