

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Freda M. Steel
Madam Justice Janice L. leMaistre

BETWEEN:

<i>ROCKY NEUFELD and SHAUNA CLANCY</i>)	<i>R. W. Schwartz and</i>
)	<i>S. R. McEachern</i>
<i>(Applicants) Respondents</i>)	<i>for the Appellant</i>
)	
<i>- and -</i>)	<i>S. F. Vincent</i>
)	<i>for the Respondents</i>
<i>QUALICO DEVELOPMENTS (WINNIPEG)</i>)	
<i>LTD.</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Respondent) Appellant</i>)	<i>January 29, 2019</i>

STEEL JA (for the Court):

[1] This is an appeal from the granting of leave under section 14(1), Part II of *The Limitation of Actions Act*, CCSM c L150 (the *Act*) to commence a claim against the respondent Qualico Developments (Winnipeg) Ltd. (Qualico) for negligent construction and breach of contract.

[2] Under Part II of the *Act*, the Court may relieve against the statutory limitation bar if the applicant files a notice of application within 12 months of discovering material facts of a decisive character that reveal a claim which has a reasonable chance of success. If that is the situation, leave will be granted to begin an action despite the passage of time.

[3] A decision under section 14(1) of the *Act* is a discretionary decision. Unless there is an error in law, a misapprehension of the evidence or a palpable and overriding error of fact, the decision is entitled to deference unless it is so clearly wrong as to amount to an injustice (see *McIntyre v Frohlich et al*, 2013 MBCA 20; and *Embil v S Maric Construction Ltd et al*, 2018 MBCA 68 at para 12).

[4] Qualico built a new house for the applicants in 2003. Water problems in the basement appeared in 2004 (the 2004 problem). The applicants raised concerns in February 2004 and the evidence reveals it was still a problem in July 2004. The evidence points to a number of causes, including a gap between the foundation and wall, grading of the property, frost build up on the cement basement wall and a leaky outdoor faucet. After July 2004, there were no further issues with water in the basement of the house. The problems apparently resolved themselves and no further work was required.

[5] In August 2016, the applicants began extensive renovations to the house. The renovations included an addition that required selective demolition to the building envelope. On August 30, 2016, the removal of the exterior coverings of the house revealed decay to the wood frame of the building (the 2016 problem).

[6] The applicants retained the services of a professional engineer, who provided an initial report dated January 9, 2017 and a supplementary report dated May 16, 2017. He concluded that there was extensive water infiltration

or penetration into the exterior envelope of the house on the first and second floors caused by defects in the original construction. Prior to 2016, there were no indications of water penetration through the exterior envelope of the house. The application judge found that there was no connection between the 2004 problem and the 2016 problem.

[7] Qualico argues that the application judge erred in law, misapprehended the evidence and committed a palpable and overriding error. It submits that the applicants knew, or ought to have known, there was a problem of defective construction in the spring and early summer of 2004 when they complained of water in the basement. In particular, it argues that the water in the basement placed an onus on the applicants to do further investigation in 2004.

[8] At the hearing before the application judge, Qualico conceded that the applicants had satisfied the “reasonable chance of success” test under section 15(2) of the *Act*. The sole issue in the case was when the applicants knew, or ought to have known, of all material facts of a decisive character upon which to file the application against Qualico.

[9] The 2004 problem with the water in the basement covered a short period of time and then it went away. Nothing happened to trigger a concern between 2004 and 2016. The applicants submitted that they received advice from Qualico that the problem was due to condensation as a result of the concrete curing and that it would go away, which it did. Other problems with water in the basement were attributed to the lack of grading and, later, to a faulty outdoor faucet. There was no ongoing problem.

[10] The expert hired by the applicants made it clear that the 2016 problem was due to a long-standing construction defect and was different than the 2004 problem of water in the basement. The expert indicated that they were two different conditions in two different locations and that they had nothing to do with each other.

[11] The application judge did consider section 20(3) of the *Act* which requires the consideration of certain subjective elements, including the applicants' personal characteristics of intelligence, education and experience, even if he did not refer to the particular section in the *Act*. He stated, "In considering this position, I am mindful of Mr. Neufled's intelligence, education and experience as an Accredited Appraiser" (at para 12).

[12] Based on all of this, the application judge concluded that the applicants had been diligent and that a reasonable person would not have opened up the walls of the house when the 2004 problem was short term and the problem indeed appeared to have been resolved. He stated (at para 16):

In my view, none of these deficiencies would have flagged for the applicant or an objective person viewing the circumstances reasonably that there could be a problem with water penetrating the exterior envelope of the first and second floors of the home. It would be unreasonable to expect the applicants or anyone else, including Qualico to suspect that water leaking into the basement of a home should trigger a further investigation that would see the owners of a newly built home start taking apart the exterior walls.

[13] We agree. It is clear that the application judge understood the evidence and the issues before him. We are not persuaded that the application judge erred in law or made any palpable and overriding errors of fact, or that

the decision is unjust. Therefore, the decision is entitled to deference. We would dismiss the appeal with costs.

Steel JA

Monnin JA

leMaistre JA
