IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Marc M. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

	)	***K. T. Williams*** *and*
	)	***K. L. Dear***
	)	*for the Appellant*
	)	
ST. BONIFACE GENERAL HOSPITAL	)	***J. M. Woolley*** *and*
	)	***M. C. Ross***
(Applicant) Appellant	)	*for the Respondent*
	)	*PCL Constructors of*
- and -	)	*Canada Inc.*
	)	
PCL CONSTRUCTORS OF CANADA INC. and FERGUSON CORPORATION	)	***J. E. E. Roberts***
	)	*for the Respondent*
	)	*Ferguson Corporation*
(Respondents) Respondents	)	
	)	*Appeal heard:*
	)	***January 14, 2019***
	)	
	)	*Judgment delivered:*
	)	***May 14, 2019***

PFUETZNER JA

[1] Applications to extend the limitation period under Part II of *The Limitation of Actions Act*, CCSM c L150 (the *Act*), are brought regularly in Manitoba. Appeals of orders arising from those applications seem to follow nearly as a matter of course. This is one such appeal.

Background

[2] In 2002, the applicant, St. Boniface General Hospital (the Hospital), entered into a contract with the respondent, PCL Constructors of Canada Inc. (PCL), for the construction of a new five-storey building. PCL engaged the respondent, Ferguson Corporation (Ferguson), to construct a structural glazed and pressure-plate curtain wall system for the exterior of the building. Construction was completed in 2003 and, although the Hospital had intended to use the building as a research facility, it remained substantially vacant for several years.

[3] In 2006 and 2008 respectively, the third and second floors were developed to be used as office space. By 2012, the interiors of the first, fourth and fifth floors had been completed for permanent clinical occupancy as cardiac-care units.

[4] Between 2012 and 2014, there were over 60 reports of water infiltration into the building described variously as wet windows, leaking ceilings, water collecting on window sills and damaged drywall. Between 2009 and 2010, there had been four such reports.

[5] Property management staff of the Hospital took steps to investigate the cause of, and to alleviate, the water infiltration. This included exposing bulkheads in some areas, caulking windows, inquiring of the architects who consulted on the construction of the building and consulting the firm that outfitted the building for permanent clinical occupancy.

[6] Ultimately, the Hospital retained John Wells of Crosier Kilgour & Partners Ltd., who was identified by the Hospital as an expert in curtain wall

systems, to investigate and determine the cause of the water infiltration.

[7] During January and February of 2015, Wells performed an investigation of the building, including a thermographic scan. On June 11, 2015, he issued a "Curtain Wall System Audit" (the interim report) to the Hospital.

[8] The interim report listed findings indicative of "significant infiltration of cold, exterior air"; "significant air leakage of the building envelope"; "high levels of infiltration/exfiltration due to air leakage through the window and wall system"; and "the presence of significant air leakage through the framing of the curtain wall and at terminations." Wells made a key finding that the results of the thermographic scan "suggest that defects or deficiencies exist at several locations in the building envelope assembly."

[9] The interim report stated that "[f]urther investigative work, including invasive openings into the wall system are ultimately required to diagnose the specific cause." Wells recommended that further investigation was required "to diagnose the point(s) of air leakage in the curtain wall so that appropriate remediation options can be developed." The further investigation would involve "diagnostic flood testing in combination with invasive inspection recesses into the curtain wall."

[10] The Hospital engaged Wells to conduct the next phase of the investigation which included selective demolition and invasive investigation of the curtain wall system to allow for examination of the components of the wall and the construction techniques used.

[11] On March 30, 2016, Wells issued a "Curtain Wall Audit: Phase 2

Final Report" (the final report) to the Hospital. The final report confirmed Wells's earlier findings regarding air and water leakage through the curtain wall and concluded that "deficiencies in the design and construction of the curtain wall are responsible for the significant levels of air leakage and water penetration." The major items of concern identified in the final report were "loose pressure plates, discontinuities in the weather sealant application, corner block assembly, and frame joinery, and blocked drainage channels."

[12] The Hospital filed a notice of application under section 14(1) of the *Act* on November 21, 2016, seeking "leave to commence an action against the respondents, notwithstanding that the time for beginning such action may have expired".

[13] The application judge characterised the issue before him as "whether the necessary degree of knowledge the Hospital had, or ought to have had, . . . triggered the 12-month filing deadline before the independent expert retained by the Hospital issued his final written report".

[14] After reviewing the evidence, the application judge found that:

> [T]he cumulative knowledge the Property Manager actually had, or ought to have had, by the time he reviewed the Interim Report as at June 11, 2015 was sufficient to trigger the 12-month filing deadline described in the ***Act***, as against these respondents. As of that date, the Property Manager knew:
>
> - PCL and Ferguson were responsible for the design and construction of the curtain wall that formed the envelope of the Building;
>
> - The moisture problem was of significant concern to him given the age of the building and that remediation or repair costs would be significant;

- The gaps in the curtain wall that were visible both to the naked eye and via thermographic scanning created significant and abnormal air flow into and out of the Building and abnormal air flow was the only reasonable explanation for the moisture penetration problem; and

- The gaps constituted significant deficiencies in the envelope of the Building.

[15] The application judge dismissed the Hospital's application.

Issue

[16] The essential issue raised by this appeal is whether the application judge erred in the exercise of his discretion by dismissing the Hospital's application for leave to bring its claim outside of the limitation period under the *Act*.

Analysis

[17] The application judge's decision to deny leave under section 14(1) of the *Act* was discretionary. Discretionary decisions are afforded a high degree of deference on appeal. The standard of review was recently described by Hamilton JA in *Olford et al v Springwood Homes Inc*, 2019 MBCA 2 (at para 9):

> 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).

[18] The Hospital submits that the application judge made palpable and overriding errors of fact as a result of misapprehending evidence and that he

erred in law by misapplying the tests under the *Act*.

Did the Application Judge Make Factual Errors?

[19] The Hospital maintains that the application judge made palpable and overriding errors in finding that, by October 20, 2014, "the primary focus of the Hospital was on determining which third party was to blame for the problem and the possibility of litigation was quite real" and that it was no longer giving serious consideration to other possible causes of water penetration linked to normal aging of the building, shifting foundation or poor maintenance.

[20] I am not persuaded by this submission. The record contained email correspondence between Hospital staff and others from which the application judge could reasonably draw these inferences. In any event, even if these were errors, they are not overriding. Ultimately, the application judge's key finding was that the Hospital had, or ought to have had, the requisite knowledge of its cause of action at June 11, 2015. Accordingly, the knowledge he attributed to the Hospital at October 20, 2014 is of no moment.

Did the Application Judge Err in Applying the Legal Tests?

[21] The relevant statutory provisions from Part II of the *Act* 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

(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

(b) the date on which the application was made to the court for leave.

. . .

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.

. . .

Definitions
20(1) In this Part

"appropriate advice" in relation to any fact or circumstance means the advice of competent persons qualified, in their respective spheres, to advise on the professional or technical aspects of that fact or that circumstance, as the case may be;

. . .

Reference to material facts
20(2) In this Part any reference to a material fact relating to a cause of action is a reference to any one or more of the following, that is to say:

(a) The fact that injuries or damages resulted from an act or omission.

(b) The nature or extent of any injuries or damages resulting from an act or omission.

(c) The fact that injuries or damages so resulting were attributable to an act or omission or the extent to which the injuries or damages were attributable to the act or omission.

(d) The identity of a person performing an act or omitting to perform any act, duty, function or obligation.

(e) The fact that a person performed an act or omitted to perform an act, duty, function or obligation as a result of which a person suffered injury or damage or a right accrued to a person.

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.

[22] The effect of sections 14(1) and 15(2) of the *Act* is to create a two-part test for claimants seeking leave to bring a claim outside of the applicable limitation period. As explained by this Court in *Johnson v Johnson*, 2001 MBCA 203 (at para 34):

> Pursuant to s. 14(1), the court must be *satisfied* on the evidence adduced that not more than 12 months have passed between the date on which an applicant first knew of all the circumstances of the case upon which the action is based and the date upon which the application to court was made. Pursuant to s. 15(2), no order is to be granted under s. 14(1) unless it appears to the court that an

> applicant's evidence would be *sufficient* to establish the cause of action on which the action is founded, absent evidence to the contrary.

[23] Section 14(1), the first part of the test, is a statutory discoverability rule. In *Fawley et al v Moslenko*, 2017 MBCA 47, Mainella JA wrote (at para 21):

> The judge considers the evidence adduced by the applicant, in light of the legal principles set out in sections 14(1) and 20 of the [*Act*], and decides whether the applicant knew, or ought to have known, all material facts of a decisive character upon which the action is based not more than 12 months before the date on which the application was filed.

[24] In *Johnson*, Helper JA (quoting Wright J in *John Doe v Griggs*, 2000 MBQB 16 at para 31) described the extent of knowledge required to satisfy section 14(1) of the *Act* as only that the claimant "knew or ought to have known there could be a link . . . sufficient to establish a cause of action. It is not required that he have knowledge sufficient to establish that there actually is such a link" (at para 15).

[25] Section 15(2), the second aspect of the test, is a "limited assessment of the merits of the proposed action" (*Fawley* at para 25). What is required under section 15(2) of the *Act* is for "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" (*ibid*).

Position of the Hospital

[26] The Hospital argues that the application judge erred in law by

misapplying the legal tests under the *Act*, specifically under sections 14(1), 15(2), 20(2) and 20(3). The Hospital says that this is a question of law subject to review on a standard of correctness.

[27] The Hospital submits that the interim report does not provide sufficient information to support the application judge's finding that, once it was armed with the interim report, it knew or ought to have known "all material facts of a decisive character upon which the action is based" (section 14(1) of the *Act*). It maintains that the interim report contains none of the "material facts" listed in section 20(2) of the *Act*, that the application judge did not consider sections 20(2) or 20(3) of the *Act* and that there was no "decisive evidence" in the interim report.

[28] Further, the Hospital argues that the application judge erred by saying that the test set out in section 15(2) of the *Act* is "a low hurdle for an applicant to clear." The Hospital submits that the application judge erred in finding that the information in the interim report "would . . . be sufficient to establish the cause of action" when Wells clearly indicated that, at that stage, he could not definitively determine the cause of the water penetration into the building.

[29] Finally, the Hospital raises a concern regarding the interplay between sections 14(1) and 15(2) of the *Act* and suggests that they impose different evidentiary thresholds. Essentially, the Hospital argues that the *Act* puts it (and similarly placed plaintiffs) in an impossible position because the interim report could be found to satisfy section 14(1) (as disclosing "all material facts of a decisive character upon which the action is based", where "facts of a decisive character" under section 20(3) of the *Act* means "facts . . .

determining . . . that . . . an action would have a reasonable prospect of succeeding"), but not the higher threshold in section 15(2), as the interim report is not evidence that "would . . . be sufficient to establish the cause of action" (emphasis added).

Position of the Respondents

[30] The respondents argue that the application judge correctly identified the legal tests and made no palpable and overriding errors in applying those tests to the facts. The respondents submit that the application judge's decision is entitled to deference.

Discussion

[31] While the Hospital has characterised this issue as a question of law, in my view, the proper approach is to determine: first, whether the application judge identified the correct legal test (which is a question of law reviewed on a standard of correctness); and, second, whether the application judge correctly applied the legal test to the facts (which is a question of mixed fact and law, reviewed on a standard of palpable and overriding error) (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 26-27, 36).

[32] In my view, the application judge correctly identified and stated the applicable legal tests. In his endorsement, he wrote:

> Section 14(1) of the ***Act*** requires that the Hospital prove that not more than 12 months have passed from the date on which the Hospital first knew, or ought to have known, of all material facts of a decisive character upon which the action is based. The Hospital must also prove under section 15(2) of the ***Act*** that the evidence in support of its application constitutes a *prima facie* case that has a reasonable prospect of success.

[33] He also referred to several of this Court's leading cases on the interpretation of these sections of the *Act*: *Einarsson v Tamar Mail Order Inc*, 1992 CarswellMan 92; *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 *Johnson*, including passages from these cases referring to the requirements under sections 20(2) and 20(3) of the *Act*.

[34] I do not agree with the Hospital's submission that "decisive evidence" is required in order for there to be material facts of a decisive character within the meaning of the *Act*. As correctly noted by the application judge: "There is no requirement for an applicant to be certain as to whether or not a link exists between the conduct of a potential defendant and the harm suffered. As long as there could be a link between the conduct and the harm, the 12-month limitation clock begins to tick."

[35] Nor am I persuaded that the application judge misapprehended the test under section 15(2) of the *Act* when he said that "it is a low hurdle for an applicant to clear." His statement is consistent with prior jurisprudence, including *Rarie v Maxwell* (1998), 168 DLR (4th) 579 at para 45 (Man CA) ("the evidentiary threshold is not a burdensome one"); and *The City of Winnipeg v AECOM Canada Ltd et al*, 2015 MBQB 188 at para 32 ("I recognize that the threshold burden contemplated by s. 15(2) is not an onerous one.")

[36] After correctly identifying the legal tests, the application judge applied them to the facts before him, concluding that "[a]ll the material facts of a decisive character needed to establish that a link could reasonably exist between the actions of the respondents and the harm suffered were known or

could have been known by the Hospital when the Interim Report was published."

[37] I am not persuaded that the application judge made any palpable and overriding errors in applying the legal tests to the facts, particularly in light of Wells's statement in the interim report that the thermal plume anomalies "suggest that defects or deficiencies exist at several locations in the building envelope assembly."

[38] The Hospital's final argument is that claimants under Part II of the *Act* are disadvantaged by the differing evidentiary thresholds set out in sections 14(1) and 15(2) of the *Act*. While I am not persuaded that there is such a differing evidentiary threshold, I am also not convinced that the Hospital has suffered any disadvantage in this case. The Hospital received the final report within 12 months of receiving the interim report; the final report was before the application judge; and there is no question that it provided evidence sufficient to satisfy the evidentiary threshold under section 15(2) of the *Act*.

[39] The Hospital's argument is really a critique of Part II of the *Act*. This is certainly not the first criticism of the *Act*, which has been described as "not, however, entirely satisfactory" (Manitoba Law Reform Commission, *Report on Limitations*, Report 123 (July 2010) at 17, online (pdf): <www.manitobalawreform.ca/pubs/pdf/123-full_report.pdf> (the Report)); "rather obscure" (*Einarsson* at para 10); and "somewhat complicated" and "very difficult to understand" (*McCormick v Morrison* (1970), 13 DLR (3d) 474 at 476 (Man QB), quoting from *Re Clark v Forbes Stuart (Thames Street), Ltd*, [1964] 2 All ER 282 at 284 (CA (Eng)); and *Goodchild v Greatness*

Timber Co Ltd, [1968] 2 All ER 255 at 257 (CA (Civ Div) (Eng)) respectively).

[40] The Manitoba Law Reform Commission has recommended a wholesale revision of the *Act*, which differs in significant ways from the legislation in all of the other provinces (see the Report at p 1) and is derived primarily from a 17th century English statute (see the Report at p 5).

[41] In my view, Part II of the *Act* cries out for reform. The modern limitations statutes adopted in other provinces are far simpler. Generally, they provide that the limitation period does not begin to run until the claimant has actual or constructive knowledge of the fact that he or she has a claim (see the Report at p 17). The issue of whether the claimant has commenced his or her claim within the limitation period is for the defendant to raise as a defence if appropriate, typically at the trial or on a motion for summary judgment (see the Report at p 18).

[42] There is no need under the modern limitations regimes for a claimant to bring an application to court for leave to commence the claim—a needless step that the structure of Part II of the *Act* requires every applicant who discovers his or her claim outside of the limitation period to do—creating additional expense for litigants and using valuable court time. This is remarkably out of step with the proportionality principle which, in recent years, has become an animating principle in civil litigation due to the growing realisation that access to civil justice is out of reach for most people (see *Hryniak v Mauldin*, 2014 SCC 7 at paras 23-33; and the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, rr 1.04(1)-1.04(1.1).

[43] As illustrated by the case at bar, the main issue on applications under Part II of the *Act* is often whether the claimant brought his or her application to commence a claim within 12 months of its discovery—an arbitrary period of time that is unrelated to the underlying limitation period.

[44] Because decisions under Part II of the *Act* are discretionary and highly fact-driven, it is often difficult to reconcile the results in the multitude of published decisions. In the Report, the Manitoba Law Reform Commission recommended against including any provision allowing for judicial discretion to extend a limitation period, noting (at pp 40-41):

> None of the modern Canadian limitations regimes, however, have included such discretion. The general consensus in Canada appears to be that permitting courts to waive or extend limitations creates too much uncertainty. The comments of the Saskatchewan Department of Justice are typical:
>
> > Introduction of a substantial discretionary element would leave limitations law in an unpredictable state.
>
> . . .
>
> Permitting any discretion simply invites applications to extend, unnecessarily increasing both the burden on the courts and the cost and unpredictability of litigation.
>
> [emphasis added]

[45] Unfortunately, for the time being, it appears that the law of limitations in Manitoba will continue to exist in an "unpredictable state" (see para 44 above).

Conclusion

[46] As I have explained, because of the discretionary nature of decisions

under Part II of the *Act*, this Court is reluctant to intervene. I am not persuaded that the application judge erred in law, made a palpable and overriding error of fact or mixed fact and law, or that the decision is so clearly wrong as to amount to an injustice.

[47] Accordingly, I would dismiss the appeal with costs.

Pfuetzner JA

I agree: Monnin JA

I agree: Mainella JA