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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

FRANK TRUNZO AND MARIA CUDA TRUNZO	)	**APPEARANCES:**
applicant(s),	)	JOSEPH AIELLO
	)	for the applicant(s)
- and -	)	
	)	
THURAISINGHAM SATGUNAM	)	
respondent.	)	MICHAEL WEINSTEIN
	)	MELANIE WISE
	)	for the respondent
	)	
	)	JUDGMENT DELIVERED:
	)	October 19, 2020

DEWAR J.

INTRODUCTION

[1] This is another in the litany of cases in which an Order seeking the extension of a limitation period is sought. This case involves a conflict between the interests of a respondent who seeks some certainty that his life will not be interrupted by his actions of many years before, and the interests of applicants who seek compensation for losses recently sustained which they attribute to poor workmanship provided by the respondent over 20 years ago.

FACTS

[2] Frank and Maria Trunzo ("the Applicants") jointly own 190 Shoreline Drive, Winnipeg, Manitoba ("the House"). They purchased the House from Thuraisingham Satgunam ("the Respondent") on or about February 3, 1998. The Applicants were told that the Respondent had constructed the House. There is no evidence filed to the contrary.

[3] In or around April 2014, the Applicants retained Anderson Builders to address an issue of water coming down into the second storey bedroom and ensuite bathroom window trim on the northwest side of the house. Anderson Builders investigated the problem and concluded that the vapour barrier above the shower in the ensuite bathroom had not been properly sealed, and warm moist air from the shower therefore had made its way into the attic where it later condensed when warmer spring weather came. That conclusion prompted the Applicants to perform certain remedial work.

[4] Anderson Builders monitored the House for the next two winters and noted no water to be visible either in the attic or in the interior.

[5] In September 2017, Anderson Builders was asked to assist with a renovation to the kitchen of the House. During the demolition phase, they noticed some rot on the sheathing and joist structure over the cantilever on the north wall. Further demolition was pursued to investigate the damage. It revealed that damage was extensive. Concern for structural damage prompted Anderson Builders to retain an engineer, namely Mr. Mohammed Matar, to

inspect the damage. He sent a report to Anderson Builders on November 7, 2017, which opined that "perimeter rim boards are decaying as a result being exposed to excessive moisture that can be a result of condensation, improper flashing or vapour/moisture barrier". He requested Anderson Builders to contact him again if joists were found to be affected.

[6] Anderson Builders made certain repairs and then stopped their work due to the impending winter.

[7] In the spring of 2018, Anderson Builders returned to the House to finish their work. When they opened the walls, they noted that the damage was not localized, and continued to the "end of the house". More importantly, they noted that the structural joists and headers supporting the second floor had rotted away badly, and the supporting members were vastly deteriorated. Arne Anderson, the principal of Anderson Builders, not a structural engineer, opined that "left unattended the floor would have collapsed".

[8] In the summer of 2018, Anderson Builders contacted Mr. Matar to inspect the House again. In a report dated July 11, 2018, Mr. Matar recorded that he observed "joist and framing decay due to improper flashing and moisture" as well as "local wood insect infestation". He opined that "the damage is caused by improper flashing that resulted in moisture penetration. This caused wood decay and insect infestation."

[9] In an affidavit filed by Mr. Matar on behalf of the Applicants, he deposed:

> I can confirm that the structural integrity of the house at 190 Shoreline Drive had been so severely compromised that, if left

> unattended, the structural support to the home would have failed, putting the occupants at risk.

[10] Mr. Matar further deposed:

> A properly constructed home in Winnipeg should have maintained a structural integrity far beyond 20 years.

[11] In his affidavit filed in support of the Applicants, Arne Anderson of Anderson Builders expressed the same opinion about the life of a Winnipeg house.

[12] An application to extend the limitation period for the purpose of suing the Respondent was filed on October 25, 2018. The proposed action alleges that the Respondent was negligent in the construction of the House.

[13] The proposed statement of claim contains allegations that go beyond the damage described by Messrs. Anderson and Matar. For example, in their affidavits, they do not say anything about mould, carbon dioxide levels, the exhaust and supply ventilation system in the House, and furnace.

Position of the Applicants

[14] The Applicants argue that they first became aware of the structural damage to the House in July 2018 when they became aware of the report from Mr. Matar. They therefore have commenced the application for extending the limitation period in a very timely manner.

Position of the Respondent

[15] The Respondent argues that:

a) The Applicants ought to have discovered the structural damage much earlier. When moisture problems surfaced in 2014, that was a red flag which ought to have been thoroughly investigated at that time. Since 2014 is beyond one year before the filing of the application, the Applicants are beyond the statutory time by which the court can even entertain an application such as this.

b) There is insufficient evidence to demonstrate that the Applicants have a cause of action which has a reasonable chance of success against the Respondent.

ANALYSIS

Nature of the cause of action for which leave to commence is requested

[16] Paragraph 1 of the brief of the Applicants describes the nature of the cause of action which they seek to commence. They seek leave of the Court pursuant to subsection 14(1) of ***The Limitation of Actions Act***, C.C.S.M. c. L150 ("the LAA").

> to commence an action against the Respondent, Thuraisingham Satgunam for economic loss resulting from dangerous defects.

[17] In short, the Applicants do not propose an action in contract. They propose an action in tort. They allege that the Respondent constructed the House in a negligent manner such that excessive moisture made its way into the House. They allege that they have sustained economic loss attributable to the excessive moisture. They acknowledge that in order to be successful, they will need to show that the defects in the building caused by the negligence of the

builder pose a real and substantial danger to the inhabitants of the building. (See ***Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.,*** 1995 CarswellMan 249, [1995] 1 S.C.R. 85 at para. 36).

[18] The normal limitation period for a case of this nature is six years. That period expired at the latest in 2004, being six years following the date that the Applicants acquired the House. It more likely expired earlier since by the time the Applicants acquired the House, the work which they now claim to have been negligently performed, had already been done.

The Law

[19] In Manitoba, the LAA prescribes limitation periods by which various causes of action must be sued. Recognizing that arbitrary limitation periods create injustices where damage is not apparent during the limitation period, the LAA permits limitation periods to be extended in certain situations. Those situations were circumscribed in the case of ***Sochasky v. Winnipeg (City),*** 2013 CarswellMan 454, 2013 MBQB 204 which outlined requirements that an applicant must show to successfully obtain an extension of the limitation period. At para. 22, Saull J., after canvassing the relevant sections of the LAA, wrote:

> 22 Taken together, these sections provide that in order to be successful on an application for leave under sections 14(1) and 15(2) of *The Limitation of Actions Act*, the moving party must:
>
> (a) prove by evidence that he or she has a cause of action which, subject to any defence that may be raised, has a reasonable chance of success;

> (b) prove, at the very least, that he or she first learned of a fact material to his or her cause of action within the 12 months next before the application was filed;
>
> (c) establish that the fact, first learned within that period, is "material" within the sense defined in section 20(2); it must be of "a decisive character" as that phrase is defined in section 20(3);
>
> (d) establish that the fact must not be one which the applicant ought to have known about earlier.

[20] I propose to deal with items (b), (c), and (d) first.

Whether the facts material to the cause of action were known or ought to have been known by the Applicants more than one year before the application was filed

[21] The application was filed on October 25, 2018. If the Applicants knew or ought to have known of the material facts upon which their cause of action is grounded prior to October 25, 2017, no relief is available to them.

[22] The facts material to the applicant's proposed cause of action are:

a) there was excessive moisture in the House;

b) the excessive moisture was able to enter the House because it had not been constructed properly;

c) the excessive moisture created defects in the House which posed a real and substantial danger to the inhabitants of the House; and

d) as a result, the plaintiffs sustained a loss.

[23] The Respondent points to the year 2014. He argues that in April, the Applicants retained Anderson Builders to investigate the presence of water coming down into windows of the master bedroom and ensuite bathroom. The Respondent argues that, at that time, the Applicants became aware of excessive

moisture in their home which should have been investigated fully. Had they done so, the Applicants would have learned of the more widespread problem about which they now complain. The Respondent therefore argues that the Applicants are out of time to bring an application to extend the limitation period.

[24] The evidence before me indicates that the presence of moisture in the bedroom and bathroom windows prompted the Applicants to retain advice about why it existed and how to fix it. The Applicants retained Anderson Builders who concluded that the source of the water was attributable to the escape of moisture from the shower in the ensuite bathroom into the attic. The water accumulated and condensed when the weather turned warmer. In other words, in the minds of the Applicants and their contractor, this was a localized problem, and it was fixed. Anderson Builders monitored this problem for the next two winters and it did not reoccur. The more widespread problem was not discovered until after Anderson Builders were retained to assist in the renovation of the kitchen in 2017, and even then, they did not become aware of the problem above the kitchen until November 2017 which is within the one year period prior to the filing of this application. Indeed, the full extent of the problem was not known until the summer of 2018 when Mr. Matar, a structural engineer, concluded that the structural integrity of the home had been compromised.

[25] At its most basic level, the Respondent argues that the 2014 failure of Anderson Builders to investigate whether there were other areas of the House

damaged by water infiltration must be imputed to the Applicants. Counsel for the Respondent draws an analogy to lawyers who act for clients after a loss and failed to diligently pursue certain avenues of inquiry. Although not specifically mentioned by counsel, the cases of ***McIntyre v. Frohlich et al.***, 2013 CarswellMan 95, 2013 MBCA 20 and ***Goodman v. East St. Paul (Rural Municipality)***, 2011 CarswellMan 238, 2011 MBQB 111 are such cases. In ***McIntyre,*** the adding of a further defendant was not pursued in a timely fashion even though he was potentially identified during an examination for discovery of the named defendant. In ***Goodman,*** the failure of a lawyer to make timely inquiries as to who installed netting in an arena deprived the plaintiff of an order extending the limitation period to add the installer as an additional defendant. In both cases, the applicants had presumably relied on their lawyers and yet the conduct of the lawyers was imputed to them.

[26] Counsel for the Applicants argues that there is a difference between cases involving advice from lawyers and cases such as this, involving advice from other experts. In the case of lawyers, there is an agency relationship whereas in the case of other professionals, the relationship is generally one between contracting parties. Although I recognize that a lawyer often works as an agent for a client, I am not convinced that a case involving poor legal work or advice should be dealt with differently from a case involving poor work or advice provided by a contractor.

[27] The LAA recognizes that if circumstances exist from which an applicant ought to have ascertained or inferred a fact, that applicant is required to take reasonable steps to seek appropriate advice which would have discovered the material fact. Subsections 20(3) and 20(4) of the LAA read:

> **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.
>
> **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.

[28] The submission of the Respondent essentially contends that if the advice received from an expert is incorrect, even negligent, the expert's poor advice should be imputed to the applicant? That may seem harsh, but there is a degree of imputation present in the statute. For example, in section 20(4), the statute uses the words "a person of his intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them" which suggests that negligent advice can be imputed to the applicant. Negligent advice may not be "appropriate advice".

[29] This case however does not need to address that question. Whereas it was clear in ***McIntyre*** and ***Goodman*** that the legal advice was deficient, here, there is no evidence to show that there is any deficiency in the work done by Anderson Builders in 2014. Moisture in a localized area by itself does not necessarily suggest that a broader and more destructive investigation ought to have been pursued, and there is no other evidence before me to suggest that it should have. On the record before the court, there was no "red flag" to require further inquiry in 2014.

[30] I am satisfied that the Applicants did not become aware of the extensive moisture problem in the House which created a dangerous situation until, at the earliest, when they received the opinion from Mr. Matar in November 2017 and, at the latest, when they received the opinion from Mr. Matar in the summer of 2018, both of which were within the year prior to the filing of this application.

Have the Applicants provided enough evidence to demonstrate that they have a cause of action with a reasonable chance of success?

[31] The Applicants submit that there is a low threshold which they must overcome in order to satisfy the requirement that they must show a cause of action with a reasonable chance of success. They point the court to the evidence of Frank Trunzo, Arne Anderson, and Mohammed Matar.

[32] One of the issues which arises at this juncture concerns part of the affidavit of Mr. Trunzo. In it, he attached an unsigned July 27, 2018 letter from prairieHOUSE Performance Inc. ("PPI") to Arne Anderson which outlines observations as to various deficiencies in the construction of the House, and how to fix them. Counsel for the Respondent argues that this report should be disregarded because it is hearsay and because Mr. Trunzo is not qualified to express the opinions which are contained in that report. He relies upon my earlier decision in ***Green Brier Inn (Wpg.) Inc. v. Coca-Cola Bottling Company,*** 2013 MBQB 53, 2013 CarswellMan 64 at paras. 28 to 30 wherein I had ruled that experts' reports attached to affidavits by non-experts should normally be disregarded. The rationale for that approach was based upon the reluctance of courts to allow respondents to file expert evidence on the merits of the proposed claim during an application to extend the limitation date. By simply attaching a report of an expert to an affidavit of a non-expert, a party undermines the right of the opposing party to cross-examine the expert, since the expert has not sworn the affidavit. Further, by so doing, a party is adducing

hearsay evidence which is not normally admissible, especially if the hearsay deals with contentious facts.

[33] Counsel for the Applicants takes the position that the report of PPI is admissible, and if not admissible for the truth of its contents, at least for the purpose of providing narrative.

[34] In arguing that the report is admissible for all purposes, counsel for the Applicants makes reference to the case of ***Fawley et al v. Moslenko***, 2017 MBCA 47, 2017 CarswellMan 207. Counsel argues that this case changes the landscape since ***Green Brier***. In ***Fawley***, the applicants were personal representatives of the estate of a deceased person who proposed to bring a claim alleging that the respondent was responsible in part for the murder of the deceased. However, the applicants were out of time and needed an extension of the limitation period. In support of their application for an extension, the applicants filed an affidavit which referenced the existence of a recently discovered police statement by the person convicted of the murder. The statement implicated the respondent. The respondent objected to the admissibility of that statement on the application on the basis of hearsay and double hearsay. Mainella J.A., writing for a unanimous court, concluded that the affidavit was admissible. Counsel for the Applicants argues that the Court of Appeal has therefore opened the door to more hearsay evidence on applications such as this.

[35] I am not convinced that the decision in ***Fawley*** changed the landscape to the extent submitted by counsel for the Applicants. There, the hearsay objections were overcome by the principled exceptions to the hearsay rule, and for the purposes of the application before the court, the affidavit evidence was admissible. In my opinion, ***Fawley*** stands for the principle that the ***Rules of Court*** do not trump the general rules of evidence which permit hearsay evidence where the evidence might fall within the list of traditional exceptions to the hearsay rule or where it might be ruled admissible using the necessity and reliability criteria recognized in the principled exception to the hearsay rule. In ***Fawley***, the court determined that the hearsay evidence could be admitted under the principled exception to the hearsay rule.

[36] The case at bar is a different situation. In my opinion, the report of PPI should not be admissible on this application. First of all, it is not even signed. Secondly, it contains expert opinions which at least at this stage of the litigation are contentious. Thirdly, the manner in which the report is adduced, namely by attachment to Mr. Trunzo's affidavit, is not necessary. There is no evidence that the author of the report has died, gone missing, or is otherwise unavailable. It fails to meet the necessity test. Fourthly, reliability cannot be assessed because, as per ***Manitoba Hydro Electric Board v. John Inglis Co.,*** 1999 CarswellMan 509 at para. 21, the respondent is discouraged, if not forbidden, to file evidence on the merits of the proposed action, and the author has not been tendered for cross-examination.

[37] In addition, the objection in this case is not confined to hearsay. The report contains the opinion of an expert. Mr. Trunzo is not qualified as an expert. The attachment of this report to Mr. Trunzo's affidavit is simply a device to avoid the normal evidentiary rules against allowing non-experts to provide expert testimony. Furthermore, it shelters the expert from being challenged on cross-examination, one of the few remaining tools available to a respondent in this kind of an application.

[38] Counsel for the Applicants alternatively argues that if the report is inadmissible for the truth of its contents, then it should be admitted as part of the "narrative". That is, it should be used to demonstrate that it was only by July 27, 2018 that the Applicants really understood the link between the damages and the negligence of the Respondent. I do not agree. To use the report for that purpose essentially allows the Applicants to get in by the back door that which they cannot bring in through the front. If it is intended to somehow support the Applicants' delay in bringing this application, then the inference must be made that the opinions expressed have some substance in order to show that the Applicants have obtained "appropriate advice". If the opinions have no substance, what use is this report? It does not help the Applicants to say that they were justified in bringing the application when they did.

[39] For these reasons, I rule that the comments in Mr. Trunzo's affidavit about PPI and the attached report are not admissible for any purpose. They are to be disregarded.

[40] Therefore, without the "PPI evidence", have the Applicants shown by evidence that they have a cause of action with a reasonable chance of success?

[41] A reasonable chance (prospect) of success has been the subject of judicial comment in many cases. See ***Green Brier*** at paras. 28 to 30, and again by the Court of Appeal in ***Fawley*** at para. 26 which reads:

> 26 The threshold for establishing a reasonable prospect of success is not as onerous as providing evidence that would prove the case on balance and not as simple as showing that the facts on which the claim is based, if accepted, could successfully resist a motion to strike out the claim (see Chan v. Chan, 2001 MBCA 191 (Man. C.A.) at para 14; and Cairnie Estate at para 45). No two cases for relief from a limitation period are alike. What is important is that the facts relied on by an applicant "must be of substance" (Chan at para 14). This means that the facts are not based on speculation or conjecture but, rather, are grounded in tangible and identifiable pieces of evidence that satisfy the judge. As Scott CJM explained in Cairnie Estate, "that there is something to the case so that if sent on to trial there is some realistic prospect that the action will succeed" (at para 45).

[42] What evidence exists here? Mr. Trunzo deposed that he relied upon Anderson Builders and Mr. Matar. Mr. Anderson deposed that there were significant moisture issues in the House which he observed locally in 2014 and more generally in 2017 and even more generally in 2018. Mr. Matar deposed in 2018 that the moisture issues affected the structural integrity of the building, the cause for which he attributed to improper flashing. In November 2017, he attributed the cause of observed moisture damage to be "condensation, improper flashing, or vapour/moisture barrier". In my view, there is enough to

justify a claim that construction practices employed by the Respondent caused moisture buildups that resulted in damage. There is enough to say that the claim of the Applicants has a reasonable chance of success, or at least some success.

[43] I therefore am prepared to extend the limitation period to permit a statement of claim to be filed by the Applicants against the Respondent alleging that due to improper workmanship or materials, moisture entered the House and damage resulted which posed a real and substantial danger to the inhabitants of the House.

[44] Counsel for the Respondent submitted that if I were to grant leave to the Applicants to issue a statement of claim, then I should parse out various alleged deficiencies from the proposed claim, as was done by Edmond J. in ***Olford et al. v. Springwood Homes Inc.,*** 2018 MBQB 78. He argues that claims for mould remediation, improperly installed windows, improperly installed ventilation system, and improperly applied stucco are particulars of negligence which were not the subject of the Anderson and Matar evidence nor the permitted portions of the Trunzo affidavit.

[45] In my opinion, the problem outlined in the admissible evidence was the presence of excessive moisture in the House. The Applicants are given leave to commence an action against the Respondent detailing the deficiencies in his work that caused the buildup of excessive moisture. I am not on this application in a position to determine whether all of the deficiencies alleged by the

Applicants in their proposed statement of claim contributed to the buildup of excessive moisture. That is a matter to be determined by the trial judge who will also need to assess whether the resultant damage posed a real and substantial danger to the inhabitants of the House.

[46] The statement of claim must be filed within 45 days of the date that the Order reflecting this judgment is signed.

[47] The costs of this application shall be determined by the judge who assesses the costs at the end of the trial.

_____J.