IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice William J. Burnett
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

ASH APIARIES LTD.	)	
	)	
(Plaintiff/Applicant) Appellant	)	
	)	***A. P. Loewen*** *and*
- and -	)	***J. E. E. Roberts***
	)	*for the Appellant*
JASON STEINER carrying on business as STEINER CONSTRUCTION	)	
	)	***K. L. Desjardine***
(Defendant/Respondent) Respondent	)	*for the Respondent*
	)	
- and -	)	
	)	*Appeal heard:*
WIZER BUILDINGS INC.	)	***October 29, 2018***
	)	
(Defendant)	)	
	)	*Judgment delivered:*
- and -	)	***March 15, 2019***
	)	
MITEK CANADA INC.	)	
	)	
(Third Party)	)	

BURNETT JA

[1] In the Court below, the application judge granted the plaintiff leave to commence a claim in negligence against the defendant Jason Steiner carrying on business as Steiner Construction (Steiner) for damage, loss or

injury to real property (the real property claim), but denied leave to commence a claim against him for damage, loss or injury to chattels (the chattel claim).

[2] The plaintiff appeals the application judge's decision to deny leave with respect to the chattel claim, and Steiner cross appeals the decision to grant leave with respect to the real property claim.

[3] For the reasons that follow, I would dismiss the appeal and the cross appeal.

Facts

[4] The application proceeded on the basis of affidavit evidence, and no cross-examinations were conducted.

[5] The facts are not complex.

[6] On September 22, 2008, the plaintiff entered into a contract with the defendant Wizer Buildings Inc. (Wizer) to construct a new building (the building) for its honey-processing plant. The written agreement is essentially a detailed estimate of the cost for various components of the building. The estimate totals $308,536.40.

[7] Construction of the building began in 2008, and the building was completed in June 2010.

[8] In September 2008, Wizer subcontracted a portion of the work to Steiner, including the installation of the prefabricated wooden roof trusses (the trusses).

[9] Steiner admits that he installed the trusses. Significantly, there is no evidence as to when the installation of the trusses began or finished.

[10] The plaintiff was under the impression that the building was constructed by Wizer. According to Bryan Ash (Ash), a manager and co-owner of the plaintiff:

> At all times, [the plaintiff] was under the impression that the building was constructed by Wizer. [The plaintiff] was not advised of any subcontractors being involved in the construction. In fact, Jake Maendel assured me that this was a turn-key operation that Wizer would handle from start to finish. While I did not ask him to define what he meant by "turn-key" I asked him who would put up the building and he indicated that he had several crews that were experienced. I took this to mean Wizer crews. While I saw Jason Steiner and his crew working on the Building at various times, I assumed that he was a Wizer employee.
>
> [emphasis added]

[11] Steiner declared bankruptcy on August 28, 2009.

[12] On February 20, 2011, a large portion of the roof on the building collapsed. The plaintiff's insurer valued the loss at $329,145.02 for damage and loss to the building, $192,536.46 for contents of every description (i.e., chattels), $9,140 for contractors' equipment and $4,620.62 for extra expenses. The application judge said that the real property claim totalled $342,905.64 and included the amounts identified for the loss of the building, the contractor's equipment and the extra expenses.

[13] The plaintiff's insurer immediately retained an adjustor to investigate the loss.

[14] On February 21, 2011, that adjustor retained a professional engineer. The engineer attended the site on February 23, 2011, and he subsequently prepared an origin and cause report dated March 9, 2011. In the report, the engineer identified the designer of the trusses, Mitek Canada Inc. (Mitek), and the manufacturer of the trusses, Prairie Truss (Manitoba). Among his other findings, the engineer found that certain "extremely important" bracings were not installed. It was the engineer's opinion that the failure to install the bracings likely contributed to the failure of the roof.

[15] On October 25, 2011, the adjustor wrote to Wizer and said that it was "[their] understanding that [Wizer] was the general contractor for construction of th[e] building". The adjuster advised that "[their] insurers [would] be looking to [Wizer] for reimbursement of costs incurred as a result of this loss." The adjustor requested that Wizer or its insurer contact their office "to discuss this matter further." In response, an adjustor for Wizer's insurer advised that his firm had been retained but provided no other relevant information.

[16] On June 27, 2012, the plaintiff's insurer followed up with Wizer and left a message regarding the subrogated claim, but did not hear back.

[17] On September 27, 2012, the adjustor for Wizer's insurer requested copies of photographs and the engineering report.

[18] On January 2, 2013, the plaintiff's insurer emailed an adjustor retained by Wizer's insurer and requested their principal's position on liability. Later that month, the plaintiff's insurer retained counsel to commence legal proceedings.

[19] On February 19, 2013, the plaintiff filed a statement of claim naming Wizer as the sole defendant. The claim alleged that the collapse of the roof was caused by the breach of contract and negligence of Wizer, and, in relation to the latter, it alleged, among other things, that Wizer "failed to exercise proper care in the selection of subcontractors and suppliers".

[20] On October 24, 2013, Steiner was discharged from bankruptcy.

[21] On October 25, 2013, Wizer filed a statement of defence and a third party claim against Mitek. There is no suggestion in the statement of defence that the truss installation had been subcontracted to another party. In the third party claim, Wizer says that it contracted with Mitek for structural engineering advice and that, if the loss and damage resulted from a structural problem with the construction of the roof, it was attributable to a breach of contract by Mitek or its negligent work, advice and inspections (or failure to inspect).

[22] Curiously, Wizer did not take third party proceedings against Steiner (i.e., the installer of the trusses).

[23] On May 20, 2014, Wizer's counsel advised plaintiff's counsel by email that:

> I just found out last week and thought you should know that my client says much of this job was subcontracted to Steiner Construction—Jason Steiner—of Arborg.

[24] On September 10, 2014, Wizer's representative confirmed at examination for discovery that Steiner Construction installed the trusses.

[25] On February 4, 2015, the plaintiff applied, pursuant to section 14(1) of *The Limitation of Actions Act*, CCSM c L150 (the *LAA*) and Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, rr 5 and 26, to amend the claim to add Steiner as a defendant and to claim damages for negligence. (I note parenthetically that all references in this decision to sections are references to sections in the *LAA*.)

[26] In its notice of application (the application), the plaintiff states:

> No earlier than May 20, 2014, the Plaintiff learned a material fact of a decisive nature with respect to the involvement of [Steiner], namely that Mr. Steiner was subcontracted by Wizer to install the roof trusses. The Plaintiff did not know about Mr. Steiner's involvement previously, nor ought it to have known.

[27] In his affidavit in support of the application, Ash deposed that, prior to counsel's email dated May 20, 2014, he had no knowledge of Steiner's involvement as a subcontractor to Wizer and assumed that he was an employee.

[28] In response, Steiner deposed that at no time did he suggest to the plaintiff that he was an employee of Wizer, or that he was part of the same organisation; that he did not conceal from the plaintiff that he was working as a subcontractor; and that he worked openly under the name "Steiner Construction".

The Application Judge's Decision

[29] The application judge noted that the limitation period for injury to real property is six years from the date the cause of action arose and for injury to chattels is two years from the date the cause of action arose. The application

judge also noted that the parties agreed that the real property claim was within the limitation period and that the chattel claim was not.

[30] In the proceedings before the application judge, Steiner acknowledged that an amendment to include the real property claim would be appropriate unless his bankruptcy was a complete bar.

[31] The application judge identified three issues, specifically:

1. the effect, if any, of Steiner's bankruptcy on the plaintiff's application to add him as a defendant and claim damages for negligence;

2. whether the plaintiff was entitled to an extension of time under Part II of the *LAA* in relation to the chattel claim;

3. whether the plaintiff was entitled to amend its claim pursuant to Queen's Bench rr 5.01 and 26 in relation to the real property claim.

[32] With respect to the first issue, the application judge noted that Steiner had declared bankruptcy twice and that the most recent occasion was on August 8, 2009, and she found that "[t]his was subsequent to the work he performed on the warehouse, but prior to the collapse of the building in February 2011." Later in her decision, the application judge confirmed her finding that "Steiner performed the work prior to becoming bankrupt."

[33] Various arguments were advanced by the plaintiff and Steiner as to whether the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (the *BIA*) had application and, in particular, whether the claims proposed by the plaintiff in

this proceeding (i.e., the real property claim and the chattel claim) were "claims provable in bankruptcy."

[34] The application judge found that the plaintiff did not have notice or knowledge of Steiner's bankruptcy and that:

> It was therefore not in a position to submit a claim to the trustee to determine whether same was a claim provable in bankruptcy, nor was it in a position to apply to lift the stay of proceedings in order to file the claim.

[35] The application judge concluded:

> [T]hat whether or not [the plaintiff]'s claim is in fact a claim provable in bankruptcy and, if so, the extent of Steiner's liability are issues for trial and not ones to be determined on this application.
>
> Suffice it to say, on the facts before me, Mr. Steiner's bankruptcy is not a complete bar to the claim it now seeks to bring against Mr. Steiner.

[36] The application judge then considered the second issue, whether the plaintiff had met its obligation under Part II of the *LAA*:

> I will address whether or not leave should be granted under the [*LAA*]. Sections 14(1) and 15(2) must be read in conjunction with Sections 20(2), (3) and (4). And I take these sections into account in the following analysis.
>
> In following the criteria summarized in Sochasky [*Sochasky v Winnipeg (City)*, 2013 MBQB 204], I find that the report from Crosier Kilgour and Partners provides evidence that Ash has a cause of action, which subject to any defence that may be raised, has a reasonable chance of success.

> The evidence discloses that [the plaintiff] first learned of Mr. Steiner's possible involvement in the construction on May 20, 2014, when its counsel received an email from counsel for Wizer advising of same. The app -- this application was then filed within 12 months as required by Section 14(1). It is, it was conceded by counsel for Mr. Steiner that the identity of Mr. Steiner is a fact, which is both material and of a decisive character as contemplated by Section 20(2) and 20(3) of the [*LAA*].
>
> The contentious issue, which remains, therefore is whether the fact of Mr. Steiner's existence is one which [the plaintiff] ought to have known about earlier.
>
> The effect of Section 20(4) of the [*LAA*] is to place a positive obligation upon the applicant to demonstrate that he or she took all reasonable steps under the circumstances, including the taking of appropriate advice to ascertain the facts necessary to ground the cause of action.

[37] The application judge reviewed the affidavit evidence filed by the plaintiff and Steiner, and she concluded that the plaintiff had failed to take all reasonable steps under the circumstances to identify Steiner as a subcontractor:

> While Mr. Steiner may not have suggested that he was a Wizer employee to any Ash representative, I take at face value, Mr. Ash's evidence that he was not aware that Wizer was using any subcontractors.
>
> However, the analysis is not limited to what Mr. Ash knew or did not know during the construction. Following the building collapse, [the insurer] became involved immediately. Upon receipt of the report from Crosier on March 9, 2011, the possibility of a subrogated claim should have been apparent. Yet, there is no evidence of anything done by [the insurer] to investigate who designed or installed the trusses or deter -- to determine if there were other subcontractors involved who might be possible defendants.

> Given that the loss arose as a result of a construction project, it is not unreasonable to assume the possibility of subcontractors being involved, particularly given the size of the project.
>
> Insurers are no stranger to [the] world of litigation. [The insurer] is in the business of insurance where claims are brought and defended regularly. I note that [the insurer] was aware of the two year limitation period. In her affidavit of January 28, 2015, Maureen Sikorski (phonetic) states that:
>
> > In light of the two year limitation period being approached, I've obtained Filmore Riley LLP in January 2013, to commence a subrogation proceeding.
>
> Nonetheless, a significant amount of time passed between the Crosier report and the referral of the file to legal to counsel with no evidence of what steps were taken in-between to determine if anyone other than Wizer was involved in the construction.
>
> I find that the plaintiff has failed to demonstrate that all reasonable steps were taken under the circumstances to identify Mr. Steiner as a subcontractor. I therefore decline to grant leave to amend the statement of claim to include a claim against Mr. Steiner for injury to chattels.
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> [emphasis added]

[38] The application judge's reasons with respect to the third issue were brief:

> With respect to the real property claim, Steiner [concedes] the appropriateness of the amendment save for the reasons relating to his bankruptcy. I have already indicated that Steiner's bankruptcy does not act as a complete bar. Accordingly, leave to amend the statement of claim to include a claim against Mr. Steiner for injury to real property is granted.

The Issues on Appeal and the Parties' Positions

[39] The plaintiff submits that the core issues in its appeal are whether it ought to have known that the trusses were installed by a subcontractor and whether its lack of knowledge that there was a subcontract between Wizer and Steiner was objectively reasonable.

[40] In particular, the plaintiff says that the application judge:

1. misapprehended the facts in relation to the plaintiff's obligation to take all reasonable steps to identify Steiner;

2. misdirected herself or erred in principle in that she:

    a) failed to accurately consider the circumstances when determining whether the plaintiff had acted reasonably;

    b) failed to consider that there was no source of information reasonably available to the plaintiff which would have identified that the trusses were installed by a subcontractor;

    c) failed to consider that Wizer would be expected to inform on Steiner but failed to do so;

    d) relied on the general observation that construction projects often utilise subcontractors, to draw the specific conclusion that an investigation ought to have been made as to whether the trusses were installed by a subcontractor

> when the plaintiff believed that it knew who had installed the trusses and that no subcontractor was involved.

[41] The plaintiff submits that:

> Thus, [the insurer's] investigation *promptly* determined who designed the trusses, who manufactured the trusses, and that the fault lay with the installer of the trusses, not the designer. There is no reason, to this day, to suspect that other parties than the designer, manufacturer and installer of the trusses may be to blame. [The insurer's] investigation erroneously determined that Wizer installed the trusses. The erroneous conclusion was based on what Ash understood from his discussions with Wizer (that Wizer would use one of its "crews" to put up the building).
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> [underlining added]

[42] The plaintiff says that, because it believed it knew who had installed the trusses (Wizer), it was not apparent that there were any missing facts requiring further investigation. In addition, the application judge did not point to anything that the plaintiff or its insurer reasonably could have done, but failed to do, in order to determine that fact prior to the limitation period expiring.

[43] Steiner says the application judge made no error in finding that the plaintiff had failed to demonstrate that all reasonable steps had been taken under the circumstances to identify Steiner as a subcontractor.

[44] In his cross appeal, Steiner says that the application judge erred in finding that:

1. there was no way for the plaintiff to know of Steiner's bankruptcy prior to his discharge;

2. whether or not the plaintiff's claim is a claim provable in bankruptcy against Steiner was an issue for trial; and

3. Steiner's bankruptcy (and subsequent discharge from bankruptcy) was not a complete bar to any claim the plaintiff seeks to bring against him.

[45] Steiner observes that a simple search would have revealed his bankruptcy.

[46] Steiner submits that the real property claim was clearly a claim provable in bankruptcy. According to Steiner, his work was completed prior to the bankruptcy, and any liability which would result from that work had crystalized once the work was completed. The application judge had all of the relevant information to decide whether the plaintiff's claim was a claim provable in bankruptcy, but failed to make that determination.

[47] Steiner says that granting leave to amend the claim was grossly prejudicial, as he will be put to the task of defending complex litigation at his own expense, shortly following his discharge from bankruptcy. In addition, due to the passage of time, Steiner submits that he has lost the ability to make his own investigations or to receive the assistance of his trustee in resolving the matter. Finally, Steiner relies on the now familiar refrain that granting leave did not reflect the just, most expeditious and least expensive determination of this case on its merits, and it is inconsistent with the principle of proportionality.

[48] The plaintiff submits that the question as to whether a claim is a claim provable in bankruptcy is highly fact-specific and involves questions of

mixed fact and law. The plaintiff says that Steiner's discharge from bankruptcy did not discharge the real property claim, because that claim is not a claim provable in his bankruptcy. Moreover, there is no evidence as to when Steiner finished work on the building, and it follows that there was no evidentiary basis to conclude that Steiner had any liability to the plaintiff as of the date of bankruptcy on the basis that the defective work had been performed prior to that time. The application judge's suggestion otherwise was an error, but an innocent error in the final result.

Standard of Review

[49] The standard of review applicable to the issues raised in this appeal and cross appeal is summarised in *McIntyre v Frohlich et al*, 2013 MBCA 20 (at para 49):

> This appeal concerns discretionary decisions under the [*LAA*] and the Queen's Bench Rules. Therefore, the standard of review for appellate intervention is one of deference. Unless there is an error in principle or a misapprehension of the facts, the decisions should not be overturned unless they are so clearly wrong as to amount to an injustice. An error in principle is an error in law, which calls for the standard of review of correctness. This court may intervene when there is a misapprehension of the facts that is a palpable and overriding error. See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Zhang v. Chik et al.*, 2012 MBCA 28, 280 Man.R. (2d) 26; *Timmerman v. Selkirk and District Planning Area Board et al.*, 2008 MBCA 52, 228 Man.R. (2d) 77; and *Homestead Properties (Canada) Ltd. v. Sekhri et al.*, 2007 MBCA 61, 214 Man.R. (2d) 148.

[50] More recently, in *Fawley et al v Moslenko*, 2017 MBCA 47, Mainella JA observed that (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* at para 49; and *Laing* [*Laing v Sikundiak*, 2015 MBCA 72] at paras 57-58).

See also *Olford et al v Springwood Homes Inc*, 2019 MBCA 2 at para 9.

Analysis and Decision

The Cross Appeal

[51] The cross appeal can be dealt with summarily.

[52] The parties agreed that the limitation period for damage to real property had not expired as at February 4, 2015 such that, subject to the impact of Steiner's bankruptcy, an amendment to add Steiner should be allowed.

[53] The application judge concluded that "whether or not [the plaintiff]'s claim is in fact a claim provable in bankruptcy and, if so, the extent of Steiner's liability are issues for trial". The application judge's decision to leave these issues for determination at trial was a discretionary decision and is entitled to considerable deference. I am also of the view that it was the correct decision in the circumstances, albeit for different reasons.

[54] The application judge plainly erred when she found that Steiner had completed his work prior to the date of bankruptcy. There is no evidence as

to when Steiner completed his work. Without further evidence, it is not possible to determine whether Steiner had any liability or obligation to the plaintiff on or before the date of bankruptcy or whether the real property claim is a "claim provable in bankruptcy" within the meaning of the *BIA*. Those issues are highly fact-specific, cannot be decided on the limited record that was before the application judge and are clearly issues for trial.

[55] The cross appeal is therefore dismissed.

The Main Appeal

[56] Section 14(1) provides:

> **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
>
> (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.

[57] The "contentious issue" before the application judge and the important question in this appeal is whether the plaintiff ought to have known that Steiner was subcontracted by Wizer to install the trusses more than 12 months prior to the filing of the application (February 4, 2015). The other requirements for leave pursuant to Part II of the *LAA* were not seriously

contested. There is no dispute that this fact is both material (section 20(2)(d)) and decisive (section 20(3)). I am also willing to accept that, prior to May 20, 2014, the plaintiff did not know this fact (section 20(4)(a)).

[58] Section 20(4) provides:

> **Where facts deemed to be outside knowledge**
> **20(4)** Subject to subsection (5), for the purposes of this Part, a fact shall, at any time, be taken not to have been known by a person, actually or constructively if
>
> (a) he did not then know that fact;
>
> (b) in so far as that fact was capable of being ascertained by him, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of ascertaining the fact; and
>
> (c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, the fact might have been ascertained or inferred, he had taken all actions that a person of his intelligence, education and experience would reasonably have taken before that time for the purpose of obtaining appropriate advice with respect to the circumstances.

[59] In *Johnson v Johnson*, 2001 MBCA 203, this Court confirmed that (at para 14):

> Section 20(4) places a positive obligation upon an applicant to demonstrate that she took all reasonable steps under the circumstances, including the taking of appropriate advice, to ascertain the facts necessary to ground the cause of action.

That "positive obligation" includes, in appropriate cases, an obligation to demonstrate that all reasonable steps were taken to identify the proper and necessary parties to the litigation.

[60] There are a number of factors which have been considered by Manitoba courts in deciding whether or not an applicant has satisfied the positive obligation contemplated by sections 20(4)(b) and 20(4)(c). Such factors include:

1. whether the applicant has taken any action or steps to ascertain the fact. See, for example, *McIntyre* at para 34 ("no evidence here to suggest that any effort was made" (emphasis omitted)); *Pickering v The Government of Manitoba et al*, 2008 MBQB 56 at para 27 ("no evidence of inquiries"); and *Goodman v RM of East St Paul*, 2011 MBQB 111 at para 18 ("Nothing appears to have been done");

2. the ease/difficulty of attempting to ascertain the fact. See, for example, *Green Brier Inn (Wpg) Inc v Coca-Cola Bottling Company*, 2013 MBQB 53 at para 40 ("some further inquiry could easily have been made" (emphasis omitted)), cited with approval in *Wolinsky et al v Assiniboine Credit Union*, 2016 MBCA 15 at para 20; and *Greenberg v Crown Utilities Ltd et al*, 2007 MBQB 122 at para 33 ("inquiries would have very quickly revealed");

3. the likelihood that the action or steps taken would be successful. See, for example, *Goodman* at para 25 ("Had a

request been made . . . the existence of [the respondent] would have been disclosed before the limitation date even expired");

4. whether any delay in seeking or ascertaining the fact was outside the applicant's control. See, for example, *Hunt v Lee et al*, 2011 MBQB 252 at para 86 ("the defendants should not be able to rely on [the applicant's] delay in instituting litigation when it was the time it took them to complete their own review of the case which created a large part of the delay");

5. whether the applicant received inaccurate, misleading or false information. See, for example, *Szabo v Bergmann et al*, 2010 MBQB 186 at para 62 ("these respondents . . . cannot now rely on [the applicant's] failure to obtain the records when she was misled by representatives of some of these respondents"); *Sochasky v Winnipeg (City)*, 2013 MBQB 204 at para 32 ("Although I do not go so far as to say that the letter was intended to mislead, it was misleading"); and *Penner v Martens et al*, 2008 MBCA 35 where certain "vague and unsupported suggestions" (at para 18) made by the manufacturer's representative at his examination for discovery were "hardly, by itself, material evidence of a decisive nature that should have sent a clear message to [the applicants] to redirect the focus of their action" (at para 16);

6. whether there is a reason to believe—described in some decisions as a "flag"—that a third party may be involved and that further actions, steps or inquiries are warranted. See, for

example, *McIntyre* at para 63 (“there were enough flags to warrant an inquiry about Dr. Sikora’s liability”); *Green Brier Inn (Wpg) Inc* at para 39 (“there were sufficient flags available to the plaintiff by the end of the summer of 2008”); and *Wolinsky* at para 24 (“The above evidence demonstrates that the applicants were aware of the possible involvement of the respondent”);

7. the applicant’s intelligence, education and experience. See, for example, *Greenberg* at para 32 (“the applicant must be regarded as a person possessed of intelligence, education and experience, who was also the recipient of legal advice. All her documented actions speak to the existence of her intelligence and experience”); *Cahill v Pasieczka*, 2014 MBQB 217 at para 56 (“There is no question that the applicants had prior experience with basement problems. . . . I must consider what facts the applicants had or ought to have had given their intelligence, education and experience”); and *Hunt* at para 74 (“this is a case where a lay person, including a lawyer, could not have been expected to know whether [the defendant] was negligent”); and

8. whether the applicant obtained appropriate advice. See, for example, *Olford et al v Springwood Homes Inc*, 2018 MBQB 78 at para 60 (“the applicants . . . retained their own experts to provide appropriate advice”).

This list of factors is clearly not exhaustive or applicable to each case.

[61] In my view, the plaintiff ought to have known (more than 12 months before February 4, 2015) that Steiner was subcontracted by Wizer to install the trusses. I say this for several reasons.

[62] In his affidavit evidence, Ash acknowledges that he interpreted Jake Maendel's comments to mean that Wizer would put up the building and that he assumed Steiner was a Wizer employee. Importantly, Wizer did not tell the plaintiff that all of the work would be performed by Wizer employees, and it cannot be said that the plaintiff received inaccurate, misleading or false information from Mr. Maendel.

[63] As noted in sections 20(4)(b) and 20(4)(c), a person's intelligence, education and experience are considerations in deciding whether all actions or reasonable steps have been taken.

[64] This appeal involves a subrogated claim, brought by the plaintiff's insurer. The insurer is an experienced litigator, with significant knowledge of the construction industry and construction practices. The construction in question was construction of a new building to process honey. The written agreement discloses the numerous components of the proposed construction. This was not the construction of a garden tool shed.

[65] As is evident from the plain wording of section 20(4) and the jurisprudence referred to previously, a failure to take any action or reasonable steps will result in a failure to meet the statutory test.

[66] Although the plaintiff was aware in March 2011 that the collapse of the roof was attributable to the faulty installation of the trusses and the plaintiff's adjuster viewed Wizer in October 2011 as "the general contractor

for construction of this building", no steps were taken by the plaintiff, its insurer or the insurance agent to confirm who installed the trusses or the relationship of that person to Wizer.

[67] The application judge correctly observed that there was no evidence of anything done "to determine if there were other subcontractors involved who might be possible defendants" and that there was no evidence of steps taken between the engineer's report (March 9, 2011) and the referral of the file to legal counsel (January 2013) to determine if anyone other than Wizer was involved in the construction. While the application judge erred when she said that there was no evidence of anything done by the plaintiff's insurer to investigate who designed the trusses—in his report, the engineer identified Mitek as the designer of the trusses—little turns on this error. The plaintiff was aware that "the fault lay with the installer of the trusses" but did not even ask Wizer who installed the trusses.

[68] The plaintiff clearly could and should have done more. The action taken between March 2011 and January 2013, set out in paras 15-18 of this decision, can hardly be described as reasonable steps taken to determine if there were subcontractors or anyone else involved in the construction.

[69] It would have been an easy matter to ask Wizer whether it installed the trusses or whether it engaged someone else for that purpose. If no response was given to that inquiry, at least it could be said that an attempt was made; if a misleading response was given, that would have been a factor favouring due diligence.

[70] The insurer retained counsel shortly before the two-year limitation period expired. If counsel had been retained earlier, it is conceivable that steps

might have been taken to determine whether subcontractors were employed by Wizer. Clearly plaintiff's counsel considered the possibility of subcontractor involvement given the inclusion of the allegation in the statement of claim that Wizer "failed to exercise proper care in the selection of subcontractors and suppliers".

[71] In *Goodman*, Dewar J found there was no due diligence on the basis of information which the plaintiff's counsel could have easily requested (at para 18):

> Counsel . . . argued that there is no evidence of anything done by the plaintiff or her counsel (I might add, not the plaintiff's counsel at the hearing) to investigate who designed or installed the protective netting. Indeed, it was open to her then counsel to write to the R.M. and ask that question, or failing that, to serve the R.M. with an interrogatory, or even request that the R.M. submit to an examination for discovery.

[72] While I would ordinarily be reluctant to assume subcontractor involvement simply because the loss arose as a result of a construction project, that assumption becomes much more understandable given the nature of the project and in circumstances where the plaintiff's adjuster viewed Wizer as a general contractor and plaintiff's counsel contemplated subcontractor involvement.

[73] The plaintiff submits that Wizer's failure to bring a third party claim against Steiner provides further support that its actions were reasonable. In my view, the fact that Wizer issued a third party claim against Mitek on October 25, 2013, but did not issue a similar claim against Steiner, provides no assistance in deciding whether the plaintiff took reasonable steps "to

ascertain the facts necessary to ground the cause of action" (*Johnson* at para 14).

[74] For these reasons, the application judge's decision is entitled to deference as I am not persuaded that she made any error of law or palpable and overriding error of fact, or that her decision was so clearly wrong as to amount to an injustice.

[75] In the result, both the appeal and the cross appeal are dismissed. Each party shall bear their own costs.

Burnett JA

I agree: Mainella JA

I agree: Pfuetzner