IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Madam Justice Diana M. Cameron
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

MELANIE OLFORD and BRIAN OLFORD	)	***A. W. K. Challis*** *and*
	)	***D. M. Steinfeld***
	)	*for the Appellant*
(Applicants) Respondents	)	
	)	***A. F. Hacault*** *and*
	)	***S. E. W. Birse***
- and -	)	*for the Respondents*
	)	
	)	*Appeal heard and*
SPRINGWOOD HOMES INC.	)	*Decision pronounced:*
	)	***January 15, 2019***
	)	
(Respondent) Appellant	)	*Written reasons:*
	)	***January 18, 2019***

On appeal from 2018 MBQB 78

HAMILTON JA (for the Court):

[1] The respondent appealed the order granting the applicants' application, pursuant to section 14(1) of Part II of *The Limitation of Actions Act*, CCSM c L150 (the *LAA*), to extend the time for them to file a statement of claim, in contract and negligence, seeking damages for defects in the construction of their custom-built home. The applicants had to make extensive repairs for wood rot and mould caused by water leakage. At the hearing of the appeal, we dismissed the appeal with brief reasons to follow. Our reasons follow.

[2] The limitation period related to these claims expired six years after the applicants took possession of the home in October 2009. They filed their application on July 18, 2017, after receiving two experts' reports. The respondent argues that the applicants first knew, or ought to have known, all material facts of a decisive nature before receipt of the experts' reports.

[3] In June 2010, the applicants first noted water leaking at the living room window. In 2015, the applicants discovered wood rot and mould after removing a portion of the drywall around the window. In 2016, more water leakage occurred and the applicants discovered more wood rot and mould.

[4] Over this time period, the applicants attempted to address the water leakage problem by engaging with the respondent and consulting with the window manufacturer.

[5] In July 2016, the applicants contacted Beach Rocke Engineering Ltd. (Beach Rocke) to provide an opinion with respect to the window problem. Beach Rocke expressed concerns about the possibility of further damage to other parts of the house. Pursuant to Beach Rocke's recommendation, the applicants deconstructed further portions of the house and discovered extensive damage. Beach Rocke recommended that the applicants retain an expert experienced in envelope design issues. In August 2016, the applicants retained Proskiw Engineering Ltd. (Proskiw), which provided a draft report in October 2016 and a final report in May 2017.

[6] The respondent asserts two grounds of appeal.

[7] First, the respondent submits that the application judge erred in law in how he interpreted the statutory requirements under Part II of the *LAA*.

More specifically, the respondent argues that the application judge considered a new requirement for knowledge of the extent and specific cause of damages. Further, it argues that the applicants had knowledge of the damages sufficient to bring a claim, and that there could be a connection between those damages and the actions of the respondent, more than 12 months before filing their application.

[8] Second, the respondent submits that the application judge made palpable and overriding errors of mixed fact and law in finding that the applicants required expert evidence to have all of the material facts of a decisive nature.

[9] A decision under section 14(1) of the *LAA* is a discretionary decision. The decision is entitled to deference unless there is an error of law, a palpable and overriding error of fact or mixed fact and law, or the decision 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).

[10] The application judge set out the applicable law correctly and we are not persuaded that he interpreted it incorrectly. While the application judge stated at one point in his analysis that the applicants "were aware of a possible cause of action" (at para 45) prior to receipt of the Beach Rocke and Proskiw reports, this comment must be considered in the context of the entire analysis of the application judge. We are satisfied that the application judge understood the applicable law and made no reversible error in applying the law.

[11] After reviewing the law and the facts in detail, the application judge concluded (at para 47):

> In this case, I am satisfied that given the applicants' personal characteristics of intelligence, education and experience that "appropriate advice" was required in respect of the material facts. In this case the expert advice consisted of an opinion from an engineer and building envelope expert as to the cause of the moisture intrusion into the home. It was not until the applicants received the opinion from Beach Rocke, that further efforts were made to expose damage to the home and the opinion from Proskiw was received, that the applicants knew all of the material facts of a decisive character. In my view, given the nature and character of the facts and the proposed cause of action, it was reasonable for the applicants to receive the appropriate advice in order to determine whether they may have a cause of action with a reasonable prospect of success. Prior to receipt of the Beach Rocke report, the applicants did not have material facts of a decisive character grounding a claim against the respondent in breach of contract and/or negligence.

[12] The application judge's finding that the applicants acted reasonably in seeking expert advice and that it was not until they had the expert reports from Beach Rocke and Proskiw that they knew all the material facts of a decisive nature upon which to base their causes of action, is entitled to deference. This finding drives his conclusion that the applicants filed their application not more than 12 months before the date on which they first knew, or, in all of the circumstances of the case, ought to have known, of all material facts of a decisive nature upon which the action is based. This finding is a finding of mixed fact and law and is also entitled to deference.

[13] The application judge carefully explained his decision and why the applicants required the experts' reports. He understood the positions of the parties and the issues. He addressed the case law relied upon by the

respondent and distinguished this case from those prior cases in which the court found that the applicants did not need to wait for an expert report to have the required knowledge (see *Swan River Valley Hospital District No 1 et al v MMP Architects et al*, 2002 MBCA 99; *Morry et al v Janzen et al*, 2015 MBCA 86; and *Guertin et al v Valley Builders of Morris (2010) Inc et al*, 2016 MBQB 144).

[14] We are not persuaded that the application judge erred in law or made any palpable and overriding error of fact, or mixed fact and law, as the respondent asserts. Therefore, his decision to grant the applicants' application is entitled to deference.

[15] For these reasons, we dismissed the appeal with costs.

Hamilton JA

Cameron JA

Pfuetzner JA