

**CITATION:** MCAP v. Dickieson, 2023 ONSC 2233  
**COURT FILE NO.:** CV-18-66832  
**DATE:** 2023/04/13

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
)  
MCAP SERVICE CORPORATION ) D. Zacks and E. Ngondo, on behalf of  
Plaintiff/Responding Party ) the Plaintiff  
)  
)  
**-and-** )  
)  
)  
)  
TIM DICKIESON (d.b.a. PREFERRED ) C. Afonso, for the Defendants  
APPRAISAL SERVICES )  
Defendants/Moving Party )  
)  
)  
) **HEARD:** April 5, 2023

2023 ONSC 2233 (CanLII)

**RULING ON SUMMARY JUDGMENT MOTION**

**A.J. GOODMAN J.:**

[1] The defendants, Tim Dickieson, and his company, Preferred Appraisal Services (“Dickieson”) provides real estate appraisal services. The defendants bring this summary judgment motion to dismiss the negligence action as against them on the basis that it was commenced beyond the applicable limitation period pursuant to the *Limitations Act 2002*, S.O. 2002, c. 24, Sched. B.

[2] The plaintiff, MCAP Service Corporation (“MCAP”), is the industry leader in mortgage financing. It is a subsidiary of MPAC Commercial LP, which is Canada’s largest mortgage financing company. It employs approximately 1,400 people and currently administers approximately \$146 billion of residential, commercial, and construction mortgages.

[3] For the following reasons, the defendants’ motion is granted.

**Background:**

[4] The defendants seek an order dismissing the plaintiff’s action because it is alleged that it was commenced beyond the applicable limitation period.

[5] The plaintiff made a loan in 2013 to a borrower who is not party to this action. The plaintiff alleges that it made this loan based on an allegedly negligent appraisal prepared by the defendant in 2012. The crux of the plaintiff’s allegations is that the defendant overvalued the property at issue in a 2012 appraisal.

[6] Specifically, MCAP received an appraisal report that was prepared by the defendant in December 2012 (the “Appraisal”) for a residential property at 10 Richmond Street East, St. Catharines, Ontario (the “Property”). MCAP pleads that it relied on the Appraisal in deciding to enter into a mortgage loan with the owner of the Property in January 2013. The Appraisal estimated the market value of the Property at \$340,000 and lent \$272,000 to the mortgagor in reliance on that appraisal.

[7] The owner defaulted on the loan in April 2016 and MCAP sold the Property pursuant to a power of sale for \$195,000 in March 2017. There was a shortfall. The Mortgage was insured by Genworth and pooled with other insured residential

mortgages for sale by MCAP to investors as *National Housing Act* Mortgage-backed Securities Certificates.

[8] MCAP alleges that the Appraisal overvalued the Property, that it was prepared in a negligent manner, and that it was the cause of its alleged damages.

**Issues:**

[9] The ultimate question for this motion is when the negligence claim crystallized or was otherwise discoverable and if it commenced after expiry of the statutory limitation period.

**Positions of the Parties:**

[10] The defendants submit that a claim is discovered when a plaintiff discovers or ought to have discovered material facts sufficient to plead the cause of action at issue. The defendants argue that the plaintiff discovered its cause of action on June 15, 2016, but only commenced this action over two years later on September 19, 2018.

[11] There is no dispute that the borrower defaulted in April 2016. In June 2016, the plaintiff obtained an opinion that the original appraisal was unreasonable. The defendants say that the opinion on appraisal demonstrated that the plaintiff may anticipate losses on the loan in excess of \$110,000.

[12] The plaintiff completed its power of sale process by March 2017, and by May 2017, hired a lawyer for this claim. Nonetheless the action was commenced in September 2018, more than two years after the negligence claim was known or discoverable by the plaintiff.

[13] The defendants submit that the plaintiff has taken the erroneous position that its limitations “clock” should not start until its damages crystallized through the power of sale. The defendants contend that lenders cannot wait for the power of sale to start the limitations “clock”. They further say that crystallization of the quantum of the loss is not necessary.

[14] The defendants submit that the plaintiff completed its processes according to its “protocol” and completed all of the pre-litigation steps in less than one year, but simply sat on its rights until after the limitation period expired.

[15] MCAP responds that a reasonable person would have inferred Dickieson’s liability no earlier than May 10, 2017 when MCAP obtained a retrospective valuation implicating the defendants. To discover its claim, MCAP required sufficient facts to plausibly infer that the Appraisal was wrong. MCAP knew at all relevant times that Dickieson had drafted the Appraisal and that it had relied on it when underwriting the mortgage. However, MCAP did not know that the Appraisal was wrong until it obtained a retrospective valuation.

[16] MCAP submits that it acted reasonably by diligently following its protocol for administering a mortgage in default. The protocol itself is reasonable. No reasonable person, with MCAP’s abilities and in its circumstances, would have acted in the commercially unjustifiable way Dickieson argues is industry practice.

[17] MCAP says that Dickieson’s limitations defence asks the court to find that MCAP runs its business unreasonably. The argument is that MCAP’s protocol for administering loans in default is contrary to industry practices, notwithstanding that MCAP is the industry leader, and that its regulators, investors, and insurers

continuously review and approve the protocol. The defendants make this argument without considering its substantial commercial implications.

[18] MCAP obtained four post-default valuations to assess the equity in the property and to market it for sale. The defendants' position is that any of these valuations ought to have caused MCAP to discover his alleged negligence. This argument is flawed. The plaintiff says that the post-default valuations alone could not permit a plausible inference of the defendants' negligence. A property's value declines for different reasons, the least likely of which is appraiser negligence. Inferring Dickieson's negligence required an investigation, including obtaining a "retrospective valuation" directly comparable to Dickieson's valuation. MCAP obtained a retrospective valuation exactly when its protocol required. It sued Dickieson within two years of that date.

[19] MCAP submits that it did not sit on its rights. The protocol is the standard, it is constantly reviewed and MCAP acted reasonably by following it. MCAP submits that the motion for summary judgment ought to be dismissed.

**Relevant Legal Principles:**

[20] Rule 20.04(2) of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 provides that summary judgment shall be granted if the court is satisfied that there is no genuine issue requiring a trial. The seminal case of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 and r. 20.04(2.1) now provide that for summary judgment motions, the court has the power to weigh the evidence, evaluate the credibility of a deponent, and to draw any reasonable inference from the evidence.

[21] Issues of limitation periods and discoverability are capable of being decided on a summary judgment motion.

[22] On a motion for summary judgment, the *Rules of Civil Procedure* specifically permit the court to draw an adverse inference from the failure of a party to provide direct evidence from a person having personal knowledge of contested facts. The parties must present their “best case” or risk losing the motion.

[23] The relevant portions of s. 5 of the *Limitations Act, 2002* are as follows:

Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5(1) 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).

[24] Paragraph (a) refers to the party’s subjective knowledge while para. (b) entitles a court to make a finding on a modified objective standard. In other words, knowledge of the s. 5(1)(a) discovery matters requires *prima facie* knowledge, or

sufficient knowledge to form a plausible inference of the defendant's liability: *McFlow Capital Corp. v. James*, 2021 ONCA 753, at para. 35.

[25] The applicable definition of when a cause of action arises was articulated in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224: “[A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence...”

[26] The analysis for s. 5(1)(b) asks when a reasonable person, with MCAP's abilities and in its circumstances, would have inferred Dickieson's liability: *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600, at para. 55, *Georgian Properties Corporation v. Robins Appleby LLP*, 2022 ONCA 245, 468 D.L.R. (4<sup>th</sup>) 476, at para. 39, *Fehr v. Sun Life Assurance Company of Canada*, 2018 ONCA 718 at paras. 173-175, *Crombie Property Holdings Limited v. McColl-Frontenac Inc. (Texaco Canada Limited)*, 2017 ONCA 16, 406 D.L.R. (4<sup>th</sup>) 252, at para. 51, leave to appeal to S.C.C. ref'd [2017] S.C.C.A. No. 85.

[27] For a claim based on an allegedly negligent act, all that is needed is *prima facie* grounds to infer that the loss was caused by the negligent acts of the defendant. It has also been expressed as facts necessary to form a plausible inference that a defendant's acts and omissions caused the loss.

**Analysis:**

[28] In this case, the plaintiff has admitted the following facts: On June 15, 2016, MCAP received an opinion from a realtor, Joe Cosentino, (“Cosentino”) who had been asked to comment on the value of the Property (the “First Cosentino Report”). and to provide an opinion as to the reasonableness of the Appraisal. The plaintiff

received the “First Cosentino Report” which valued the Property at approximately at \$160,000, rather than the estimated value in the Appraisal at issue of \$340,000. Cosentino provided comments wherein he indicated the value of the Property and questioned the accuracy of the original Appraisal. (“question the \$340,000 value? Neighbourhood values are from 70,000 to 285,000 max.”)

[29] The plaintiff prepared the Loan Diagnostics Report dated June 15, 2016, which valued the Property at \$160,000 and prepared an internal Loan Loss Provisioning Report projecting a loss of \$110,880.51. A representative from MCAP admitted in cross-examination that from this point forward, MCAP anticipated a loss on the sale of the Property. The plaintiff’s guidelines required a report assessing the Property and the original appraised value by a specific deadline (100 to 115 days post-default). The industry standards set the deadline for this report as August 2, 2016 (120 days post-post default). On August 26, 2016, MCAP obtained a second report from Cosentino estimating the market value of the Property at \$145,000 (“the “Second Cosentino Report”). This report was created after Cosentino was able to conduct an interior inspection.

[30] On September 1, 2016, MCAP then received an appraisal of the Property from Regional Appraisals Inc. (the “Post-Default Appraisal”) which estimated the market value of the Property at \$201,000. On September 6, 2016, MCAP obtained a third report from Cosentino, which valued the Property at \$155,000 (the “Third Cosentino Report”). This report was obtained after MCAP asked Cosentino to consider his opinion in light of the Post-Default Appraisal.

[31] So, between August 26 and September 6, 2016, the plaintiff obtained three additional post-default valuations which all valued the Property well below the \$340,000 value set out in the defendants’ Appraisal. On March 21, 2017, the

Property is sold for \$195,000 through a power of sale. On May 29, 2017, MCAP referred this matter to external counsel who eventually commenced this action on September 19, 2018.

[32] Does the limitation “clock” start running from June 15, 2016, the date of the first negative opinion regarding the value of the collateral and the original Appraisal? Or, are alternative start times for the limitation “clock”, namely the plaintiff’s own deadline to have conducted those assessments, or the industry standard for such a deadline?

[33] In answering these questions, it is helpful to delve further into the evidence. MCAP posed a question to Cosentino regarding the standard reporting form that he was asked to fill out, namely the “drive-by value” section. Cosentino was specifically asked: If Drive by Value is 15% lower than the Origination Value stated above, please provide an explanation as to the drop in value (ie: market conditions, major events including business closures, overall feedback, etc.).

[34] When examined, Cosentino confirmed that his report contained his opinion regarding the value of the Property in June 2016:

Q. If I’m reading this right, then it means on June 15 of 2016 you had done a drive-by of this particular property and had come up with an estimated value of 160,000 on that date. Is that right?

A. Correct.

[35] Cosentino confirmed that his report also communicated to the plaintiff that his opinion was that the original appraised amount of \$340,000 was unreasonable:

Q. In other words, what you wrote there is that -- you question that the 340,000 value was correct... The reason that you questioned that was because you thought that value was unreasonable for the property based on your drive-by?

A. Correct.

[36] The First Cosentino Report was then provided to Darcy Laviolette, (“Laviolette”) an MCAP employee working in the Default Management Group. Upon receipt of the First Cosentino Report, Laviolette prepared a Loan Diagnostics Report dated June 15, 2016, which included Cosentino’s valuation of \$160,000 as well as his comments questioning the value of the Property in the Appraisal. The following day, Laviolette prepared a Loan Loss Provisioning Report, based on the valuations, setting out a projected loss of \$110,880.51.

[37] During cross-examination, Ana Ialeggio, (“Ialeggio”) the manager of MCAP’s Mortgage Investigations Unit (“MIU”), confirmed that the calculations in the MCAP Loan Loss Provisioning Report dated June 16, 2016.

Q. Okay, and, based on this...I’m just reading from the last line here...the projected principal loan loss she came up with...and you have to go to the second page to see the continuation, but it’s approximately 110,000; that is how you read that?

A. Yes.

[38] Ialeggio also agreed that from this point forward, MCAP anticipated that there would be a loss on the sale of the Property.

Q. All right. And so, based on this calculation, you would agree with me that, up until the time that the property was sold, MCAP was always anticipating that there was going to be some type of loss, and they just didn’t know what amount; is that fair?

A. Yes.

[39] It is clear that these reports and the Post-Default Appraisal (collectively the “Post-Default Valuations”) were all in the possession and within the knowledge of MCAP more than two years prior to the commencement of this action.

Industry practice related to MCAP to investigate the grounds for a cause of action:

[40] In her affidavit, laleggio says that the industry practice for residential mortgage lenders is not to conduct any investigation into the cause of an anticipated shortfall until after the property has sold. I observe that laleggio cites no source of information for this assertion. The defendants retained Andrey Pavlov, (“Pavlov”) a Professor of Finance at Simon Fraser University, to prepare an expert report in response. Pavlov provided an opinion stating that laleggio is incorrect:

...there is an industry practice that after a mortgage loan becomes non-performing (i.e. the borrower stops paying in full and on time), lenders obtain an updated estimate of the value of the mortgage property. Furthermore, if this value is materially below the original value estimate obtained at the time that the loan was entered into, then lenders investigate and explain this discrepancy.

[41] Pavlov’s concluded that, based on industry practice, MCAP would have completed such an investigation by August 2, 2016 (i.e. 120 days from default):

...a reasonable lender with the abilities and circumstances of MCAP would have investigated why the value of the Property was reported as being less than the appraised value of \$340,000 as set out in the Appraisal. This investigation would have occurred shortly after the borrower’s default on April 4, 2016. Industry practice is for that investigation to be complete within 120 days of the default. Therefore, to meet industry practice, a reasonable lender would have completed that investigation by August 2, 2016, and certainly well before September 18, 2016.

[42] In response to Pavlov’s report and to discuss MCAP’s abilities and circumstances, the plaintiff delivered the affidavit of Mark Adams, (“Adams”) General Counsel and Corporate Secretary for MCAP. Adams explains, *inter alia*, that the Default Management Process is MCAP’s protocol for administering mortgage loans in default. It results from years of development and evolution guided by regulatory and investor requirements. The protocol is scalable and

repeatable so that it functions efficiently whatever the volume of defaults. This is necessary because defaults can increase by many multiples during times of economic stress. MCAP had nine agents across Canada administering approximately 900 mortgages in default. The protocol is cost effective. MCAP's business requires feasibly enforcing residential mortgages with the least amount of time, expense, and effort. Dozens of institutional investors, banks, financial regulators, and rating agencies review the protocol continuously. <sup>i</sup>

[43] Adams disagreed with Pavlov's conclusion. However, on cross-examination, Adams admitted that he did not actually review any of the materials relevant to this action, nor did he have any firsthand knowledge of the circumstances relevant to the plaintiff's discovery of the cause of action.

[44] Adams was also unaware that there were numerous post-default valuations which not only indicated that the value of the Property was lower than previously thought, but also explicitly impugned the accuracy of the Appraisal.

[45] Pavlov prepared a supplementary report in response to the comments made in Adams' affidavit. Pavlov concluded that the proprietary documentation attached to Adams' affidavit actually provided additional support for his initial opinion. Pavlov concluded that not only was it industry practice for a lender to obtain an updated valuation after a loan went into default, but it was also actually MCAP's practice to operate in this manner.

[46] MCAP submits that I ought to disregard Pavlov's evidence as being unnecessary to my determination for this motion. I am not persuaded by this argument. I accept Pavlov's opinion on the industry practice and to the extent that

it assists me in understanding MCAP's "protocol" to address the fundamental question of discoverability.

[47] In fact, not only is it a requirement, explicit or implied, for the pool administrator to obtain an updated appraisal, or at least an updated value estimate, but MCAP did so shortly after the loan at issue went into default. MCAP's internal guideline stipulated the deadline as 100 to 115 days after default by which its analysts must obtain reports assessing the value of the mortgaged property. Specifically, MCAP obtained a "drive-by" appraisal only about ten days after the loan became 60 days in arrears.

Claim commenced beyond the applicable limitation period:

[48] In cases based on an allegedly negligent opinion that induced the plaintiffs to enter into a financial transaction that caused a loss, the "damage" occurs when the plaintiff enters into the transaction, not when their loss is monetized into a specific amount.

[49] For the purpose of negligent misrepresentation claims, damage is the condition of being worse off than if the defendant had not made the misrepresentation. In cases where a plaintiff is induced to enter into a transaction in reliance on a misrepresentation and fails to get what he was entitled to, the plaintiff suffers damage sufficient to complete the cause of action when he enters into the transaction, not when the loss is monetized into a specific amount.

[50] Certainty of a defendant's responsibility for the act or omission that caused or contributed to the loss is not a requirement. There is also no requirement that a plaintiff know the monetary value of the damage.

[51] In other words, there is a requirement to discover “damage” but not “damages”. As stated by the Court of Appeal for Ontario in *Hamilton (City) v. Metcalfe & Mansfield Capital Corp*, 2012 ONCA 156, 347 D.L.R. (4<sup>th</sup>) 657 at para. 54:

The City’s position that damage occurred when the Devonshire notes matured also fails to appreciate the distinction between damage and damages. Damage is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. Damages, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was damage.

[52] Therefore, the deemed discovery date for the cause of action is the date of the transaction; namely, January 2013. This means that based on the deemed discovery date, this action was commenced five years after the expiry of the limitation period. An example of this principle is found in *Hamilton (City)*, where the plaintiff was deemed to have discovered their claim on the date that they purchased a financial instrument in reliance on a misrepresentation by the defendant financial advisor. In *Mortgage Investment v. Szpivak*, 2014 ONSC 2261, the plaintiff was deemed to have discovered their claim on the date that it entered into a private mortgage in reliance on a misrepresentation by a real estate appraiser.

[53] The deemed discovery date is a rebuttable presumption. However, if a plaintiff wishes to rely on the discoverability principle to establish that the limitation period began to run on a date other than the deemed discovery date, then the plaintiff bears the onus of establishing that the discoverability doctrine applies in its favour.

[54] In this case, MCAP obtained four different opinions and prepared two internal reports indicating that the Property was worth less than the appraised value in the Appraisal. All of these reports were obtained between June and September 2016, including an opinion that the Appraisal was incorrect.

[55] Ialeggio also provided evidence that investigation of the cause of an anticipated loss would not be commercially viable until after the power of sale is completed. However, cross-examination of the witness demonstrated that any economic concerns do not actually arise. Ialeggio admitted that it was extremely rare for a post-default valuation to explicitly suggest that the original appraisal was incorrect. She stated that she had been with MCAP since 1995 and “I’ve seen something like this maybe three, four times”.

[56] Pavlov also noted that in MCAP’s 2014 offering memorandum, only 68 of MCAP’s 22,061 loans were in arrears. At an average cost of \$250 per appraisal report, MCAP would only have to pay \$17,000 to appraise every single defaulted property, which represents just 0.00045% of the \$3.77 billion principal amount for those mortgages; and far less would be spent if only done after the three or four occasions where there was a negative comment by the initial realtor’s report. As such, it was Pavlov’s opinion that: “... the cost of obtaining an updated value estimate for every property backing a mortgage loan that meets the Defaulted Mortgage Loan definition would be negligible relative to the size of MCAP’s mortgage portfolio”.

[57] I am persuaded by the defendants that the issue of cost is a red herring. MCAP’s practice was to conduct the kind of review they claim is too expensive. MCAP still obtained a report such as the First Cosentino Report within 100 to 115 days of any loan still in default by that time.

[58] I find that there is no commercial or industry-based reason why MCAP cannot comply with the *Limitations Act 2002*.

[59] I need not even turn to Pavlov's opinion that a reasonable lender would have conducted exactly the kind of investigations that would have led to the discovery of the cause of action by August 2, 2016. MCAP's own guidelines required such investigations to be done by July 28, 2016. In fact, MCAP beat both deadlines and engaged the investigation by June 15, 2016, when it obtained the First Cosentino Report. Accordingly, the plaintiff had knowledge of a *prima facie* cause of action more than two years before commencing this action. Alternatively, a cause of action ought to have been discovered by a reasonable person in the circumstances of the plaintiff and it did not take a retrospective appraisal to come to that determination.

[60] I cannot leave this decision without addressing the plaintiff's fundamental reliance on its protocol. I am not persuaded by the plaintiff's arguments and do not accept the protocol as providing the basis for MCAP's delay related to discoverability of its claim. First, the protocol is nothing more than a timetable. There is no formal protocol memorialized to deal with the issue at bar. It appears to address situations when default occurs and when the process of Power of Sale is initiated. Clearly it does not provide guidance or direction on the issue of negligence. Next, it is subject to some interpretation and does neither remedy real-time information received nor grant authority to employees to take appropriate action in analogous circumstances where warranted.

[61] Finally, in any event, the plaintiff's affidavit evidence regarding its protocol is somewhat self-serving to the extent that no objective or expert evidence was provided.<sup>1</sup>

[62] Even if I were to accept the protocol as providing the plaintiff's timing of subjective or objective discoverability of its potential claim, MCAP appeared not to have completely adhered to its own guidelines in this negligence case.

[63] Moreover, I reject the plaintiff's submission with respect to the insurance indemnification argument. There is no basis or policy interest in only having a claim crystallize once a party has been notified that it will not be covered by its insurer.

[64] In sum, discovery of a cause of action is not delayed until a plaintiff discovers that their action is desirable or even viable. The discovery of a claim does not depend upon the plaintiff knowing that his or her claim is likely to succeed or until the full extent of damages are known: *Johnson v. Studley*, 2014 ONSC 1732 at para. 60; *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80, at para. 59, aff'd 2013 ONCA 474.

[65] Lenders cannot wait for the completion of a power of sale to delay the running of the limitation "clock" for a claim of appraiser negligence. It was incumbent on MCAP to investigate the matter further rather than wait for a future event or for the loss to crystallize or be unquestionably confirmed. Moreover, the discoverability of a claim does not depend on whether the injured party's insurer will indemnify the insured.

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<sup>1</sup> My critique of MCAP's protocol is limited to this specific case only and is not to be construed as a general rebuke of its guidelines, or otherwise to be taken out of context.

**Conclusion:**

[66] The limitation period runs from when the plaintiff has, or ought to have had, knowledge of a potential claim. The question is whether MCAP knows enough facts to base a cause of action against Dickieson, and, if so, then the limitation period begins to run. Such has been established by the defendants in this case.

[67] I am satisfied that MCAP had discoverability of the claim by June 15, 2016, or at the latest, by September 6, 2016. In any event, I find that a reasonable lender with MCAP's abilities and circumstances would have been aware that the value of the Property was substantially below the impugned appraised value well before September 18, 2016. With the updated appraisals and related information, the claim crystallized more than two years before its action was commenced. As such, summary judgment is granted and the action is statute-barred.

**Costs:**

[68] If the parties cannot agree on the issue of costs, I will consider brief written submissions. The cost materials shall not exceed three pages in length, (not including any Bill of Costs or Offers to Settle). The defendants shall file their respective costs submissions within 15 days of today's date. The plaintiff shall file its costs submissions within 15 days of the receipt of the defendants' materials. The defendants may file a brief reply within five days thereafter. If submissions are not received by May 24, 2023, the file will be closed and the issue of costs considered settled.

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A.J. Goodman J.

**Released:** April 13, 2023

**CITATION:** MCAP v. Dickieson, 2023 ONSC 2233  
**COURT FILE NO.:** DC-22-144JR  
**DATE:** 2023/04/13

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

2023 ONSC 2233 (CanLII)

**B E T W E E N:**

MCAP SERVICE CORPORATION

Applicant

**- and -**

TIM DICKIESON (dba PREFERRED  
APPRAISAL SERVICES)

Defendants

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**RULING ON SUMMARY  
JUDGMENT MOTION**

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**A.J. Goodman J.**

**DATED:** April 13, 2023

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1. The Protocol provides a timeline for administering an insured mortgage in default. DMG agents follow it exactly. The only discretion they have is to initiate mortgage enforcement proceedings earlier than the Protocol requires when the borrower is plainly unable or unwilling to cure the default.
  2. From day one of the default through day 30, the DMG's Early Collections Unit administers the mortgage. This unit attempts to work with the borrower to cure the default. On day 31 of the default, the DMG's Loan Restructuring Unit assumes responsibility.
  3. No later than day 90 of the default, the Loan Restructuring Unit refers the mortgage to an external lawyer (unless there is an agreement with the borrower to cure the default).
  4. Between day 90 and day 100 after the default, the external lawyer sends a letter to the borrower demanding the borrower cure the default.
  5. The demand letter triggers the Loan Restructuring Unit's duty to undertake a title and tax search and obtain a "Drive-By Valuation". This usually occurs between day 100 and day 115 after the default.
  6. A "Drive-By Valuation" is an assessment by a realtor (and not a certified appraiser). It describes the property's condition, occupancy status, and value. It is described as a "drive-by" because the realtor does not enter the property. It is primarily for assessing the equity in the property, which determines the procedure the Protocol prescribes for subsequent administration. Where equity is unlikely and the mortgage is insured, the DMG gives notice of a potential claim to the mortgage insurer.
  7. The insurer may indemnify MCAP for its costs of selling the property and the losses arising from a sale for less than the mortgage's outstanding amount. Accordingly, the insurer may impose its own guidelines for MCAP to follow during the marketing of the property.
  8. By day 120 after the default, the DMG will obtain further valuations of the property. These include a realtor's comparative market analysis ("CMA") and a certified appraiser's full post-default appraisal. These guide how MCAP will market the property and protect against improvident sale allegations.
  9. On day 120 after the default, MCAP's external lawyer will commence a civil action to force the sale of the property. The DMG aims to list the property within 210 days of the action's commencement and to close the sale within 395 days from the default.
  10. If the sale closes and results in a loss to MCAP, a DMG manager will in certain circumstances ask the Corporate Compliance and Legal Group to review the file to assess whether another party might have contributed to the loss. These circumstances include potential borrower misrepresentation in the loan documents; potential solicitor's negligence; potential fraud; and significant variance between post-default appraisals and the underwriting appraisal.
  11. If the Corporate Compliance and Legal Group determines that legal action may be appropriate, it refers the file to an external lawyer for an opinion. If the lawyer concludes that MCAP has a cause of action with a reasonable prospect of success, the Group's Vice President determines whether to proceed with litigation.
  12. Importantly, the Corporate Compliance and Legal Group's review does not occur before the sale of a property. This is an attribute of the Protocol's "funnel process" for primarily two reasons:
    - (a) It is uncertain whether MCAP will incur a loss until the sale closes. For example, property values may increase between default and the sale to such an extent that they extinguish any loss.

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(b) Because the mortgage is insured, the insurer may indemnify MCAP for the loss. If it does, the insurer is subrogated to any cause of action that MCAP has, and the insurer and not MCAP will decide whether to pursue recovery from a third party.

13. Accordingly, the Protocol does not require or permit DMG agents to look for, identify, investigate, assess, or resolve any breach by a third party, including an appraiser, with respect to the mortgage loan while administering a default. They have neither the mandate nor the training to undertake these functions.