Citation: Viscount Gort Motor Hotel Ltd v Pre-Con Builders Ltd et al, 2021 MBCA 5

Date: 20210122
Docket: AI19-30-09378

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

	)	***B. J. Meronek, Q.C.*** *and*
	)	***E. A. Lawlor-Forsyth***
	)	*for the Appellant*
	)	
THE VISCOUNT GORT MOTOR HOTEL LTD.	)	***K. T. Williams*** *and*
	)	***K. L. Dear***
	)	*for the Respondent*
(Applicant) Appellant	)	*Pre-Con Builders Ltd.*
	)	
- and -	)	***M. G. Finlayson***
	)	*for the Respondent*
PRE-CON BUILDERS LTD. and HART & SON PLASTERING (1999) LTD.	)	*Hart & Son Plastering (1999) Ltd.*
	)	
(Respondents) Respondents	)	*Appeal heard:*
	)	***September 16, 2020***
	)	
	)	*Judgment delivered:*
	)	***January 22, 2021***

On appeal from 2019 MBQB 130

MAINELLA and PFUETZNER JJA

[1] The applicant appeals the judge's dismissal of its application to extend the limitation period under Part II of *The Limitation of Actions Act*, CCSM c L150 (the *Act*).

[2] The applicant sought to file a statement of claim for breach of

contract and negligence by the respondents in the performance of exterior finishing work on its hotel property in Winnipeg (the hotel). The applicant alleges that the respondents are responsible for deficiencies relating to the face sealed stucco system applied to the fifth and sixth floors of the west wing of the hotel (the stucco deficiencies) and for deficiencies related to the exterior insulation finishing system (EIFS) applied to the balance of the west wing and to the east wing of the hotel (the EIFS deficiencies).

[3] The judge dismissed the application based upon his finding that the applicant "either knew or ought to have known of the cause of action more than 12 months before the filing of the application" (at para 48).

[4] For the reasons that follow, in our respectful view, the judge erred in finding that the stucco deficiencies and the EIFS deficiencies could not form separate causes of action. Based on the judge's findings regarding discoverability, the applicant knew, or ought to have known, of the stucco deficiencies more than 12 months prior to filing its application. As a result, we would dismiss the appeal in respect of the stucco deficiencies. However, the record does not support a finding that the EIFS deficiencies were discoverable more than 12 months prior to the applicant filing its application. We would allow the appeal in respect of the EIFS deficiencies.

Background

[5] In 2007, the applicant contracted with the respondent, Pre-Con Builders Ltd. (Pre-Con), to refurbish the exterior cladding of the west and east wings of the hotel (the exterior finishing work). Pre-Con entered into a subcontract with the respondent, Hart & Son Plastering (1999) Ltd. (Hart), in respect of the exterior finishing work.

[6] In simple terms, the scope of the exterior finishing work was: (1) to cover the existing stucco on the fifth and sixth floors of the west wing with a levelling coat of stucco and refinish it with an acrylic coating (the face sealed stucco system); and (2) to remove any existing metal siding and to apply EIFS, covered by the same face sealed stucco, to the balance of the west wing and to the east wing. The exterior finishing work was substantially completed by December 31, 2007.

[7] In 2012, the applicant began to experience issues with respect to the exterior finishing work. A timeline of key events is as follows:

- July 12, 2012: A large piece of stucco fell off the west wing of the hotel.

- August 7, 2012: Tracy Wilkie (Wilkie), the general manager of the hotel at that time, emailed Pre-Con, stating that "exterior plaster [was] falling and cracking".

- October 1, 2013: Wilkie emailed Philip Kives, the beneficial owner of the applicant, stating "another section of the exterior [stucco]" fell off on the 6th floor of the west wing and that another section looked like it was "bubbling and may [also] fall off". She wrote that she was "<u>really thinking this [was] a defect in workmanship [not] done to spec</u>" (emphasis added), and that the hotel "should get the insurance Company involved as . . . this will just keep happening and let them go after the Company who did the work."

- Around October 2013: The hotel's insurer was notified of the

stucco deficiencies. The insurer retained engineer John Wells (Wells) of Crosier Kilgour & Partners Ltd. to inspect the stucco deficiencies.

- November 13, 2013: Wells provided his report (the Crosier report) to the insurer's adjuster.

- January 16, 2014: The insurer's adjuster emailed Wilkie to advise that insurance coverage was denied for the stucco deficiencies on the basis that there were "specific exclusions relating to latent defect and/or faulty workmanship/design."

- March 12, 2014: Wilkie received a copy of the Crosier report which indicated:

> . . .
>
> . . . 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. . . .
>
> . . .
>
> . . . [W]e generally do not recommend applying high-density polymer based pargings over existing stucco . . ..
> . . .
>
> To summarize, the point of failure in the system 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. . . .
>
> [emphasis added]

- September 2014: Gordon Bachynski (Bachynski) assumed responsibility from Wilkie for dealing with the stucco

deficiencies on behalf of the applicant.

- September 10, 2014: Bachynski contacted Jack Abiusi (Abiusi) of Tower Engineering Group (Tower) regarding the stucco deficiencies.

- September 16, 2014: Bachynski emailed the management team of the hotel advising that he wanted to retain Tower to assess "[w]hether the [respondents] are culpable in that they knew or ought to have known their processes were deficient".

- September 19, 2014: Tower did a site visit at the hotel.

- September 22, 2014: Abiusi told Bachynski that he had "concerns with the work Pre-Con Builders had done", that the hotel "should retain a building envelope specialist to comment on the complete building envelope" and that the hotel may "be required to strip off all of the exterior finish down to the studs".

- October 1, 2014: The hotel formally retained Tower.

- October 6, 2014: Tower retained Edifice Tutorial Inc. (Edifice) to "review and report on the failing building envelope system".

- October 16, 2014: Kevin Knight (Knight) of Edifice observed deficiencies in both the face sealed stucco system and the EIFS work on his first site visit to the hotel, including "(EIFS) installation expansion joints and window details (not to industry standards)."

- February 20, 2015: Knight delivered a report (the Edifice

report) in which he set out his findings of serious deficiencies in both the face sealed stucco system and the EIFS work.

- June 29, 2015: The hotel filed its application under Part II of the *Act* for leave to file its statement of claim outside of the limitation period.

Decision of the Judge

[8] The judge stated that the onus was on the applicant to "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" (at para 45).

[9] After considering the evidence, the law and the arguments of the parties, the judge concluded that the applicant "either knew or ought to have known of the cause of action more than 12 months before the filing of the application" (at para 48). Key to his decision was his finding that "the necessary facts were obtained by the Applicant upon receipt of the [Crosier report] on March 12, 2014 – more than 15 months before filing their Notice of Application" (at para 49).

[10] The judge considered the applicant's argument that it required the Edifice report in order to ascertain the material facts regarding both the stucco deficiencies and the EIFS deficiencies. The judge did not accede to this argument on the basis that, even if the Edifice report was required in order to obtain material facts, the applicant failed to meet its obligation under section 20(4) of the *Act* to take all reasonable steps to ascertain the necessary facts. The judge found that the applicant had many opportunities to seek advice regarding the problems with the work done by the respondents prior to

and "upon the receipt of the [Crosier report] on March 12, 2014" and that, "If the [a]pplicant had taken reasonable steps to seek appropriate advice at any of these times, it could have filed its application in time" (at para 55).

[11] The applicant asserted before the judge that the EIFS deficiencies and the stucco deficiencies were "different and independently discoverable and actionable" (at para 57). The judge considered this and found that (*ibid*):

> . . . [T]he 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.

[12] In finding that the stucco deficiencies and the EIFS deficiencies do not constitute separate causes of action, the judge relied on this Court's decision in *Swan River Valley Hospital District No 1 et al v MMP Architects et al*, 2002 MBCA 99, noting that "the facts in ***Swan River*** . . . are, in many ways, analogous to the case at bar" (at para 58).

Issues

[13] The applicant says that the judge erred in dismissing its application for an extension of time to file its claim. It raises two main issues.

[14] First, did the judge err in finding that the applicant knew, or ought to have known, about its claim at the time it received the Crosier report?

[15] The second issue is whether the judge erred in failing to find that the EIFS deficiencies are independent construction defects distinct from the stucco deficiencies, are "unrelated and independently discoverable", and are

capable of forming a separate cause of action. The applicant asserts that it did not know about the EIFS deficiencies, nor could it have known about them until it received the Edifice report.

Analysis and Decision

Did the Judge Err in Determining When the Applicant Knew, or Ought to Have Known, of All Material Facts of a Decisive Character?

[16] Part II of the *Act* provides for a statutory discoverability rule, the purpose of which is to alleviate the unfairness that would occur if potential claims were allowed to become statute barred before they were reasonably discoverable.

[17] Sections 14(1) and 15(2) of the *Act*, reproduced in the appendix to these reasons, effectively create a two-part test to be applied on requests for leave to file a statement of claim outside of the limitation period.

[18] First, under sections 14(1) and 15(2), a judge must review the evidence and make a finding as to whether the applicant "knew or ought to have known there could be a link . . . sufficient to establish a cause of action" more than 12 months prior to bringing the application (*Johnson v Johnson*, 2001 MBCA 203 at para 15, quoting *John Doe v Griggs*, 2000 MBQB 16 at para 31; see also *St Boniface General Hospital v PCL Constructors of Canada Inc et al*, 2019 MBCA 57 at paras 22-24). In doing so, a judge must determine when an applicant first knew, or ought to have known, of "all material facts of a decisive character upon which the action is based" (section 14(1)(a); see also sections 20(3)-20(4) of the *Act*). That is, a judge must determine when the cause of action was discovered or discoverable.

[19] This part of the test requires a judge to apply a legal standard to the facts. Absent a pure error of law, or a palpable and overriding error of fact or of mixed fact and law, this Court will not interfere with the decision (see *Fawley et al v Moslenko*, 2017 MBCA 47 at para 27).

[20] Second, section 15(2) requires the judge to make a "limited assessment of the merits of the proposed action" (*Fawley* at para 25). The applicant must establish that it has a prima facie case with a reasonable prospect of success, subject to any defences that may be raised (*ibid*). The second part of the test is not at issue on this appeal.

[21] The applicant argues that the judge failed to consider both the subjective and objective requirements of the statutory discoverability rule. It maintains that it did not understand the technical conclusions in the Crosier report to say that an act or omission of the respondents may have caused the stucco deficiencies and that this lack of understanding was objectively reasonable.

[22] The respondents submit that the judge made no palpable and overriding errors and that there was ample evidence to support his findings. They argue that the applicant had actual knowledge that there could be a link between the respondents' work and the stucco deficiencies by October 1, 2013 when Wilkie said she was "really thinking this [was] a defect in workmanship" and that the Crosier report merely confirmed this knowledge.

[23] In our view, the judge stated and applied the correct legal test to the evidence. We agree with the respondents that the judge made no palpable and overriding errors in his factual findings or in his application of the law to the facts. The link between the stucco deficiencies and the work of the

respondents was clearly set out in the Crosier report. Moreover, that link had already been identified and communicated by Wilkie.

Did the Judge Err in Not Finding That the EIFS Deficiencies Were Distinct and Could Form a Separate Cause of Action?

[24] Applications under Part II of the *Act* frequently involve claims for multiple construction defects. As previously mentioned, an important issue on an application under Part II of the *Act* is the determination of when the potential claim was discovered or was discoverable with reasonable diligence. Accordingly, the characterisation of individual construction defects as either independent causes of action or merely parts of the same cause of action is critical if those defects are not discovered or discoverable at the same time.

[25] The importance of this characterisation is illustrated by the approach taken in *City of Portage la Prairie et al v Tower Engineering Group Limited Partnership et al*, 2019 MBQB 4. There, the applicants sought leave to file a statement of claim alleging multiple design and construction defects in different building systems against multiple respondents who had been retained under several contracts.

[26] Edmond J began his analysis by determining the dates that the limitation periods expired with respect to each of the "causes of action alleged by the applicants in the statement of claim" (at para 58) since "the various causes of action arose at different times" (at para 61).

[27] Edmond J's next step was to examine "each of the potential causes of action to determine when the applicants knew or ought to have known of the material facts of a decisive character relating to each claim" (at para 87). In effect, he made findings as to when each cause of action was either

discovered or was discoverable with reasonable diligence. As it happened, the causes of action were discoverable at different times.

[28] The same approach was endorsed by the Ontario Court of Appeal in *Grey Condominium Corp No 27 v Blue Mountain Resorts Ltd*, 2008 ONCA 384, where the central question on the appeal was "whether independently discoverable construction defects caused by a single act of negligence may give rise to separate causes of action" (at para 1). In that case, the plaintiff discovered a serious construction deficiency in 1993 and two additional deficiencies in 1996. The trial judge's unchallenged finding of fact was that the latter two deficiencies were not discoverable prior to 1996 "upon the use of reasonable diligence" (at para 24). Under the *Limitations Act*, RSO 1990, c L15, if the defects gave rise to one cause of action, the entire claim would be statute barred. However, if each defect gave rise to "a separate and distinct cause of action" (at para 2), the claim for the latter two defects would be brought in time. Epstein JA noted that the trial judge rejected the "single cause of action" theory (at para 68)—being the theory that, "as soon as the first deficiency comes to light, the limitations clock starts to tick in respect to all deficiencies, known or unknown" (at para 22), and held that "separate deficiencies do give rise to separate causes of action" (*ibid*).

[29] Epstein JA agreed with the trial judge's rejection of the single cause of action theory as it "would allow builders . . . to avoid liability for subsequently discovered dangerous defects" (at para 68). Moreover, she wrote that it would be unfair to deny a claim "based solely on the single cause of action paradigm" for latent defects that "will often be discovered over a period of time" (at para 71). Having said that, she emphasised that "trial judges must be careful to ensure that the deficiencies in question are clearly

independently discoverable" (at para 72). Otherwise, there is the risk of undermining the "need for finality in litigation" (*ibid*).

[30] Turning to the present case, the applicant argues that the judge misapprehended the evidence regarding the EIFS deficiencies and failed to appreciate that they are independent and distinct from the stucco deficiencies, giving rise to distinct causes of action and associated limitation periods. It says that it had no knowledge of the material facts relating to the EIFS deficiencies until it received the Edifice report and there was no basis for the judge to conclude that it ought to have known of the material facts earlier.

[31] The applicant maintains that the judge misapplied the test in Part II of the *Act* to the EIFS deficiencies and that he erred in concluding that the EIFS deficiencies are either a particular of the claim and/or damage and could not form the basis of an independent cause of action. It characterises this as an extricable question of law and argues that the judge "appears to suggest that the single cause of action paradigm applies uniformly to construction deficiency cases."

[32] The respondents' position is that the question of whether a construction deficiency gives rise to an independent cause of action depends upon several factors, including "the nature, scope and complexity of the work performed . . . and whether the deficiency was truly distinct in the sense that it was not discoverable upon the exercise of reasonable diligence." The respondents argue that the EIFS deficiencies were not distinct because they were discoverable if the applicant, armed with the facts known to it upon receipt of the Crosier report, had exercised reasonable or any diligence.

[33] The judge's analysis of whether the EIFS deficiencies could form

the basis of a cause of action independent from the stucco deficiencies is brief. He stated, "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" (at para 57). With respect, we disagree with this conclusion.

[34] As correctly noted by the judge, both claims relate to construction work performed by the same parties under the same contract and allege breach of contract and negligence. However, in determining whether the EIFS deficiencies could form a separate cause of action, the judge should have asked whether the claim in respect of the EIFS deficiencies "introduce[d] a new set of facts that provides the basis for an action in court" separate from the allegations in respect of the stucco deficiencies (*Britton v Manitoba*, 2011 MBCA 77 at para 38).

[35] The stucco deficiencies and the EIFS deficiencies relate to different construction methods and different alleged defects. The stucco deficiencies arose from the application of a layer of watertight stucco over an old, weaker and permeable stucco surface. On the other hand, the EIFS deficiencies arose from the improper installation of the EIFS, including that the EIFS was installed over the wrong gauge of steel studs and that caulking was not used at junctions with other assemblies. When these factual differences are properly considered, it is clear that the EIFS deficiencies can form the basis of a separate cause of action.

[36] A comment is required on the judge's reliance on *Swan River*. In our view, the facts in *Swan River* are not analogous to the facts in the present case. In *Swan River*, the applicants sought to bring a claim against the architects who designed a care home facility for negligent failure to provide

an adequate design of the building's dormer windows, which caused water to infiltrate the building in the area of the dormer windows, resulting in water damage, rot and mould. The applicants' first expert report said the water damage was caused by inadequate eavestroughing at the dormers. The second expert report said that the water damage was caused by inadequate flashing at the roofline of the dormers. The applicants' position was that the information available to them upon receipt of the first expert report "constitute[d] a different cause of action" (at para 21) than that based upon the second expert report. Huband JA, for the Court, rejected that argument, concluding (at paras 24-25):

> The cause of action as against the architect sounds in negligent breach of contract in failing to provide a design that will adequately prevent water infiltration.
>
> The detail of whether the design flaw relates to the inadequacy of gutters and eavestroughs or the inadequacy of the flashing at the roof line are not separate causes of action.

[37] The claim in *Swan River* involved water damage caused to one area of the building (the identically designed dormer windows) as a result of the negligent design by the same party. Whether the water damage was caused by a flawed design of the gutters or of the flashing (or both) was held by the Court to be "a particular of the assertion of negligence . . . rather than a cause of action by itself" (at para 27).

[38] In the present case, the claim against the respondents is in respect of two different types of exterior finishing systems with different installation methods. In the Crosier report, Wells described the differences as follows: "the contractor modified the existing cementitious stucco finish on floor elevations 5 and 6. The remainder of the building had received an acrylic

stucco on rigid EPS (EIFS) exterior. Thus, floor elevations 5 and 6 are relatively unique" (emphasis added).

[39] Similarly, Knight, in cross-examination, confirmed that "[s]tucco is not EIFS. . . . EIFS is a different system than the acrylic stucco."

[40] The deficiencies in relation to the face sealed stucco system and the deficiencies in relation to the EIFS are different. This is not a case, like in *Swan River*, where two experts disagree on what went wrong.

[41] A finding that the EIFS deficiencies could, technically, form a separate cause of action does not end the analysis. The next step is to determine the limitation period for each cause of action and, critically, when each was discovered or discoverable. As previously described, this was the approach taken, correctly in our view, in *Grey Condominium* and in *Portage la Prairie*.

[42] As we have explained, the judge properly found that the applicant knew, or ought to have known, of all material facts regarding the stucco deficiencies when it received the Crosier report. The judge's decision to dismiss the application in respect of the EIFS deficiencies turned on the incorrect notion that they could not form a cause of action separate from the stucco deficiencies. Because of this legal error, it is necessary for this Court to determine whether the application for an extension of time to begin an action in relation to the EIFS deficiencies should be granted.

[43] We now turn to the question of when the applicant knew, or ought to have known, of the material facts upon which the cause of action related to the EIFS deficiencies is based.

[44] The statutory discoverability scheme in Part II of the *Act* creates a correlation between knowledge and diligence. The degree of diligence to be reasonably expected in a given case is a function of a party's actual or constructive knowledge of the material facts on which a cause of action is based. This point is made clear in sections 14(1)(a) and 20(3) to 20(4) of the *Act.*

[45] Sufficient knowledge is "more than suspicion and less than perfect knowledge" (Graeme Mew with the contribution of Debra Rolph & Daniel Zacks, *The Law of Limitations*, 3rd ed (Toronto: LexisNexis, 2016) at section 3.50; see also sections 3.48-3.49). The statutory discoverability scheme in Part II of the *Act* does not require a "complete understanding" of all of the material facts of a decisive character regarding the cause of action (*Fawley* at para 22). However, where the circumstances as to the existence of a cause of action are vague or speculative, that is an insufficient basis to put an applicant "on notice" (*Penner v Martens et al*, 2008 MBCA 35 at para 18).

[46] It is not uncommon in technical matters for the analysis of the sufficiency of an applicant's knowledge to turn on when there were enough "flags" to warrant seeking appropriate advice from an expert (*McIntyre v Frohlich et al*, 2013 MBCA 20 at para 63; see also paras 58-62, 64-66; and *Olford et al v Springwood Homes Inc*, 2019 MBCA 2 at paras 11-12).

[47] Here, prior to Knight's site visit, the applicant had no knowledge of any facts, let alone material facts of a decisive character, as to a defect with the EIFS. The nature of the EIFS defect Knight discerned on October 16, 2014 was that EIFS insulation expansion joints and window details were not installed as per industry standards; he surmised caulking had not been used.

[48] Prior to Tower's recommendation that the applicant retain Edifice, there was no reason to have the EIFS inspected for defects (see *Ash Apiaries Ltd v Steiner et al*, 2019 MBCA 23 at para 60(1)). There was no "flag" (at para 60(6)) as to an EIFS deficiency that would put the applicant "on notice" that there was a potential cause of action relating to the EIFS (*Fawley* at para 24, quoting *Penner* at para 18). Unlike the face sealed stucco system, the EIFS on the rest of the hotel was not falling apart such that even a layman might think that there was a "significant problem" (*Guertin et al v Valley Builders of Morris (2010) Inc et al*, 2017 MBCA 68 at para 3). When examined on his affidavit, Knight rejected the suggestion that the EIFS deficiencies would have been "readily apparent" on ordinary inspection with the naked eye to the reasonable person.

[49] The "flag" in relation to the respondents' faulty renovation of the face sealed stucco system is of no legal relevance because that is an independent matter arising from different facts. As previously explained, construction projects often produce multiple and independent wrongful acts, each of which can give rise to a unique cause of action with its own limitation period. For the purposes of the discoverability scheme under Part II of the *Act*, each independent cause of action must be assessed separately. The Crosier report clearly stated that the face sealed stucco system was "relatively unique." The EIFS was an entirely different wall assembly system on a different part of the hotel and was not referred to in the Crosier report.

[50] In our view, the result the judge reached here, in relation to the EIFS, is irreconcilable with *Winnipeg Condominium Corp No 30 v The Conserver Group Inc et al*, 2008 MBCA 20. In that case, the applicant had knowledge from its staff that a ruptured pipe may have been the result of faulty

remediation to a heating and cooling system, but it did not file its application for an extension of time under Part II of the *Act* until a year, less a day, after it received a report from an expert confirming it had a cause of action. This Court overturned a decision that the applicant should have filed its application without expert advice based on the suspicion of faulty remediation of the heating and cooling system and concluded that, "until the applicant had received the report from Thermo Applicators Inc., the applicant did not have knowledge of material facts of a decisive character sufficient upon which to base an action against either one or both respondents and that it had a reasonable chance of success in doing so" (at para 20).

[51] The applicant's position here is stronger than that of *Winnipeg Condominium Corp No 30*. Its staff had no knowledge or suspicion there was a problem with the EIFS. Wells had visited the hotel site to observe the stucco deficiencies and did not alert the applicant or its insurer to the possibility of the EIFS deficiencies. The EIFS deficiencies were discovered only after Abiusi had sufficient concerns after his first site visit on September 19, 2014, that he advised the applicant to "retain a building envelope specialist [Knight] to comment on the complete building envelope", including the EIFS.

[52] The idea that, once one defect is identified in a large construction project, the owner must then reasonably suspect that there may be other unrelated, hidden problems with other discrete aspects of the project and look high and low to find them (regardless of the time and expense in doing so) or risk having any future claim statute barred by the *Act*, must be rejected. That standard is not consistent with the wording of the *Act*, is commercially unrealistic, and ignores the reality that construction deficiencies are often distinct and many latent construction defects are only reasonably discoverable

over time (see *Carleton Condominium Corp No 21 v Minto Construction Ltd*, 2001 CarswellOnt 4558 at para 192 (Sup Ct J), aff'd 2004 CarswellOnt 583 (CA); and *Grey Condominium* at paras 70-71).

[53] Once the applicant became reasonably aware of possible EIFS deficiencies, it quickly obtained appropriate advice (see *Ash Apiaries* at para 60(8)). Edifice was retained and authorised to conduct invasive inspections of the building envelope of the hotel in relation to the EIFS that were detailed in several reports. It then filed its application for an extension of time to begin an action against the respondents for the EIFS renovation to the hotel in 2007 within 12 months of October 16, 2014, as required by section 14(1) of the *Act*.

[54] Ultimately, the fair resolution of a limitation problem requires that the analysis be balanced and sensitive to both the rationales for limitation periods (see *MM v Roman Catholic Church of Canada et al*, 2001 MBCA 148 at para 43; and *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 47) and the harsh consequences they can produce (see *The Insurance Company of the State of Pennsylvania v Cameco Corporation*, 2008 SKCA 54 at para 28). In our respectful view, to uphold the disposition of the judge in relation to the EIFS deficiencies would give rise to the type of "injustice" mentioned in *Kamloops v Nielsen*, [1984] 2 SCR 2, of a claim being statute barred before a plaintiff is even "aware of its existence" (at p 40).

Disposition

[55] We would allow the appeal in part. We would grant the applicant leave to commence an action against the respondents in relation to the EIFS deficiencies with the building envelope of the hotel within 30 days of the

release of these reasons. We would otherwise dismiss the applicant's appeal.

[56] As success on the application and this appeal is divided, we would order that the parties bear their own costs in this Court and in the Court below.

C.J. Mainella JA

T. Pfeiffer JA

I agree: D. Tamm JA

APPENDIX

The Limitation of Actions Act, CCSM c L150 (at sections 14(1), 15(1)-15(2), 20(3)-20(4)):

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.

Ex parte application
15(1) An application under section 14 may, with the consent of the court, be made ex parte.

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.

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.