Citation: AO v The Awasis Agency of Northern Manitoba et al, 2020 MBCA 22

Date: 20200218
Docket: AI19-30-09280

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Janice L. leMaistre
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***S. N. Rosenbaum***
	)	*for the Appellant*
	)	
A. O.	)	***D. R. Buxton*** *and*
	)	***A. Silver***
	)	*for the Respondent*
(Applicant) Appellant	)	*The Awasis Agency of*
	)	*Northern Manitoba*
	)	
- and -	)	***T. J. Björnson***
	)	*for the Respondents*
	)	*The Government of*
THE AWASIS AGENCY OF NORTHERN	)	*Manitoba and The*
MANITOBA, THE DIRECTOR OF CHILD	)	*Director of Child and*
AND FAMILY SERVICES and THE	)	*Family Services*
GOVERNMENT OF MANITOBA	)	
	)	*Appeal heard and*
	)	*Decision pronounced:*
(Respondents) Respondents	)	***December 11, 2019***
	)	
	)	*Written reasons:*
	)	***February 18, 2020***

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On appeal from 2019 MBQB 25

MONNIN JA (for the Court):

[1] The applicant appeals the dismissal of an application seeking leave pursuant to sections 14 and 15 of *The Limitation of Actions Act*, CCSM c L150 (the *LAA*) to commence an action against the respondents for breach of fiduciary duty, and negligence. The proposed statement of claim also claims against the respondents on the basis of vicarious liability for alleged assaults and breach of non-delegable duty.

[2] Following oral submissions, we dismissed the appeal, with costs, with reasons to follow. These are the reasons.

[3] The *LAA* provisions that are relevant to this appeal are as follows:

> **Extension of time in certain cases**
> **14(1)** Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between
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> (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
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> (b) the date on which the application was made to the court for leave.
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> . . .
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> **Evidence required on application**
> **15(2)** Where an application is made under section 14 to begin or to continue an action, the court shall not grant leave in respect of the action unless, on evidence adduced by or on behalf of the claimant, it appears to the court that, if the action were brought

> forthwith or were continued, that evidence would, in the absence of any evidence to the contrary, be sufficient to establish the cause of action on which the action is to be or was founded apart from any defence based on a provision of this Act or of any other Act of the Legislature limiting the time for beginning the action.
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> . . .
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> **Nature of material facts**
> **20(3)** For the purposes of this Part, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a person of his intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence based on a provision of this Act or any other Act of the Legislature limiting the time for bringing an action, an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions.

[4] The motion judge set out the test that the applicant had to meet in order to be successful in his application (at para 6):

> To succeed with this Application, A.O. must satisfy me in the circumstances of this case that it is reasonable to conclude that he only knew or ought to have known the material facts of a decisive character as of December 15, 2016, which is 12 months prior to filing his Application. In addition, the evidence provided by the applicant must establish a cause of action on at least a *prima facie* basis.

[5] The motion judge then summarised the evidence upon which the application is premised (at paras 7, 9):

> The evidence in support of the Application consists solely of A.O.'s affidavit affirmed on November 9, 2017. The affidavit includes as exhibit 1, the draft Statement of Claim A.O. proposes to file in court if successful with this Application. In the affidavit,

> A.O. adopts the matters set out in the proposed Statement of Claim as accurately reflecting his experiences.
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> Given the passage of time, much of the evidence from A.O. is uncertain. It can be described as sketchy and unsupported. Dates and names of individuals are incomplete. There is no medical evidence of any type that would support or explain the injury, loss and damages claimed by the applicant, or assist in explaining the delay in making this Application.

[6] In dismissing the application, the motion judge stated the following (at paras 47-48):

> The background of this Application arises in the context of child welfare in Manitoba. The applicant is an indigenous man who was apprehended at birth. He was placed with an indigenous family (the A.) in a First Nations community. He remained in care until November 26, 1998, the age of majority. A.O. claims he was physically and sexually assaulted from the time he was a young boy. The assaults continued into his adolescence and the sexual assaults continued until mid-adolescence. Although the dates are uncertain, it is clear the "assaults" ended by the time A.O. turned 18 years, as he no longer lived with the A.
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> The LAA sets out timelines in which a plaintiff needs to commence an action or risk being statute barred from proceeding. For example, an action in negligence is to be commenced within two years of the cause of action. S. 7 of the LAA also recognizes that a minor is a person under a disability. The time that a person is under a disability is not used in the calculation for the limitation period. In this application, the "assaults" as described by A.O. all occurred when he was a minor. The start of any limitation period for a cause of action commenced by A.O. is November 26, 1998 when he reached the age of majority. The limitation period for an action in negligence is two years, which ended on November 26, 2000. The six-year limitation period for breach of a fiduciary concluded on November 26, 2004. Therefore, A.O. seeks an extension of time to commence the action against the respondents.

[7] He continued further (at paras 50-52):

> In this case, the application for leave for an extension of time does not meet the first criteria. As I stated at the outset, it is incumbent upon the applicant to satisfy the court that in the circumstances of the case, it is reasonable that he knew or ought to have known, of the material facts of a decisive character upon which the action is based not more than 12 months before bringing his application.
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> As I understand it, counsel for the applicant submits that A.O. did not have an appreciation for the material facts of a decisive character more than 12 months before bringing his Application. Counsel relies on s. 20(3) of the LAA to assert that A.O. did not have the intelligence, education and experience to appreciate that the "assaults" as alleged, amount to a civil cause of action that might result in an award of damages. I disagree.
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> In ***Fawley et al v. Moslenko***, 2017 MBCA 47, the Manitoba Court of Appeal, explained the statutory discoverability rule has both a subjective and objective component. A.O. must demonstrate he was unaware of decisive material facts earlier than 12 months before the Application was filed and in all of the circumstances, his lack of awareness must be objectively reasonable.

[8] Finally, he concluded (at paras 59-61):

> It appears to me that many, if not all, of these concerns existed in 2005/2006 and still exist today. Nothing has changed except his decision to go ahead with the legal action. The evidence of the applicant clearly demonstrates that he knew he had a possible cause of action in 2005/2006 and chose to put it out of his mind. That was his choice.
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> In my view, the quality and completeness of the evidence from A.O. is compromised because of the passage of time. One reason for limitation periods is to ensure that parties to litigation are in a position to gather the evidence necessary to advance or defend a cause of action. I expect the passage of time would create similar difficulties for the respondents.
>
> The LAA recognizes that a potential plaintiff may not immediately know a cause of action. Limitation periods may expire, but the LAA allows a party to seek leave for an extension

> of time if the party is diligent and pursues an action in a timely manner once aware of all material facts of a decisive character. That did not occur in this case. More than a decade has passed since the applicant was aware of all material facts of a decisive character.

[9] After dismissing the application under the *LAA* in respect of the claims for negligence and breach of fiduciary duty, the motion judge provided lengthy *obiter* reasons dealing with the merits of the claims for vicarious liability for alleged assaults and breach of non-delegable duty. Although counsel made submissions on these issues, the issues were not properly before him. Because some of the parties deal with this issue in their written material before this Court, at the opening of the hearing, we informed counsel that we would not hear any representations dealing with *obiter* comments and that the sole matter that was to be dealt with in this appeal was the issue under the *LAA*.

[10] Since the application under the *LAA* deals only with the claim for negligence and breach of fiduciary duty, and the issues which are the subject of the motion judge's *obiter* comments may have to be determined by another judge, it is useful to remind judges of what this Court has previously stated with respect to *obiter* comments. In *Hyczkewycz v Hupe*, 2016 MBCA 23, although made in the context of a summary judgment application, this Court wrote (at para 5):

> . . . Judges deciding motions for summary judgment are strongly discouraged from making statements about law, where the law is in dispute, if they are referring that same legal issue back for determination by another judge. A short endorsement that the moving party has not met the test for summary judgment for a stated reason(s) is all that is required. Making statements as to the interpretation of a law in a case where the responsibility will fall

> to another judge in the same case to interpret that same law is an unnecessary use of judicial resources and, more importantly, jeopardizes judicial comity; the trial judge is placed in the difficult position of potentially having to disagree with a colleague.

[11] The applicant argues that the motion judge erred in his decision by misinterpreting section 20(3) of the *LAA* and that the standard of review applicable to this appeal is one of correctness. In support of his argument, the applicant relies on *Novak v Bond,* [1999] 1 SCR 808.

[12] Dealing firstly with the matter of the appropriate standard of review applicable to this appeal, we do not accept the applicant's submission that it is one of correctness. Mainella JA, in *Fawley et al v Moslenko,* 2017 MBCA 47, set out what, in our view, is the proper standard of review when bringing an appeal from an order dismissing an application to extend time to commence an action. In concluding that the standard is one of deference, requiring palpable and overriding error, he wrote (at para 27):

> Applications for relief from a limitation period are, as Scott CJM noted in *Penner* [*Penner v Martens et al*, 2008 MBCA 35], "very fact-specific" (at para 17). Accordingly, the standard of review on appeal is largely deferential. Both aspects of the test for leave to commence an action after the expiry of a limitation period under the *LAA* are applications of a legal standard to a set of facts and, therefore, absent a purely legal error, raise questions of mixed fact and law reviewable on a standard of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 26-30; *McIntyre* [*McIntyre v Frohlich et al*, 2013 MBCA 20] at para 49; and *Laing* [*Laing v Sekundiak*, 2015 MBCA 72] at paras 57-58).

[13] Furthermore, we are not prepared to accept that what was decided in *Novak* is applicable to this case, as that decision is based on a British Columbia statute that is different from the Manitoba legislation. The British

Columbia legislation differs significantly with the Manitoba legislation and the section considered in *Novak* has been repealed since the decision was released.

[14] In our view, the proper interpretation to be given to section 20(3) of the *LAA* is as set out in *Fawley* (at paras 23-26):

> The *LAA* recognizes that the nature of the given material facts in a particular case may require a party to seek appropriate advice from a third party as to whether the facts are of a decisive character, for purposes of advancing a claim, before filing his or her application for relief from the limitation period. Hamilton JA explained the relevant principles in the following way in *McIntyre v Frohlich et al*, 2013 MBCA 20 (at paras 57-58):
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> > Sections 20(3) and (4) of the *Act* impose an "objective/subjective" test based on an assessment of what is reasonable given the applicant's personal characteristics of intelligence, education and experience. This assessment contemplates a consideration of whether the applicant has obtained "appropriate advice" in respect of the material facts.
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> > Advice can be legal, medical or other expert advice. Depending on the factual circumstances, the date of receipt of an expert report has been found to constitute the date that a plaintiff knew of all the material facts of a decisive character. See, for example, *Winnipeg Condominium Corp. No. 30 v. Conserver Group Inc. et al.*, 2008 MBCA 20, 228 Man.R. (2d) 30, in which M.A. Monnin J.A. wrote (at para. 22):
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> > > I do not, by any stretch, wish to state that in every case the requirements of s. 14(1) of the **Act** require that a putative plaintiff obtain expert evidence to buttress its position, but in this case it was necessary to satisfy the "decisive character" requirement of the **Act**.
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> Assuming there is no issue that the applicant did not actually know all of the material facts of a decisive character earlier than 12 months before the application is filed, the discoverability determination the judge is tasked to make under the *LAA* is as

> follows: on what date, given the nature and character of the facts and the proposed cause of action, would it have been evident to a reasonable person, standing in the shoes of the applicant, that she could have a cause of action with a reasonable prospect of success? If there has been consequential delay because of the seeking of third-party advice, the appropriateness of that delay will turn on whether or not the material facts are of such a nature that they put the applicant "on notice" of the potential cause of action before seeking the third-party advice (see *Penner* at para 18; *Morry et al v Janzen et al*, 2015 MBCA 86 at paras 7-8, 13-14).
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> The second part of the test is a limited assessment of the merits of the proposed action. Section 15(2) of the *LAA* requires the judge to assess the applicant's evidence and decide whether it is sufficient, subject to any possible defence(s), to establish a prima facie case that would have a reasonable prospect of success (see *Laing v. Sekundiak*, 2015 MBCA 72 at para 66).
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> The threshold for establishing a reasonable prospect of success is not as onerous as providing evidence that would prove the case on balance and not as simple as showing that the facts on which the claim is based, if accepted, could successfully resist a motion to strike out the claim (see *Chan v Chan*, 2001 MBCA 191 at para 14; and *Cairnie Estate* [*Justice v Cairnie Estate* (1993), 105 DLR (4th) 501 (Man CA)] at para 45). No two cases for relief from a limitation period are alike. What is important is that the facts relied on by an applicant "must be of substance" (*Chan* at para 14). This means that the facts are not based on speculation or conjecture but, rather, are grounded in tangible and identifiable pieces of evidence that satisfy the judge. As Scott CJM explained in *Cairnie Estate*, "that there is something to the case so that if sent on to trial there is some realistic prospect that the action will succeed" (at para 45).

[15] In the final analysis, we have not been persuaded that the motion judge committed any error in law, let alone that he committed a palpable or overriding error. He properly applied the accepted legal principles to the facts of the case as he found them to be.

[16] Accordingly, we dismissed the appeal with costs.

Monnin JA

leMaistre JA

Spivak JA