**SUPERIOR COURT OF JUSTICE – ONTARIO**
**DIVISIONAL COURT**

**RE:** ALS Society, et al, Applicant

**AND:**

City of Windsor and Town of Tecumseh, Respondents

**BEFORE:** Reilly, Aston, Ray JJ.

**HEARD:** April 23 and 25, 2012

**ASTON J. (ORALLY)**

[1] This is an appeal by the plaintiffs from two orders of Patterson J. dated January 20, 2011 certifying two class proceedings. The orders are identical except for the parties. The two actions are proceeding in tandem.

[2] The appellants ask that the class definition in each case be amended to remove any reference to a time period. They also ask that the common issues be amended to include additional issues related to the anticipated limitation period defence, discoverability, concealment and remedy. The plaintiffs also appeal the decision by the certification judge in relation to costs of the motions for certification and the provision requiring the plaintiffs to bear the cost of any notice to the class that may be required as each matter proceeds. For convenience sake I will refer to the plaintiffs in the two actions as the "appellant" and the two municipalities as the "respondent". These reasons will apply to both proceedings.

[3] It is not unusual for issues to be reframed on appeal. In this case, the parties presented the motions judge with a dispute over whether the proposed class in each case should be truncated on the basis of a limitations period. The motions judge may have conflated the

consideration of s. 5(1)(a) of the *Class Proceedings Act* ("CPA") with the other considerations under s.5(1) based on the way he was asked to decide that issue.

[4] The plaintiff proposed that the class should not be restricted by any limitation period, but should include claimants whose claims dated back to at least January 1, 1990, or perhaps even further, to 1969.

[5] The motions judge decided this issue in favour of the defendants, ruling that the class and the scope of the claims would be limited to a two year period predating the commencement of the action on October 24, 2008 and to an additional period running from October 24, 2002 to December 31, 2003, being a period preserved by the transitional provisions in s. 24 of the *Limitations Act* 2002.

[6] On our reading of the decision below, the motions judge made this determination on the basis that the Supreme Court of Canada decision in *Kingstreet Investments Ltd. v. New Brunswick (Finance)* [2007] 1 S.C.R. 3 had determined the issue presented to him. That case held that any potential claim in a cause of action for recovery of an illegal tax starts from the time the licensing fee is paid.

[7] In *Kingstreet*, at paragraph 61, the Supreme Court of Canada stated: "The cause of action was complete at the moment the Province illegally received the payment. For this reason, the appellants can only recover the user charges paid during the six years preceding the filing date of their notice of application".

[8] It appears from paragraph 5 of the reasons of Patterson J. that he interpreted this statement in *Kingstreet* as dispositive of the issue the parties had asked him to adjudicate. It is

not. In *Kingstreet*, the plaintiffs had actually discovered their claim more than six years prior to the institution of their application. There was no discoverability issue which might have extended the six year limitation period for those plaintiffs. In this case, the pleading of discoverability and concealment raises a distinct issue.

[9] In coming to his conclusion on this point, the motions judge implicitly rejected the plaintiff's submission that issues of discoverability and concealment, which have been pleaded in the Statement of Claim in this case, should not be determined on the motion for certification but only at trial or on a motion for summary judgment.

[10] On the certification motion, the defendants had taken the contrary position that the claim could be certified as a class proceeding only if claims arising in the specific time periods previously mentioned were excluded and that the time periods needed to be determined on the certification motion, not later. Their primary submission was that under s. 5(1)(a) of the *Class Proceedings Act*, the Statement of Claim did not disclose a cause of action for claims outside the applicable limitation periods because it was "plain and obvious" such claims could not be advanced on the facts or on the law. Their alternative submission was that, without the limitation period restrictions, a class proceeding would not be the preferable procedure under s. 5(1)(d) of the CPA and that the representative plaintiff would not meet the test under s. 5(1)(e) of that Act. See page 65 of the transcript of the hearing December 7, 2010.

[11] The motions judge never had to address this alternative position of the defendants, apparently because he had dealt with the issue under s. 5(1)(a). When he went on to canvass questions of whether there was an identifiable class ( at paragraph 16 of his reasons) whether a class proceeding was the preferable procedure (at paragraphs 18 and 19) and whether the

representative plaintiff met the requirements of s. 5(1)(e) (at paragraphs 20 and 21) he was able to do so in summary fashion because he assumed that he had truncated the class (as requested by the defendants) as a threshold issue, and the defendants did not take issue with the rest of the test under s. 5 as a consequence of that threshold decision.

[12] In this context, the reasons of the motions judge are more than adequate. He addressed the issues the parties asked him to adjudicate.

[13] However, the motions judge erred in law in using the limitation period to narrow the class or the class issues if he did so under clause 5(1)(a) of the *CPA*.

[14] As Leitch J. pointed out when granting leave to appeal, *Kingstreet* does not dictate that the limitation period always starts to run, as a question of law, from the date the licence fee is paid. Discoverability, which is a question of fact, was not an issue in *Kingstreet.* In this case, the Statement of Claim pleads a discoverability/concealment issue which could possibly extend the time frame for any claim.

[15] It is not clear to us from the reasons of the Motion judge that he considered any evidence on the s. 5(1)(a) inquiry but if he did, that would also constitute an error of law. It is well settled that no evidence is admissible for the purpose of determining the s. 5(1)(a) issue and that the inquiry is limited and restricted. See for example, *McKee's Carpet Zone v. Sears,* 2010 ONSC 4571 at paragraph 33.

[16] We accept the submission of the appellants that the s. 5(1)(a) inquiry is a limited and restricted one. It does not engage any discretion or fact finding. It is purely a question of law. The standard of review on the s. 5(1)(a) issue is correctness. See *Attis v. Canada (Minister of*

*Health)* (2008) 93 O.R. (3rd) 35 at paragraph 23. The motion judge made a reversible error if he truncated the class on the basis of s. 5(1)(a).

[17] What is the appropriate remedy or relief on appeal?

[18] Although it is open to us to review the record below and render a decision on the certification motion, we are of the view that a preferable course is to refer the matter back to Patterson J. for reconsideration. Because of the way he approached the motion, as originally framed by the parties, he did not have to consider (and apparently did not consider) the alternative arguments of the defendants. When considering clauses 5(1)(b), (d) and (e) of the *CPA* it is open to the motion judge to make a certification order that truncates the class, or class issues, in the exact same manner he did, or on some other basis such as the date of publication of information by a defendant, or in the case of Town of Tecumseh the date the amalgamated municipality came into being. Without a temporal limit on the class, he might dismiss the motion for certification altogether. On the other hand, the motions judge might conclude that the class proceeding is still the "preferred procedure" on the terms proposed by the plaintiff.

[19] In our opinion, it is better for the complex and nuanced decision on the certification motion to be decided in the first instance by one of the judges designated to hear class proceedings. We say that mindful of the additional delay that this may entail. In this case, both sides are amenable to the idea that we need not refer the matter to a different judge. They have indicated that if we were to refer the matter for reconsideration they are content that Patterson J. would hear it.

[20] On reconsideration of the common issues, Patterson J. will have an opportunity to analyze the certification issues through the prism set out in paragraph 43 of *McKees Carpet Zone v. Sears* 2010 ONSC 4571.

[21] The orders below do not include remedy as a common issue. There are no reasons to explain this omission and we are unable to assess whether the motion judge overlooked the proposal of the plaintiffs in that regard or whether he dismissed their proposal. That issue should be addressed on the reconsideration.

[22] Patterson J. will also have an opportunity to reconsider the decisions he made regarding costs and notice to class members in paragraphs 4 and 5 of his orders. We express no opinion on whether those provisions in the orders were reasonable. There are simply no reasons for us to review and we agree with the appellants that they should have been afforded an opportunity to make submissions on those issues before any decision was made.

[23] In the result then, paragraphs 2 through 7 inclusive of the orders of January 20, 2011 in each of these two proceedings are set aside and the certification motion is remitted to Patterson J. for reconsideration in accordance with these reasons.

25 Apr/12

For reasons given orally on the record by Aston, J and concurred in by Reilly + Kay, J.J., the appeal is allowed and an order will issue in accordance with the oral reasons.

D Reilly Aston Kay

Plaintiff shall have 30 days to make brief written submissions on the issues of quantum and entitlement to costs. Defendants shall have a further 15 days to submit brief written submissions in reply with a further 10 days for surreply by the plaintiffs. Submissions should be sent to the Divisional Court office in London, Ont.

D Reilly Aston Kay

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***ONTARIO***
**DIVISIONAL COURT**

Proceeding under the *Class Proceedings Act, 1992*

Proceeding commenced at Windsor

**JOINT APPEAL BOOK AND COMPENDIUM**

**Volume I of VII**

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