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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	
applicant,	)	Bailey J. Harris and Sara Thompson
	)	for the applicant
- and -	)	
	)	
	)	Kyle Dear and Kevin Williams
PRE-CON BUILDERS LTD. and	)	for the respondent
HART & SON PLASTERING (1999) LTD.,	)	Pre-Con Builders Ltd.
	)	
respondents.	)	Michael G. Finlayson
	)	for the respondent
	)	Hart & Son Plastering (1999) Ltd.
	)	
	)	JUDGMENT DELIVERED:
	)	September 4, 2019

SAULL J.

I. INTRODUCTION

[1] The applicant, The Viscount Gort Motor Hotel Ltd. (the "Applicant"), seeks leave to commence an action against Pre-Con Builders Ltd. ("Pre-Con") and Hart & Son Plastering

(1999) Ltd. ("Hart") pursuant to Part II of ***The Limitation of Actions Act***, C.C.S.M. c. L150 (the "***LAA***").

[2] The Applicant operates the Viscount Gort Motor Hotel (the "Hotel") located at 1670 Portage Avenue in Winnipeg, Manitoba. The Hotel consists of two "wings" (the "East Wing" and the "West Wing"), a banquet hall and a central lobby area.

[3] K-Tel International Ltd. ("K-Tel") owns the Hotel indirectly through a number of numbered companies.

[4] The proposed action relates to the application of acrylic stucco to the exterior of the fifth and sixth floors of the West Wing and an Exterior Insulation Finishing System ("EIFS") to the balance of the West Wing and the entire East Wing of the Hotel (collectively, the "Exterior Finishing Work"). The Exterior Finishing Work was done between 2007 and 2010. Pre-Con was the Applicant's general contractor. Hart was Pre-Con's subcontractor.

[5] As a result of an insurance claim made by the Applicant on October 1, 2013, the Applicant received an expert report that detailed various deficiencies with the Exterior Finishing Work.

[6] On February 20, 2015, the Applicant received a second expert report that likewise identified various deficiencies with the Exterior Finishing Work. Thereafter, deficiencies in respect of work in other areas were also discovered by the Applicant. The scope of the required remedial work is extensive and has been underway in various phases since 2015.

[7] This application was filed on June 29, 2015. The Applicant submits that it learned of all material facts of a decisive nature fewer than 12 months prior to the filing of the Notice

of Application and that it has a *prima facie* case with a reasonable prospect of success. Accordingly, leave to commence an action against Pre-Con and Hart should be granted.

[8] The respondents submit that the Applicant filed the application for leave more than 12 months after it first knew or ought to have known of all material facts of a decisive character upon which the proposed action is based and, accordingly, the application ought to be dismissed.

II. THE EVIDENCE

[9] The evidence before me is set out in the following materials:

i. Affidavit of Gordon Bachynski, sworn June 26, 2015;

ii. Affidavit of Kevin Knight, sworn April 28, 2017;

iii. Affidavit of Karl Truderung, sworn May 4, 2017;

iv. Supplemental Affidavit of Kevin Knight, sworn December 6, 2017;

v. Supplemental Affidavit of Karl Truderung, sworn December 7, 2017;

vi. Transcript of Cross-Examination of Gordon Bachynski, dated March 12, 2018;

vii. Transcript of Cross-Examination of Karl Truderung, dated March 13, 2018;

viii. Transcript of Cross-Examination of Kevin Knight, dated March 14, 2018;

ix. Correspondence from Bailey Harris enclosing Answers to Undertakings of Gordon Bachynski, Karl Truderung and Kevin Knight, dated June 12, 2018;

x. Answers to Undertakings of Gordon Bachynski arising from his cross-examination on March 12, 2018;

xi. Answers to Undertakings of Karl Truderung arising from his cross-examination on March 13, 2018;

xii. Answers to Undertakings of Kevin Knight arising from his cross-examination on March 14, 2018;

xiii. Affidavit of Gordon Bachynski, sworn June 6, 2018, filed on June 12, 2018; and

xiv. Affidavit of Gordon Bachynski, sworn July 4, 2018.

[10] In or about 2007, Harvey Nairn, the then general manager of the Hotel (now deceased), sought quotes from Pre-Con in relation to exterior upgrades to parts of the Hotel.

[11] On September 27, 2007, a final quotation was provided by Pre-Con for certain exterior upgrades on the West and East Wings of the Hotel (the "2007 Exterior Upgrades Contract").

[12] Simply put, the scope of the work was to remove the metal siding, level the existing stucco and apply an acrylic stucco to the existing brick/surface on the first- to fourth-floor exterior walls and to the existing stucco on the fifth- and sixth-floor exterior walls on the West and East Wings.

[13] Pre-Con entered into a subcontract with Hart in respect of this Exterior Finishing Work.

[14] There is nothing in the quotation requiring or indicating that any design work be performed by Pre-Con. As well, there is no evidence that Pre-Con was obliged to supervise Hart's work.

[15] The 2007 exterior upgrade was commenced in the summer of that year and finished by December 31, 2007.

[16] On or about June 1, 2009, the Applicant entered into a CCDC Design Build Stipulated Price Contract with Pre-Con for development of a new parking lot and banquet hall, as well as renovations to the existing basement, main and second floors of the Hotel (the "2009 Contract"). The 2009 Contract is not related to the 2007 Exterior Upgrades Contract, nor is the action commenced against the same parties in relation to those aspects of that work in any way connected to the issues and contract in dispute in this litigation.

[17] On or about July 12, 2012, a piece of the exterior stucco came loose and fell off of the West Wing. This piece of exterior stucco fell from an area where stucco work had been performed by the respondents in 2007. In fact, to the knowledge of the Applicant at the time, the piece that fell off included acrylic stucco that had been applied by Hart pursuant to the 2007 Exterior Upgrades Contract.

[18] On August 7, 2012, Tracie Wilkie ("Wilkie"), the then general manager of the Hotel, emailed Pre-Con indicating "... the [Hotel's] exterior plaster was [falling] and cracking ...".

[19] On October 1, 2013, another section of the exterior stucco fell off of the sixth floor of the West Wing, and it appeared to Wilkie that another piece on the far north-west side of the sixth floor was about to fall off. The stucco that fell from the West Wing also included acrylic stucco applied by Hart in 2007. On that same date, in an email to Phil Kives ("Kives"), a principal of K-Tel, and to Shelley Colquhoun, a 30 year employee of K-Tel, Wilkie stated:

> Just thought you should be aware as we have had another section of the exterior of the building fall off on the east side now and another piece further down looks like it will also fall off.. I am really thinking this is a defect in workmanship nor done to spec, and we should get the

> insurance Company involved as I think this will just keep happening and let them go after the Company who did the work.
>
> Below is the e-mail I had sent to all the Manager [*sic*] so they too are aware.
>
> > We had a small piece of the 6th floor west side exterior wall fall off the building this afternoon onto the outside parking lot. There is a section on the far north west 6th floor corner that looks like it is bubbling and may fall off at one point.
> >
> > We have put letters in all the Balcony Rooms as well as in all the Main Floor Rooms on the West Side today so Guests are careful when going out on their Balconies, as well as barricaded all the outside rooms parking spots so no one can park there.
> >
> > Unfortunately the North West 6th bubbling is right above the Lounge and due to it being a [*sic*] emergency exit we cannot lock the door. However we have put caution tape on the ramp outside so no one can use it as well as notices on the doors and window. Please ask all Guests if possible to use the front or east doors to go outside for fresh air but we can't force them.
> >
> > [emphasis added]

[20] Later that same day, Wilkie reported this matter to the Applicant's insurer and enquired whether the stucco issues were covered by the Applicant's property insurance. In response, the insurer's adjuster retained John A. Wells ("Wells"), an engineer at Crosier Kilgour Partners Ltd. ("Crosier Kilgour"), to inspect the problem and determine the cause.

[21] In a report dated November 13, 2013 (the "Crosier Kilgour Report"), Wells called into question the construction and installation methods used by the respondents and concluded:

> Our first priority was safety of the public. Thus, we advised our client that barricading off the areas below the parging was immediately required. The barricades should remain in place until all lose [*sic*]/ delaminated parging is removed.
>
> The visual review in combination close examination of failed pieces indicates that the plane of failure is within the original stucco, thus, a substrate cohesive failure. The polymer modified cementitious mixture applied over the stucco created a rigid layer that is much more water-tight and vapour-tight compared to the original cementitious stucco application. Although visible, loose material may have been removed,

> the parging system applied was much harder and less porous than the original stucco.
>
> Cracks and/or discontinuities in joint caulking at windows, joinery, etc. would facilitate water penetration in behind the parging. In addition, stack-effect would aggravate condensation potential behind the parging, further contributing to potential moisture sources, and thus, delamination. In addition, the parging will have a significant difference in stiffness and thermal coefficient of expansion. Thus, temperature changes will create shearing stresses in the composition system, in which failure occurs in weakest link, within the original cementitious stucco.
>
> We observed that Weld-Bond was the bonding agent utilized, which is based on a poly-vinyl acetate (PVA) polymer. We could not confirm with the manufacturer on whether or not the PVA used is non-remulsifiable. Early PVA's based on re-emulsifiable polymers would break-down when exposed to moisture, leading to bond failures. In fact, the literature for the product does not recommend it for exterior exposures. However, based on the point of failure in the parging, within the original stucco, we anticipate that the polymer type used is unlikely a primary component to the parging failure.
>
> In terms of remediation, we generally do not recommend applying high-density polymer based pargings over existing stucco, primarily for the reasons referenced above. Rather, we would recommend mechanically anchoring a new exterior board product, such as cement board through to the underlying structural back-up and applying the acrylic stucco finish directly to the cement board to duplicate the EIFS finish on the lower elevations.
>
> To summarize, the point of failure is within the original stucco. The cause of the failure is related to a harder, more air, water, and vapour tight parging being applied over a weaker substrate. Moisture penetration in behind the parging, either through precipitation or condensation would also aggravate the failure in the substrate, inducing the delamination plane within the stucco, observed on-site.
>
> [emphasis added]

[22] With respect to Wells' comment that "we advised our client", it is not known when Wells conducted his site visit or whether anyone on behalf of the Applicant attended the site visit. However, the site visit would have taken place sometime after the insurer was notified on October 1, 2013, and before the date of the Crosier Kilgour Report

(November 13, 2013). Given that Wells reported to the insurer that he had communicated the need to barricade the areas beneath the parging to "our client", I infer that Wells had some direct communication with the Applicant prior to the preparation of the Crosier Kilgour Report. The Applicant has not adduced any evidence showing what was communicated to it by Wells or by its insurer in or around this time, nor has it produced the claim information that it subsequently obtained from its insurer.

[23] On January 16, 2014, Wilkie received an email from the insurance adjuster advising that the Applicant's insurer had denied coverage for problems associated with the acrylic stucco, "... on the basis that there are specific exclusions relating to latent defect and/or faulty workmanship/design" (emphasis added).

[24] On January 27, 2014, the adjuster provided Wilkie certain claim-related information, but Wilkie was not provided the Crosier Kilgour Report. Upon further request, the Crosier Kilgour Report was provided on March 12, 2014.

[25] The claim-related information was not tendered into evidence by the Applicant. This claim-related information was sought from the Applicant by way of an undertaking during the cross-examination of K-Tel's Chief Financial Officer, Gordon Bachynski ("Bachynski"), on March 12, 2018. The Answer to Undertaking provided by Bachynski was unresponsive.

[26] Irrespective of what information might lie in the undisclosed claim-related information, it is clear that the Applicant was aware of the contents of the Crosier Kilgour Report by March 12, 2014, at the latest, and, therefore, the basis for denial of coverage.

[27] On March 20, 2014, Wilkie received a revised copy of the Crosier Kilgour Report, which had been corrected to remedy a typographical error in the original

November 13, 2013 report. This revised report in no way altered Wells' findings, opinions and conclusions.

[28] In September 2014, Bachynski assumed responsibility for dealing with the stucco issues. On or about September 16, 2014, Bachynski sent an email to the management team of the Hotel in respect of the ongoing problems the Hotel was experiencing regarding water damage and the exterior stucco. He indicated that he wanted to retain Tower Engineering Group ("Tower Engineering") to assess "[w]hether the contractor and/or sub-contractor are culpable in that they knew or ought to have known that their processes were deficient?"

[29] On September 10, 2014, Bachynski had a discussion with Tower Engineering's Jack Abiusi ("Abiusi"), during which he explained the issues and the problems. Bachynski attended a site visit at the Hotel with Abiusi on September 19, 2014. Three days later, on September 22, 2014, Abiusi told Bachynski he had concerns with the work Pre-Con had performed.

[30] The Applicant ultimately retained Tower Engineering on October 1, 2014 — six and one-half months after the receipt of the Crosier Kilgour Report, and more than two years after the first piece of exterior stucco fell off the Hotel. In turn, on or about October 6, 2014, Tower Engineering retained Edifice Tutorial Inc. ("Edifice") to review and report on the building's failing envelope system.

[31] On February 20, 2015, Kevin Knight ("Knight") of Edifice prepared the Edifice Report #1 ("Edifice Report"). In his affidavit, Knight testified that:

> My review of the Hotel between October 2014 — February 2015 and which are summarized in the Edifice Report #1 led me to conclude that the acrylic coating and parging of the stucco located at West Tower of the Hotel was deficient.
>
> . . . . .

> I also concluded that the acrylic coating on the stucco and parging located at the north end of the west elevation on the 5th and 6th floors was deficient.
>
> . . . . .
>
> The condition of the stucco on the 5th and 6th floors of the West Tower clearly confirms that the installation of the stucco was done in a manner that was contrary to industry standards and is grossly deficient, and has caused water and moisture to enter the wall cavity of the Hotel. Particulars of this deficient work include:
>
> (a) Failing to install expansion joints ...
>
> (b) Failing to evaluate and assess the existing wall structural system prior to the installation of the acrylic stucco coating to ensure that the existing wall conditions were suitable for the retro-fit ...
>
> (c) Attaching the leveling coat of parging and stucco and acrylic coating to existing stucco over 25 gauge steel studs (which was sufficient to support the original stucco) without an assessment of a structural engineer to confirm if the steel studs were sufficient to support the additional weight ...
>
> [emphasis added]

[32] It is not known when the Applicant first sought the advice of legal counsel in respect of the building envelope problems. The question was specifically asked of, and refused by, Bachynski during cross-examination on March 12, 2018.

[33] What is known is that the Applicant had retained counsel by May 2015, as on May 28, 2015, a Statement of Claim was filed by its counsel in respect of the 2009 Contract (Suit No. CI 15-01-95788).

[34] The application before me seeking an extension of time under Part II of the ***LAA*** was not filed until June 29, 2015.

III. THE ISSUE

[35] The issue on this application is simply whether, in all the circumstances, the Applicant should be granted leave to commence an action against the respondents pursuant to Part II of the ***LAA***.

IV. LEGAL CONTEXT

[36] The parties agree that both s. 14(1) and s. 15(2) in Part II of the ***LAA*** are implicated on this application. Those sections read:

> **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.

[37] Part II of the ***LAA*** creates a comprehensive statutory discoverability regime designed to alleviate possible injustices that might arise from a limitation period expiring prior to discovering a claim. See: ***Rarie v. Maxwell*** (1998), 131 Man. R. (2d) (201) 184 at paras.

40 - 41 (C.A.). Simply put, these sections allow an application for leave to commence or continue an action that might otherwise be statute barred to be brought, provided it is brought within one year of discovering the cause of action.

[38] Section 20 of the ***LAA*** fleshes out the important terms found in s. 14(1). Sections 20(1) to (4) read as follows:

> **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;
>
> "**court**" in relation to an action, means the court in which the action has been or is intended to be brought.
>
> **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.

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.

[39] The requirements on an application for leave were summarized by this court in ***Sochasky v. Winnipeg (City)***, 2013 MBQB 204 (CanLII), as follows:

> 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;
>
> (d) 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); and,
>
> (e) establish that the fact must not be one which the applicant ought to have known about earlier.
>
> See: ***Einarsson et al. v. Adi's Video Shop et al.*** (1992), 76 Man. R. (2d) 218 at paras. 10-13 (C.A.).

[40] The language of s. 14(1) of the ***LAA*** places the onus squarely upon an applicant to bring forth the evidence necessary to support the application. In every case, the question becomes whether the applicant has satisfied the court that, in the circumstances of the case, it is reasonable that "she knew or ought to have known of the material facts of a decisive character upon which the action is based not more than 12 months before bringing her application": ***Johnson v. Johnson***, 2001 MBCA 203 (CanLII), at para. 12.

[41] Section 15(2) provides that the applicant must adduce evidence sufficient to establish the cause of action on at least a *prima facie* basis.

[42] The Applicant advances two main arguments in support of its application:

i) That it learned of all material facts of a decisive nature fewer than 12 months prior to the filing of the Notice of Application and that it has a *prima facie* case with a reasonable prospect of success. More specifically, the Applicant submits that until it received the Edifice Report (on or about February 20, 2015), it did not know what was wrong, the nature of the

deficiencies, who was responsible or the scope of damages, and were unaware of a potential cause of action.

ii) That it did not know that the EIFS was deficient until it received the Edifice Report on February 20, 2015, and that there was no reason to inspect the EIFS work earlier. The deficiencies in the "stucco work" and the EIFS are different and independently discoverable, and therefore the limitation period for commencing an action with respect to the EIFS work has not elapsed.

[43] With respect to the first argument, the respondents concede that the Applicant has a *prima facie* case with a reasonable prospect of success, satisfying their burden under s. 15(2) of the ***LAA***, but argue that the Applicant knew or ought to have known of all material facts of a decisive character upon which the proposed action is based more than 12 months prior to when the application was filed and, therefore, has failed to satisfy the requirements of s. 14(1) of the ***LAA***. More specifically, the respondents submit that the Crosier Kilgour Report (dated November 13, 2013 and received March 2014) provided sufficient information to identify the cause of action and that the Applicant would have been able to bring an action within the limitation period had they proceeded based on the information in that report.

[44] With respect to the second argument, the respondents argue that the alleged EIFS deficiency is either a further particular of the Applicant's claim, and/or damage, and that the allegation of mould and damage to the structural steel supports related to damages. It asserts that neither one could form the basis of an independent cause of action given they

relate to the same contract, and negligence of the same parties. They further maintain that the Edifice Report (where the EIFS was first evaluated) arrived at the same conclusion as the 2013 Crosier Kilgour Report.

V. ANALYSIS

[45] As indicated above, the language of s. 14(1) of the ***LAA*** places the onus squarely upon an applicant to bring the evidence necessary to support the extension of time. The Applicant must satisfy the court that, in the circumstances, it did not know or ought not to have known of the material facts of a decisive character upon which the action is based more than 12 months before bringing the application.

[46] In ***Johnson***, the Manitoba Court of Appeal cited with approval (at para. 15) the comments of Wright J. in ***John Doe v. Griggs***, 2000 MBQB 16 (CanLII), at para. 31 regarding what it described as "a fairly rigorous standard":

> .... It should be noted that the extent of the applicant's knowledge is only that he knew or ought to have known that there could be a link between the assault and his problems 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. This is a fine distinction, but it is important. ....
>
> [emphasis in original]

[47] In an earlier decision, Steel J. (as she then was) in ***Rebizant v. Greenwood et al.*** (1998), 127 Man. R. (2d) 35 (QB), described the extent of knowledge required to satisfy s. 14(1) of the ***LAA*** in the following way (at para. 71):

> The test pursuant to the *Act* is that the application must be initiated within 12 months of the plaintiff becoming aware of the material facts of a decisive nature. She did not need to become 'definitively' aware. She needed to become aware on the balance of probabilities that the implant she had was associated with problems and that it had caused her damage. ...
>
> [emphasis added]

[48] Given the evidence presented in this case, I conclude that the representatives of the Applicant (considering intelligence, education and experience as described in s. 20(3) of the ***LAA***) either knew or ought to have known of the cause of action more than 12 months before the filing of the application.

[49] Large pieces of stucco falling from the exterior of the building would cause alarm to any reasonable party in the Applicant's circumstances and warrant immediate action. The Applicant was aware that the respondents were the only parties involved with the relevant construction projects, and who might reasonably face liability for any faulty work. While I believe it was reasonable for the Applicant to have sought some expert knowledge on the matter, I am persuaded that the necessary facts were obtained by the Applicant upon receipt of the Crosier Kilgour Report on March 12, 2014 – more than 15 months before filing their Notice of Application under the ***LAA***.

[50] The findings in the Crosier Kilgour Report that point to the cause of action are reproduced in paragraph 21 of these reasons. Although it is clear that the Edifice Report provided the Applicant with information that would solidify or further establish the cause of action, I agree with the respondents' argument that the decision of the Manitoba Court of Appeal in ***Swan River Valley Hospital District No. 1 v. MMP Architects***, 2002 MBCA 99 (CanLII) ("***Swan River***") is applicable here. In that case, the court refused to grant leave to an applicant to commence an action in circumstances where there were two conflicting expert reports. The court held that the applicant was aware of the facts of a decisive nature upon receipt of the earlier report, and that the lower court judge erred in holding that the cause of action disclosed by the second report was different and, therefore,

the application was brought within the prescribed time. The Court of Appeal held that further and better, and even different, information provided in a later expert report does not necessarily constitute a material fact within the meaning of the ***LAA***, if the basis of the cause of action was known to the applicant at an earlier date.

[51] Even if I accepted the Applicant's position that the Crosier Kilgour Report suggested the problem was in the original stucco (thus requiring Edifice Report to obtain material facts), I find it failed to meet its obligation under s. 20(4) of the ***LAA*** to demonstrate that it took all reasonable steps to ascertain the facts necessary to ground the cause of action.

[52] The Applicant argues it took all reasonable steps and, in so doing, it relied heavily on the advice of the respondents. The Applicant points to communications between the parties (in 2012 to 2014 regarding the deficiencies), asserting it acted reasonably in seeking the advice and direction of the respondents as purported experts in the relevant fields. While I agree it was reasonable to have contacted the respondents first regarding the deficiencies, it is my view the Crosier Kilgour Report provided the Applicant with the facts they needed to proceed within the limitation period, particularly the statement, "[t]he cause of the failure is related to a harder, more air, water, and vapour tight parging being applied over a weaker substrate" (emphasis added).

[53] The fact the Applicant's insurance coverage was denied on the basis of "latent defect and/or faulty workmanship/design" is further evidence of the respondents' deficient work that should have alerted the Applicant.

[54] The Applicant knew, as early as October 1, 2013, when the second piece of stucco came off that it had serious problems with the building's envelope system. Further, the

connection between the problems being experienced by the Applicant and the work performed by the respondents was so obvious that Wilkie, without the benefit of any advice, questioned whether the respondents' work was deficient as of October 1, 2013. Bachynski raised the same question within only a week or so of becoming involved, and Abiusi indicated that he had concerns about the work performed by the respondents within three days of his attendance at the site.

[55] Surely, one would reasonably expect that the Applicant would have acted upon its knowledge on October 1, 2013, or immediately upon the insurer's denial of its insurance claim on January 16, 2014, or immediately upon the receipt of the Crosier Kilgour Report on March 12, 2014. If the Applicant had taken reasonable steps to seek appropriate advice at any of these times, it could have filed its application in time. The Applicant's failure to act when it, at a minimum, had knowledge that stucco was repeatedly falling off the building, giving rise to public safety issues, puts the Applicant outside the requirements of the ***LAA***.

[56] Given the matters set out in paragraphs 53 to 55 of these reasons, it is difficult to accept that the Applicant was so misled as to "absolve" it of its obligations under s. 20(4).

[57] As to the argument that the alleged EIFS deficiency and the deficiencies in the "stucco work" are different and independently discoverable and actionable, I find on the evidence that the alleged EIFS deficiency is either a further particular of the Applicant's claim, and/or damage, and that the allegation of mould and damage to the structural steel supports related to damages. Neither could form the basis of an independent cause of

action given the fact that they relate to the same contract, breach of duty of care and negligence of the same parties.

[58] In connection to this issue, I come back to the facts in ***Swan River,*** which are, in many ways, analogous to the case at bar. In ***Swan River***, the respondent (initially the applicant) claimed that it had obtained further and better information regarding deficiencies in construction from another expert, and that it did not know all the material facts of a decisive nature upon which to bring an action prior to the expiration of the limitation period. While the second report did provide further information, the court noted (at para. 20):

> .... With respect to the observation by the motions judge that the extent of the damage was not known as of June 15, 1999, it must be noted that damage to at least one dormer unit was fully known, and the Lodge also knew of the likelihood of similar damage to all other dormers because they had a common design and were constructed by the same contractors following the same plans and specifications. ....

[59] In ***Swan River,*** the court found that the details of whether the design flaw related to a specific inadequacy over another were not separate causes of action. The complaint based on the second report was a <u>particular</u> of the assertion of negligence in the performance of architectural services rather than a cause of action by itself. Similarly, based on the evidence before me in the present application, I find that the EIFS deficiencies are part of the overall negligence in the services performed and do not constitute a separate cause of action.

VI. CONCLUSION

[60] Leave to commence an action against the respondents is denied.

VII. COSTS

[61] Costs may be spoken to, if the parties are unable to agree.

Richard C. Gruell J.