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

BETWEEN:	)	COUNSEL
	)	
DALE DRIEDGER and JODIAN SELF,	)	Mar 5 2004 12:57
	)	Applicants: 160 309357 1 CI 03-01-32611 134
Applicants,	)	CHARGE/FEE PAID: 6.00
	)	Michael F. C. Radcliffe, Q.C.
- and -	)	
	)	Respondents Pete Peters, Wayne
	)	Peters and Cornerstone Homes:
	)	Michael G. Finlayson
PETE PETERS, WAYNE PETERS, PETE	)	
PETERS and WAYNE PETERS carrying	)	
on business under the firm name and	)	Respondents John A. Peters and
style of CORNERSTONE HOMES, JOHN	)	Triple B Concrete:
A. PETERS, and JOHN A. PETERS	)	Ronald E. Janzen
carrying on business under the firm	)	
name and style of TRIPLE B	)	
CONCRETE,	)	
	)	Judgment delivered:
Respondents.	)	March 5, 2004

SCHULMAN J.

[1] This is an application by Dale Driedger and Jodian Self ("Driedger"), homeowners, for leave to extend the time to sue pursuant to s. 14 of the ***Limitation of Actions Act***, R.S.M. 1987, c. L150.

[2] There is a unique feature to this case. Unlike the situation in all prior cases, Driedger had knowledge of all relevant facts several months before expiry of the limitation period. Driedger did not sue within the prescribed time and

seeks leave to sue on the basis that the critical information was received within 12 months, though well before expiry of the limitation period.

[3] In January 1997, Driedger entered into a written contract with Cornerstone Homes ("Cornerstone") regarding the construction of a home on Driedger's land. On the face of the agreement, which provides that any change would have to be in writing, Cornerstone was to serve as project manager for a fee of $5,000.00. In April and May 1997, Triple B Concrete ("Triple B") constructed the sub-basement, installing weeping tiles and doing related work. Triple B, having completed its work, invoiced Driedger on May 10, 1997, and Driedger paid the account. In September 1997, Driedger took possession of the now completed house. In the course of the years, Driedger finished and furnished the basement of the house.

[4] In June 2002, Driedger experienced serious basement flooding. He discovered that the source of the problem lay in his sub-basement and invited Cornerstone and Triple B down to look at the problem. They attended in August 2002 and declined to help resolve his problem. He engaged experts to figure out a solution, and he engaged contractors to implement a solution at a cost of $25,000.00, which he now wants to sue for and recover from the two firms.

[5] Plans for construction of the house called for the installation of a sump pump in the sub-basement with four pipes connecting the exterior weeping tiles to the sump and three additional pipes to half the distance from the sump to the

basement wall. An engineer engaged by Driedger attended at the site in October 2002. He stated in his report dated March 17, 2003:

> 1. The crawlspace was saturated with stagnant foul smelling water that was up to five inches in depth;
>
> 2. The floor of the crawlspace was not sloped;
>
> 3. Only two pipelines were connected to the sump instead of the seven shown on the drawings;
>
> 4. Only three pipes were observed to extend under the basement wall, one each to the south, west and east basement walls;
>
> 5. The three pipes were not firmly connected with a water-tight connection to the exterior pipes;
>
> 6. The pipes from the east and west wall[s] were connected to each other before reaching the sump. The connection was neither water-tight nor sealed and was easily pulled apart;
>
> 7. The pipes from the east and west walls sloped uphill for a short distance from the base of the concrete wall;
>
> 8. A polyethylene ground cover sealed to the exterior wall had not been installed;
>
> 9. The exterior pipelines had been installed at a higher elevation than the underside of the void form;
>
> The inspections confirmed that the weeping tile and drainage system originally installed in the crawlspace of this house was deficient and if left uncorrected, would have caused humidity levels to be elevated. In the long-term this would lead to premature deterioration of the below grade structure.

[6] Counsel for Driedger has prepared a draft statement of claim. In it, he alleges that Cornerstone served as general contractor and engaged Triple B to construct the sub-basement, but the evidence does not support such a finding. Cornerstone introduced Driedger to Triple B, and the evidence is skimpy on the

relationship between the parties. However, the determinative facts have been mentioned in ¶3.

[7] With completion of the basement in May 1997, it appears that the wrong complained of, be it in tort or in contract, would have taken place in that month or shortly before. Driedger learned the whole story, diagnosed the cure and carried it out between August 2002 and January 2003, well within the applicable limitation period. Driedger asked Cornerstone and Triple B for payment in February 2003, and they refused to pay. On April 22, 2003, Driedger filed the application that is before the court at this time. In support, Driedger file an affidavit sworn April 16, 2003. Driedger did not file a statement of claim, although it appears to have been prepared in April 2003, and if he had filed it on that day, it might have obviated the need to make this application. No explanation has been provided.

[8] There are two issues: firstly, whether the fact that Driedger permitted the limitation period to elapse, having at the time full knowledge of all material facts, precludes Driedger from obtaining an order; and secondly, whether Driedger has adduced sufficient evidence to obtain an order against one or more of the respondents.

[9] The relevant provisions of the ***Limitation of Actions Act*** are:

PART II
EXTENSION OF LIMITATION PERIOD

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.

Effect of leave
14(2) Subject to subsections (3) and (4), no provision of this Act or of any other Act of the Legislature limiting the time for beginning an action affords a defence to an action if the court either before or after the beginning of the action grants leave under this section to begin or to continue the action.

Other defences not affected
14(3) Nothing in this section excludes or otherwise affects

(a) any defence that in any action to which this section applies may be available by virtue of

(i) any provision of an Act of the Legislature other than one limiting the time for beginning an action, or

(ii) a rule of law or equity; or

(b) the operation of any Act of the Legislature or rule of law or equity that, apart from this section, would enable such an action to be brought after the end of a limitation period fixed in this Act or any other Act of the Legislature in respect of the cause of action on which that action is founded.

. . . . .

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.

[10] Counsel for Driedger argued that his client has established a cause of action against Cornerstone and Triple B, that he discovered the critical facts within 12 months of filing his application and that he is entitled to an order under s. 14.

[11] Counsel for Cornerstone and for Triple B argued that Driedger is not entitled to the order sought. He does not qualify for an order because he had all required facts months before expiry of the limitation period. They argued that the legislature never intended to provide relief for an applicant who has slept on his rights.

[12] The leading case on the application of Part II is ***Rarie v. Maxwell*** (1998), 131 Man.R.(2d) 184, in which our Court of Appeal made an in-depth examination of the discoverability rule and of Part II of the ***Act***. Philp J.A. stated:

> [15] . . . While the public policy concerns underlying the early statutes [of limitations] may be obscured by the passage of time, three rationales "which serve society and the courts' continued interest in maintaining the respect of these statutes" (the words of Major J. in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at p. 562) have been reviewed and restated in recent decisions of the Supreme Court of Canada. In *Peixeiro*, Major J., delivering the judgment of the Court, wrote (at pp. 562-63):
>
> > All the rationales were set out in *M. (K.) v. M. (H.)*, [[1992] 3 S.C.R. 6], where this Court considered the *Limitations Act*, R.S.O. 1980, c. 240 (now R.S.O. 1990, c. L.15), in order to determine the time of accrual of the cause of action in a manner consistent with its purposes (at pp. 29-30):
> >
> > > There are three, and they may be described as the certainty, evidentiary, and diligence rationales....
> > >
> > > Statutes of limitations have long been said to be statutes

> of repos[e]. The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations....
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim....
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

M. (K.) v. M. (H.) applied the three rationales to the fact situation there and found that neither the guarantee of repose, the evidentiary concerns nor the expectation of diligence on the part of the plaintiff precluded the application of the discoverability principle.

He stated further in this judgment:

> [40] . . . the injustice that has been universally identified in limitation of actions jurisprudence is the "injustice of a law which statute-bars a claim before the plaintiff is even aware of its existence" (the words of Wilson J. in *Kamloops*, at p. 40). In *Cartledge*, Lord Reid had described the injustice as "unreasonable and unjustifiable in principle."
>
> [41] I am satisfied that the 1967 amendments to the Act [S.M. 1966-67, c. 32] were intended by the Legislature to relieve against that injustice. . . .
>
> . . . . .
>
> [43] If there was any doubt as to the intention of the Manitoba Legislature in enacting the discoverability provisions (and I think there is none), the words of the then Attorney General of Manitoba (now my colleague, Justice Lyon) to the Legislature on the introduction of the 1967 amendments to the Act dispel that doubt. He stated:
>
> > And then there is - a large portion of the Bill is devoted to the provisions which permit a Court to extend the period of limitation in the following cases: (a) where the damages are for injuries to the person as defined, and (b) where the material facts or some essential element in the material facts, was outside the knowledge of the plaintiff until either after the limitation period had passed or just before the limitation period had passed. And you'll note that these provisions are reasonably well circumscribed and the Court must grant special leave to proceed

with the action after the limitation period has expired.

There is some detailed procedural matter set out in the part that I refer to, which is essentially the same as the procedure that is set up in Great Britain where the procedure came from. In fact the wording of this section follows in large part the wording of the English statute which was passed a number of years ago to accommodate situations where the actual knowledge of personal injury did not occur until after the limitation period had expired.

[Debates and Proceedings of the Legislative Assembly of Manitoba, 1st session, 28th Legislature, Vol. XIII No. 107, April 13, 1967, p. 2554]

. . . . .

[45] Part II of the Act is a comprehensive and detailed code of discoverability provisions that relieve in a reasonable manner against the injustice that has been identified by the courts. In doing so, the statutory scheme recognizes and reflects the three rationales that underlie statutory limitations and preserves the delicate balance between the conflicting rights of a plaintiff and a defendant. Leave of the court is required, but the evidentiary threshold is not a burdensome one. And the court is mandated to fix the time within which an otherwise statute-barred action must be commenced; a determination that is certainly dependent upon the particular facts of each individual case.

. . . . .

[53] Part II of the Act relieves against the injustice of statutory limitation periods that preclude an action before the material facts are known. It is unnecessary to resort to a rule of construction in order to postpone the accrual of a cause of action to the date of discovery of the material facts. The general rule of discoverability laid down in *Kamloops* has no place in Manitoba.

(emphasis added)

In a concurring judgment, Twaddle J.A. stated:

[73] In the present case, as my brother Philp so well points out, the Legislature has made it clear by enacting Part II of *The Limitation of Actions Act*, R.S.M. 1987, c. L150, that the words "cause of action accrues" used in Part I were intended to refer to the completion of the cause of action by the occurrence of damage. In Part II, the Legislature has provided a means whereby a prospective plaintiff who discovers his or her cause of action late can obtain an extension of time. Such a provision makes no sense if the statutory intent had been for the rule of construction applied in *Kamloops and Central Trust Co.* to be applied to the Manitoba statute.

(emphasis added)

[13] Sections 14 and 15 of the ***Limitation of Actions Act*** do not expressly address the issue that has arisen in this case. They do not address the relative timing of discovery and expiry of the limitation period. By contrast, s. 31(2) of the Queensland ***Limitation of Actions Act*** 1974 (Qld.) provides:

> (2) Where on application to a court . . . it appears to the court--
>
> > (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; . . . .
>
> the court may order that the period of limitation of the action be extended so that it expires at the end of 1 year after that date

The legislation of South Australia and of the Australian Northern Territory (***Limitation of Actions Act*** 1936 (S.A.) and ***Limitation Act*** 1981 (N.T.)) have like provisions. Our statute being silent on the subject, the question is whether the court should interpret s. 14 by reading into it a requirement that, in order to qualify for an order, discovery must be made after expiry of the limitation period or, perhaps, so late before that time does not permit the retaining of counsel to file a statement of claim before expiry of the limitation period. If no such requirement is read in, the question will arise whether this court has a discretion under s. 14(1) to reject the application on the ground of the timing.

[14] Two principles of construction must be considered at this point: firstly, a purposive analysis; and secondly, whether Part II can be regarded as reform legislation and, if so, the impact of this.

[15] ***Sullivan and Driedger on the Construction of Statutes***, 4th ed. (Markham: Butterworths, 2002), states at p. 197:

> Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity.

At p. 201, the author states:

> In interpreting reform legislation the courts are obviously concerned with ensuring the efficacy of the intended reform. But as *Heydon's Case* (1584, 76 E.R. 637) indicates, in the context of reform legislation the intention to reform is understood in terms of existing law and the mischief or defect for which the law did not provide. The primary interpretive challenge, then, is to master the relationship between the new rules and the existing law. In keeping with this concern, the primary interpretive values are integration, continuity and coherence.
>
> (emphasis added)

[16] In ***Rarie v. Maxwell***, the Court of Appeal defined the purpose of Part II as being to relieve against the injustice of the limitation periods under which potential plaintiffs were deprived of their right to sue because of events that took place without their knowledge and which they were unable to discover with the exercise of due diligence until after expiry of the limitation period. At the same time, there is no reason to think that the legislature intended to give relief to persons who failed to act diligently and slept on their rights. In addition, as reform legislation, applying to Part II goals of integrating continuity and coherence, the legislature could not have intended to give relief to a person who has slept on his/her rights.

[17] In the instant case, Driedger was aware of all material facts by October 2002, well before the expiry of the applicable limitation period of six years, irrespective of whether s. 2(1)(f) for injury to real property or s. 2(1)(i) for breach of contract applies. The fact that Driedger, before expiry of the limitation period, apprised the persons against whom he wishes to make a claim of his intention to sue did not postpone the limitation date prior to the enactment of Part II and, in my view, is not an important factor in interpreting Part II. I find that, in order to achieve the purpose of s. 14, it should be interpreted to require that the applicant must have been deprived of the right to sue, primarily because of the late discovery of critical facts. On the facts of this case, Driedger's failure to sue in a timely way has not been explained. In the absence of an explanation, I find that he did not act diligently and slept on his rights. Having regard to the scheme of the entire statute, I find that he has failed to bring himself within the provisions of s. 14. Moreover, I would exercise my discretion under s. 14 and dismiss his application on that ground.

[18] If I had found that Driedger could otherwise qualify for relief under s. 14(1), I would have granted an order in his favour against John Peters and Triple B only. Our practice permits an applicant only to lead evidence on the motion, but an applicant who wishes to succeed must establish evidence roughly equivalent to an initial showing on a motion for summary judgment. Based on the evidence referred to in ¶3 to ¶6, I would say that such a showing has been made against Triple B. However, there is no evidence before the court as to the

standards of inspection required of a competent project manager and whether or to what extent Cornerstone might have failed to live up to such standards.

[19] For the reasons stated in ¶17, the application is dismissed with costs.

J.