Date: 20201029
Docket: CI 07-01-54439
(Winnipeg Centre)
Indexed as: Lagimodiere et al. v. The Wawanesa Mutual Insurance Company et al.
Cited as: 2020 MBQB 154

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
ALAN LAGIMODIERE AND JUDY LAGIMODIERE,	Richard J. Handlon and Eric Blouw for the plaintiffs
plaintiffs,	
- and -	Lynda K. Troup for the defendant, FirstOnSite Restoration L.P. and FirstOnSite Restoration Limited
THE WAWANESA MUTUAL INSURANCE COMPANY AND FIRSTONSITE RESTORATION L.P., DENNIS CRAIG ASH AND LINDA MARY ELIZABETH HUHTA CARRYING ON BUSINESS AS A & H DESIGN, AND THE SAID A & H DESIGN, ABE PETERS CARRYING ON BUSINESS AS NATURAL SCENTS LOG HOMES AND THE SAID NATURAL SCENTS LOG HOMES, BEACH ROCKE ENGINEERING LTD., GARRIOCH CONSTRUCTION LTD., DONALD GARRIOCH AND MARGARET GARRIOCH CARRYING ON BUSINESS AS GARRIOCH CONSTRUCTION AND THE SAID GARRIOCH CONSTRUCTION,	Brent C. Ross and Alexandre Mireault for the defendant, The Wawanesa Mutual Insurance Company
	Amelia Peterson on a watching brief for the defendant, Beach Rocke Engineering Ltd.
defendants.	Amanda Verhaeghe on a watching brief for the defendant, Dennis Craig Ash and Linda Mary Elizabeth Huhta and A & H Design
	Gabrielle Lisi on a watching brief for the defendants, Donald Garrioch and Margaret Garrioch and Garrioch Construction

) Abe Peters and Natural Scents
) Log Homes, self-represented
) did not appear
)
) Judgment delivered
) October 29, 2020

EDMOND J.

INTRODUCTION AND STATEMENT OF FACTS

[1] Three motions have been filed which require a decision of the court:

a) The defendant, FirstOnSite Restoration L.P. ("FOS") by another company, FirstOnSite Restoration Limited ("FOS Limited") seeks an order dismissing, or, in the alternative, staying the within action as against FOS;

b) The plaintiffs seek leave of the court to amend their re-re-amended statement of claim to add FOS Limited as a defendant in this action; and

c) The defendant, The Wawanesa Mutual Insurance Company ("Wawanesa") seeks an order granting it leave to file a third party claim against FOS Limited.

[2] In 2016 FOS was insolvent and FirstOnSite G.P. Inc. ("FOS G.P.") the general partner of FOS, made an application on its behalf and on behalf of FOS seeking creditor protection under the ***Companies' Creditors Arrangement Act***, R.S., c. C-25, s. 1 ("***CCAA***").

[3] Effective April 20, 2016, FOS G.P., along with FOS entered into an asset purchase agreement ("Asset Purchase Agreement") with 3297167 Nova Scotia Ltd.

("329"). The Asset Purchase Agreement transferred substantially all of FOS's assets to 329.

[4] The Ontario Superior Court of Justice ("Ontario Court") granted an initial order on April 21, 2016, which, among other things, granted a stay of proceedings with respect to any proceeding or enforcement process against FOS in any court or tribunal.

[5] On May 9, 2016, the Ontario Court granted an Approval and Vesting Order, approving the Asset Purchase Agreement such that the assets of FOS were transferred free and clear of all liens, encumbrances, mortgages, claims and liabilities.

[6] On June 2, 2016, 329 changed its name to FOS Limited and continued to operate a business that was similar to the business carried on by FOS.

[7] On January 25, 2017, the Ontario Court granted a discharge and termination order respecting the ***CCAA*** proceedings. That order permitted the chief restructuring officer in the ***CCAA*** proceedings to file an assignment in bankruptcy for FOS.

[8] On August 24, 2017, an assignment in bankruptcy was filed and FTI Consulting Canada Inc. ("FTI") was appointed as trustee in bankruptcy.

[9] FOS was discharged in bankruptcy by order of the Ontario Court, dated December 16, 2019. The evidence establishes that no distribution was made to any unsecured creditors of FOS.

[10] At no time during the ***CCAA*** proceedings or the bankruptcy proceedings did FOS or FTI (acting as the monitor and the trustee in bankruptcy) provide notice of the ***CCAA*** proceedings or bankruptcy proceedings to the plaintiffs or defendants in this action. There is no evidence to indicate whether the plaintiffs were listed as unsecured

creditors or potential claimants of FOS. As the plaintiffs received no notice, they did not advance a claim in the bankruptcy proceeding. Nor did the plaintiffs seek an order to lift the stay of proceedings and allow their action to continue.

[11] Notwithstanding the stay of proceedings granted in the ***CCAA*** proceedings and the bankruptcy proceedings, local counsel for FOS continued to appear at case management conferences, participate and defend this action as well as arrange for workers or contractors to attend at the plaintiffs' property to make repairs to windows at the plaintiffs' home. The plaintiffs and Wawanesa allege that these steps represented to the parties that FOS was continuing to defend this action and operate as a corporation in the Province of Manitoba.

[12] On or about February 26, 2020, general counsel for FOS Limited contacted local legal counsel for FOS for the first time. On or about May 22, 2020, general counsel for FOS Limited received a package of material providing details of this action and once reviewed, he believed that this action ought to have been stayed pursuant to previous orders made by the Ontario Court.

[13] On May 27, 2020, general counsel for FOS Limited advised local counsel for FOS about the ***CCAA*** proceeding and that FOS Limited was not liable for any liabilities of FOS. Local counsel advised all counsel and parties in this action of the history of FOS and the ***CCAA*** and bankruptcy proceedings on June 9, 2020.

ISSUES

[14] The issues that must be determined are:

a) Should the action and cross-claims against FOS be stayed or dismissed?

b) Should FOS Limited be added as a defendant and/or a third party in this action?

ANALYSIS AND DECISION

a) Should the action and cross-claims against FOS be stayed or dismissed?

[15] The plaintiffs submit that FOS is a necessary party to the litigation and evidence of some of FOS's key former employees will be critical to the determination of a number of issues in this action. The plaintiffs submit that s. 69.3(1.1) of the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 ("***BIA***") stays proceedings during the bankruptcy and ceases to apply on the day on which the trustee is discharged. The plaintiffs argue that the trustee was discharged on December 16, 2019 and accordingly, the stay of proceedings is no longer in effect. FOS did not seek a stay of proceedings in this action and the time to do so has now passed.

[16] FOS submits that it is a bankrupt corporation holding no assets. Once FOS filed for bankruptcy, creditors could only file a claim in bankruptcy and no claim survives bankruptcy unless it falls within the exceptions set out in s. 178(1) of the ***BIA***.

[17] There is no evidence before the court to establish that one of the exceptions set out in s. 178(1) applies. Quite the contrary. FTI as the monitor appointed in the ***CCAA*** proceedings filed evidence in the Ontario Court seeking approval of the Asset Purchase Agreement. The evidence was reviewed by the Ontario Court and an Approval and Vesting Order was granted. A monitor has a duty to satisfy the court that the order is in the best interests of all stakeholders.

[18] There is no evidence that the debt or liability or potential liability of FOS in this action arises out of fraud, embezzlement, misappropriation or defalcation or resulting from obtaining property or services by false pretenses or fraudulent misrepresentation. A discharge in bankruptcy acts as a discharge of all claims, contingent or otherwise. The only exceptions are those listed in s. 178(1) of the ***BIA***.

[19] It is regrettable that the plaintiffs and the defendants did not receive notice of the ***CCAA*** and bankruptcy proceedings. However, the evidence filed satisfies me that receiving notice would not have changed the outcome, namely that unsecured creditors or parties with contingent claims against FOS received no distribution in the bankruptcy.

[20] The purpose of the ***CCAA*** proceeding is to permit insolvent debtors to restructure with the assistance of a court monitor and other financial advisors. FOS utilized that process in good faith to sell assets to satisfy creditors' claims. Once the assets were sold, an assignment in bankruptcy was made and FOS was discharged as a bankrupt. The ***BIA*** is intended to benefit honest, but unfortunate debtors. The purposive approach to interpreting s. 178(1)(e) of the ***BIA*** is to ensure that dishonest debtors do not benefit from their dishonesty, regardless of motive. (See ***Ste. Rose & District Cattle Feeders Co-Op v. Geisel***, 2010 MBCA 52, 255 Man.R. (2d) 45 (QL) and ***Cruise Connections Canada v. Szeto***, 2015 BCCA 363, 388 D.L.R. (4th) 648 (QL))

[21] In my view, it is unnecessary to schedule a separate hearing to determine whether one of the exceptions in s. 178(1) applies to the facts and circumstances of this case. The time to file evidence supporting any submission that the exceptions

apply was prior to the hearing of these motions. There are no allegations made in the re-re-amended statement of claim against FOS that would support a finding that one of the exceptions in s. 178(1) of the ***BIA*** applies.

[22] The evidence filed establishes that FOS was insolvent, acted in accordance with the provisions of the ***CCAA*** and the ***BIA*** and was ultimately discharged as a bankrupt. I agree that there is no evidence that notice of the Ontario proceedings was provided to the plaintiffs or the defendants in this action. However, as noted above, I am not satisfied that notice would have changed the outcome as no distribution was made to unsecured creditors.

[23] I disagree with the position advanced by the plaintiffs that because key former employees of FOS may be required to testify to determine a number of issues in this action that FOS must remain as a party to this action. That fact does not override the clear provisions of the ***BIA*** that apply on discharge of a bankrupt. If required, the alleged former key employees may be subpoenaed by any of the parties at the trial.

[24] I conclude therefore, that because there is no evidence to establish that any of the exceptions under s. 178(1) of the ***BIA*** apply in this case, the claim and cross-claims against FOS must be dismissed.

b) Should FOS Limited be added as a defendant and/or a third party in this action?

[25] The plaintiffs submit that FOS Limited ought to be added as a defendant on the basis that it has fully participated in this litigation as legal successor of FOS since April 2016, notwithstanding the ***CCAA*** and bankruptcy proceedings.

[26] The plaintiffs submit that FOS Limited is a mere continuation of FOS; FOS Limited expressly or impliedly assumed the liabilities of FOS; the cause of action against FOS is the same as the cause of action against its successor, FOS Limited; and even if an applicable limitation period has expired, there are "special circumstances" in this case which justify adding FOS Limited as a defendant.

[27] Wawanesa submits that, in addition to the position advanced by the plaintiffs, no prejudice will result from the issuance of a third party claim against FOS Limited as it has been participating as a party in this action since 2016. The plaintiffs and Wawanesa rely upon the principle of corporate successor liability.

[28] FOS Limited submits:

a) that the applicable limitation period to add FOS Limited as a party has passed and the plaintiffs cannot rely upon the Queen's Bench Rules, which are procedural, to alter substantive law and add FOS Limited as a new party to this action;

b) There are no "special circumstances" which ought to permit the amendment in this case;

c) FOS Limited is not the successor at law of FOS as the corporations are two separate and distinct corporations with officers and directors that are distinct;

d) The Approval and Vesting Order transferred the assets free and clear of all liability and the law regarding the concept of successor liability is at best unsettled and is not the law in Canada;

e) The four established exceptions to the general rule of corporate successor non-liability and asset acquisitions set out in the U.S. authority ***Ramirez v. Amsted Industries Inc.***, 431 A.2d 811 (NJ Sup Ct 1981) do not apply;

f) Any argument that FOS Limited is estopped from denying liability as a result of the continued participation in this action is not supported in law.

[29] The starting point for analysis is to review the applicable Queen's Bench Rules and law relating to amending pleadings. The relevant Queen's Bench Rules are:

a) Queen's Bench Rules 5.03(1) to 5.03(5) dealing with adding parties which provide:

> **General rule**
> 5.03(1) Every person whose presence as a party is by law necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.
>
> **Claim by person jointly entitled**
> 5.03(2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.
>
> **Power of court to add parties**
> 5.03(3) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceedings shall be added as a party.
>
> **Party added as defendant or respondent**
> 5.03(4) A person who is required to be joined as a party under subrule (1) or (2), and who does not consent to be joined as a plaintiff or applicant, shall be made a defendant or respondent.
>
> **Relief against joinder of a party**
> 5.03(5) The court may by order relieve against the requirement of joinder under this rule.

b) Queen's Bench Rules 26.01 and 26.02, dealing with amending pleadings which provide:

> **General power of court**
> 26.01 On motion at any stage of an action the court may grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> **When amendments may be made**
> 26.02 Generally, a party may amend a pleading,
>
> (a) by requisition before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
> (b) on filing the written consent of all parties and, where a person is to be added or substituted as a party, the person's written consent;
> (c) at any time on requisition to correct clerical errors; or
> (d) with leave of the court.

[30] In ***Winnipeg (City) v. Integra Credit Union Ltd.***, 2013 MBCA 2, 288 Man.R. (2d) 133 (QL), the Court of Appeal confirmed the factors to be considered on a motion under Rule 26.01 as follows (at para. 16):

> (a) the seriousness of the prejudice to the other party;
> (b) whether that prejudice that would result can be compensated for by costs or an adjournment;
> (c) whether there was a delay on the part of the party moving for the amendment and, if so, whether the delay has been satisfactorily explained; and
> (d) the nature of the proposed amendment and whether it raises a valid, arguable point that has merit.

[31] In considering the seriousness of the prejudice to the other party, the court considers whether any of the proposed amendments create a new cause of action and if so, whether the new cause of action is statute barred.

[32] In ***Onishenko Estate v. Quinlan***, [1972] S.C.R. 380 (S.C.C.) (QL), the Supreme Court of Canada held that amendments to pleadings that create new causes of action which are statute barred may only be allowed if "special circumstances" exist. It is clear that special circumstances have been interpreted to be "rare" and "exceptional". (See ***Miller v. Jaguar Canada***, [1998] 123 Man.R. (2d) 161, [1997] M.J. No. 555 (Man. C.A.) (QL))

[33] The analysis to be undertaken to consider whether to grant an amendment respecting a new cause of action arising outside a limitation period was considered in ***Arctic Foundations of Canada Inc. v. Mueller Canada Ltd. (c.o.b. Mueller Flow Control)***, 2009 MBQB 309, 248 Man.R. (2d) 123 (QL) and the questions to be answered can be summarized as follows:

a) Do the proposed amendments create new causes of action? If so,

b) When did the new causes of action arise and what are the limitation dates?

c) Are the new causes of action statute barred?

d) If the limitation period has expired, should the proposed amendments nonetheless be permitted if "special circumstances" exist?

[34] The plaintiffs propose to add the following allegations to the re-re-amended statement of claim:

> 27.1 On or about April 20, 2016, substantially all of FirstonSite's assets were transferred to FirstOnSite Restoration Limited (which was known at the time as 3297167 Nova Scotia Ltd.) ("**FOS Limited**") pursuant to an Asset Purchase Agreement (the "**APA**"). Thereafter, on May 9, 2016, in proceedings commenced under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "***CCAA* Proceedings**"), the Ontario Superior Court of Justice granted an

> Approval and Vesting Order, approving the APA. On August 24, 2017, FirstonSite filed an assignment into bankruptcy.
>
> 27.2 FOS Limited is carrying on the same activities that FirstonSite was carrying on prior to the *CCAA* Proceedings, and is doing so under the same management and with the benefit of FirstonSite's goodwill, trade name, logo and other intellectual property. The sole purpose of the *CCAA* Proceedings was to allow FirstonSite to escape liability from its creditors, including the plaintiffs.
>
> 27.3 Notwithstanding the *CCAA* Proceedings, FOS Limited has fully participated in the within litigation since the date of its incorporation, including, without limitation, by participating in investigations of deficiencies, and performing or directing the remediation of deficiencies, at the Insured Premises. At all times since the date of the *CCAA* Proceedings, FOS Limited has represented through its conduct that it is the successor to the rights and obligations of FirstonSite, which representation the plaintiffs have relied on to their detriment. Accordingly, by its own conduct, FOS Limited has assumed the liability of FirstonSite *de facto*, and is now estopped from denying same. In the circumstances, FOS Limited should be held liable for FirstonSite's liabilities to the plaintiffs in accordance with the principles of the doctrine of corporate successor liability.

[35] It is unclear whether the proposed amendments create a new cause of action or advance the same cause of action alleged against FOS against a new party. The plaintiffs' submission is that FOS Limited acquired substantially all of the assets of FOS; FOS Limited continues to operate in the same industry as FOS; FOS Limited operates with a name that is sufficiently similar to that of FOS, such that FOS Limited is benefiting from the goodwill, trade name, logo and other intellectual property of FOS.

[36] Further, the plaintiffs submit that FOS Limited represented to the parties, through its conduct, that FOS Limited is the successor to the rights and obligations of FOS and therefore assumed the liability of FOS in this action. FOS Limited denies this assertion and filed an affidavit sworn by Matthew Kristofco, stating, based on

information and belief, that continuing to defend this action occurred because the person providing instructions to Ms. Troup, legal counsel for FOS, did not appreciate or have sufficient knowledge of the Ontario Court orders to advise counsel of them or their effect. In other words, FOS Limited says continuing to defend and take steps in this action was a mistake. In my view, the time to assess the veracity of that evidence is after a trial with a full evidentiary record, not on the basis of a statement made in an affidavit based on information and belief.

[37] The plaintiffs submit that the limitation period has not expired because no new cause of action has arisen. The plaintiffs allege that FOS Limited assumed the liability of FOS and that the cause of action and the allegations of negligence and breach of duty made against FOS apply against FOS Limited. In the alternative, the plaintiffs submit that if the cause of action against FOS Limited is statute barred, the amendments should nonetheless be permitted as a result of the "special circumstances" in this case.

[38] It is unnecessary for me to decide whether the proposed amendments create a new cause of action and I leave that determination for the trial once a full factual foundation has been laid. If the claim against FOS Limited is a continuation of the same cause of action alleged against FOS then arguably there is no limitation issue. If, on the other hand, the claim against FOS Limited is a new cause of action based on the principle of corporate successor liability, it is arguable that cause of action arose when FOS Limited, by its conduct, assumed the liability of FOS in this action. That is alleged by the plaintiffs, to have occurred sometime during or after 2016 when FOS Limited

came into existence. If that is the case, then six years has not expired from the date the alleged cause of action based on corporate successor liability arose.

[39] The other question that should also be addressed at the trial is whether the cause of action against FOS can continue against a new corporate entity when the claim against FOS has been dismissed by virtue of the provisions of the ***BIA***.

[40] Whether the applicable limitation period has expired or not, it is my view that this is a case in which the amendments ought to be allowed because "special circumstances" exist. The special circumstances are that the plaintiffs did not receive notice of the ***CCAA*** or bankruptcy proceedings and FOS or the new corporate entity, FOS Limited, continued to defend this action, appear at case management conferences and take active steps to assist in the remediation of the plaintiffs' property. In my view, it would be unfair and amount to an injustice to deny the amendments based on a limitations defence at this time.

[41] FOS Limited assumed the name FirstOnSite Restoration following the completion of the Asset Purchase Agreement. Some of the officers and directors of FOS continue to be officers and directors of FOS Limited. That does not mean that FOS Limited necessarily assumed the liabilities of FOS and the principle of corporate successor liability applies in Manitoba. It simply means that there is an arguable case being advanced by the plaintiffs. I am mindful that the position advanced by the plaintiffs and Wawanesa is contrary to the terms of the Asset Purchase Agreement and the Approval and Vesting Order granted by the Ontario Court.

[42] For the purpose of the granting leave to amend pleadings, it is unnecessary to decide whether the legal principle of corporation successor liability applies in Manitoba or whether the estoppel argument applies to the facts of this case. The question that must be decided is whether the nature of the proposed amendments raise valid arguable points that have merit. In my view, the threshold is a relatively low one and given the issue of corporate successor liability is an unsettled area of law, I am persuaded that the court should grant the proposed amendments to permit this issue to be argued at trial with a full factual record. (The principle of corporate successor liability has been considered in several cases in Canada. See ***Central Sun Mining Inc. v. Vector Engineering Inc.***, 2011 ONSC 1439, [2011] O.J. No. 993; ***Cooperative Centrale Raiffeisen-Boerenleenbank B.A., Rabobank International, New York Branch v. Liebig & Keown LLP***, 2016 ABQB 417, 42 Alta. L.R. (6th) 198; ***Suncor Inc. v. Canada Wire & Cable Ltd.***, [1993] 7 Alta. L.R. (3d) 182, [1993] A.J. No. 4 (Alta. Q.B.); ***Parlette v. Sokkia Inc.***, [2006] O.J. No. 4085, 151 A.C.W.S. (3d) 1059 (Ont. Sup. Ct.); ***Talbot v. Nourse***, 2018 ONSC 1061, 81 B.L.R. (5th) 145 (QL); and ***101133912 Saskatchewan Ltd. (c.o.b. Hybrid Construction) v. First Care Medical Management Inc.***, 2019 SKQB 231, [2019] S.J. No. 368 (QL))

[43] In making this determination, I am not accepting that the principle of corporate successor liability applies in Manitoba. Nor am I accepting that the estoppel principle argued by the plaintiffs necessarily applies. The plaintiff submits that FOS Limited by its conduct, assumed any liability of FOS in this action. Further, the plaintiff submits that FOS Limited is merely a continuation of FOS and therefore one or more of the

exceptions to the general rule of corporate successor non-liability as outlined in the U.S. authorities, apply in this case.

[44] Without accepting that the exceptions outlined in the U.S. authorities and the Canadian authorities noted above apply in Manitoba, I accept that the plaintiffs have raised valid, arguable points that may have merit based on the specific facts of this case. In my view, the fair and just determination on the facts presented is to grant leave to file the amended pleading and allow the issues of corporate successor liability and estoppel to be determined at trial with a full factual record.

[45] The parties did not present any cases in which the principle of corporate successor liability was accepted as a basis for liability after a trial. At the conclusion of the hearing of the motions, counsel were given an opportunity to file any further authorities that may be similar to the facts and circumstances of this case and no further authorities were filed. This principle has been referenced in motions for summary judgment and in motions to amend pleadings. In ***Central Sun Mining Inc.***, the Ontario Superior Court refused to grant summary judgment dismissing a claim based on corporate successor liability because the possibility that the principle of corporate successor liability may apply " … must be determined on the basis of the facts considered individually in each case." (para. 49).

[46] I agree that the finding of the court in ***Central Sun Mining Inc.*** applies equally in this case. Frank J. concluded at para. 48 as follows:

> **48** I have concluded that while the prospects of the doctrine of successor liability being applied by a Canadian court to the facts of this case may be limited, it is not impossible based on the facts which are known and the law as it has developed in the U.S. that the doctrine would be adopted and applied in this case.

[47] I also accept as pointed out in ***101133912 Saskatchewan Ltd.*** at para. 55 that " … an application for leave to amend is not to be used to determine difficult and unsettled points of law." The nature of the proposed amendment advanced by the plaintiffs raises valid arguable points on an unsettled area of law that may have some merit on the facts of this case.

[48] Accordingly, applying the factors to be considered to decide whether to grant leave to amend the re-re-amended statement of claim, I find as follows:

a) FOS Limited will suffer a prejudice if the plaintiffs' motion to amend the re-re-amended statement of claim is granted and the court finds that the plaintiffs are advancing a new cause of action which is statute barred. It is unnecessary to decide that issue at this time because I am satisfied, whether the limitation period has expired or not, special circumstances exist in this case that lead me to conclude it would be unfair and amount to an injustice to deny the amendments;

b) In assessing the prejudice, I considered that adding FOS Limited as a defendant will not result in significant prejudice to FOS Limited or other parties as trial dates have already been set, discoveries have been held, documents have been exchanged and FOS Limited is fully aware of the status of this action. Any prejudice that may result can be compensated for by an award of costs;

c) There has not been a delay on the part of the plaintiffs seeking the amendment as they moved promptly to amend their pleading once they

were informed by counsel for FOS Limited of the ***CCAA*** and bankruptcy proceedings; and

d) The nature of the proposed amendment raises arguable points that have merit and, in my view, they should only be decided with a full factual record.

The motion seeking leave to amend the re-re-amended statement of claim is therefore granted. The plaintiffs must file and serve their amended pleading within seven days after the order granted is filed.

Third Party Claim

[49] Wawanesa seeks leave of the court to file a third party claim against FOS Limited. Queen's Bench Rule 29.01 permits a defendant to commence a third party claim against any person who is not a party to the action and who is, or may be, liable to the defendant for an independent claim arising out of the matters at issue. After the close of pleadings, leave of the court is required to commence a third party claim (Queen's Bench Rule 29.02).

[50] The test applied by the court was reviewed recently in the decision of ***Loeppky v. Taylor McCaffrey LLP***, 2019 MBQB 59, [2019] M.J. No. 130 (QL). It involves considering two questions:

a) Is there a *prima facie* cause of action against the third party?

b) Would prejudice result if leave were granted to file the third party claim?

[51] In answer to the first question, for the reasons outlined above in connection with the motion to amend the re-re-amended statement of claim, I agree with the position

advanced by Wawanesa that it has a *prima facie* cause of action against FOS Limited based on the corporate successor liability principle reviewed above. That does not mean that corporate successor liability is the law in Manitoba or that the facts and circumstances fall within one of the exceptions noted in the U.S. authorities. In granting leave to file a third party claim, the threshold is a relatively low one and in my view, Wawanesa has met the burden.

[52] In answer to the second question, the court must determine whether the filing of the third party claim results in a prejudice that outweighs the avoidance of multiplicity of actions. I agree that in most cases, the potential prejudice can be met by an award of costs against the party seeking leave (See ***Leoppky*** and ***Modified Thermoset Resins Inc. (c.o.b. PPC Coatings) v. Westland Construction Ltd.***, 2018 MBQB 69, [2018] M.J. No. 157 (QL)).

[53] Adding FOS Limited as a defendant or as a third party will not result in significant prejudice to any party. As noted in connection with the plaintiffs' motion, trial dates have already been set, discoveries have been conducted, documents have been exchanged and FOS Limited is fully aware of the status of this action due to its involvement over the past four years.

[54] Wawanesa's motion to advance a claim for contribution and/or imdemnity against FOS Limited is granted. However, the correct procedure pursuant to the Queen's Bench Rules is not to issue a third party claim.

[55] In light of my ruling granting the plaintiffs' leave to amend their re-re-amended statement of claim and add FOS Limited as a defendant in this action, the proper

procedure for a co-defendant to advance a claim for contribution and/or indemnity against FOS Limited is for Wawanesa to amend its statement of defence and include a cross-claim against FOS Limited. A third party claim is only filed when a party has a claim against a person who is not a party to the action. Wawanesa's motion to issue a third party claim made was appropriate when FOS Limited was not a party to the action. Therefore, the appropriate order is to grant Wawanesa leave to amend its statement of defence and add a cross-claim against FOS Limited. (See Queen's Bench Rules 28.01 and 29.01)

[56] All defendants affected by this decision shall comply with the Queen's Bench Rules regarding the filing of any amended statement of defence and cross-claim once they are served with the amended re-re-amended statement of claim by the plaintiffs.

[57] The parties have each been partly successful on their motions and, in my view, the appropriate disposition of costs, particularly given the facts of this case, is that costs shall remain in the cause.

_____ J.