Citation: Normandeau v Rond's Marine Ltd et al, 2022 MBCA 62
Date: 20220713
Docket: AI21-30-09648

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Janice L. leMaistre

BETWEEN:

	)	***D. M. Olson***
	)	*for the Appellant*
	)	
MICHAEL NORMANDEAU	)	***G. C. Lisi***
	)	*for the Respondent*
(Plaintiff) Respondent	)	*M. Normandeau*
	)	
- and -	)	***No appearance***
	)	*for the Respondent*
ROND'S MARINE LTD.	)	*Robertson Motorsports &*
	)	*Marine*
(Defendant) Appellant	)	
	)	***K. E. Stoll***
- and -	)	*on a watching brief*
	)	*for the Respondents*
ROBERTSON MOTORSPORTS & MARINE,	)	*Fineline Industries, Inc.,*
FINELINE INDUSTRIES, INC., FINELINE	)	*Fineline Industries, LLC*
INDUSTRIES, LLC and CENTURION	)	*and Centurion Boats*
BOATS	)	
	)	*Appeal heard:*
(Third Parties) Respondents	)	***February 28, 2022***
	)	
	)	*Judgment delivered:*
	)	***July 13, 2022***

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this appeal was heard remotely by videoconference.

MAINELLA JA

Introduction

[1] This appeal concerns the applicable limitation period for a claim regarding a leaky boat.

Background

[2] On June 30, 2015, the plaintiff purchased a new boat from the defendant for $123,856 with the idea of enjoying the short Manitoba summers with his family. Unfortunately, events did not turn out as planned. On the boat's maiden voyage, there was a transmission problem resulting in it limping back to shore to be repaired by the defendant. On July 10, 2015, the plaintiff took the repaired boat back onto the water; it quickly sank and was a total loss.

[3] An action for breach of contract was commenced on January 31, 2018, more than two years after the loss. The defendant moved for summary judgment dismissing the claim for being statute barred. It argued that the essence of the claim was an "injury to chattels" and, therefore, the applicable limitation period was two years—not six years. Sections 2(1)(g) and 2(1)(i) of *The Limitation of Actions Act*, CCSM c L150 (the *Act*) state:

> **Limitations**
> **2(1)** The following actions shall be commenced within and not after the times respectively hereinafter mentioned:
>
> (g) actions for trespass or injury to chattels, whether direct or indirect, within two years after the cause of action arose;

> (i) actions for the recovery of money (except in respect of a debt charged upon land), whether recoverable as a debt or damages or otherwise, and whether a recognizance, bond, covenant, or other specialty, or on a simple contract, express or implied, and actions for an account or not accounting, within six years after the cause of action arose;

[4] The boat sank because of its plumbing; specifically, an inadequately tightened hose clamp attached to the ballast intake hose became separated from the port tank hose spigot. One of two scenarios caused the separation of the intake hose from the port tank hose spigot: (a) a defect in the boat that existed some time before it came into the defendant's possession, or (b) the faulty repair of the boat's transmission by the defendant.

[5] In its statement of defence and third party claim, the defendant denied it was at fault for the loss and alleged that any issue as to the quality or fitness of the boat was the responsibility of the manufacturer and/or others that supplied the boat to it.

[6] In her reasons, the motion judge said the relevant limitation period under the *Act* did not depend on whether the claim was framed in tort or contract or that it was in relation to a chattel. She concluded that the relevant question was whether, "at its core," the claim was one of "injury to chattels" within the meaning of section 2(1)(g) of the *Act*. She described this as a "question of law" that she could determine (see r 20.03(4) of the MB, *Court of Queen's Bench Rules*, MR 553/88).

[7] The motion judge adopted the definition of "injury to property" used by the Courts of Appeal of British Columbia and Alberta under their

limitations legislation as being equally applicable to the definition of "injury to chattels" under section 2(1)(g) of the *Act*.

[8] In the leading authority of *WCB (BC) v Genstar Corp*, 1986 CarswellBC 78 (CA), McLachlin JA (as she then was) said that an '"injury to property' refers to the situation where property is damaged by an extrinsic act, and not to the situation where a claim is made for damage occasioned by defects in the property itself" (at para 16). In *Edmonton (City) v Lovat Tunnel Equipment Inc*, 1993 ABCA 178, the Court said an "injury to property" required "external assault," not "internal failure" (at paras 5-6).

[9] The motion judge found that "the plumbing did not injure itself"; it failed. She said that "the damage came from the separation of the intake plumbing which caused the intake of water. The only real disagreement [was] who was likely to be at fault between [the defendant] and the third parties." She dismissed the summary judgment motion, concluding that the breach of contract claim was not statute barred by section 2(1)(g) of the *Act*. She said that, although the claim "involve[d] a chattel", it was not, at its "core", about an "injury to chattels".

Discussion

[10] The first submission of the defendant is that the motion judge identified the wrong legal test in applying section 2(1)(g) of the *Act*, which is reviewable on a standard of correctness (see *Housen v Nikolaisen*, 2002 SCC 33 at para 27).

[11] The defendant says that the motion judge should have followed *Speciallaser Tech Inc v Specialloy Industries Ltd*, 1998 CarswellMan 531

(QB), which, it argues, is a different test than *WCB (BC)*. It points out that the language of the *Act* is different than in other provinces (in particular, under section 2(1)(g) of the *Act*, the injury can be "direct or indirect") and, unlike in other provinces, the *Act* has an extension of limitation period procedure (see Part II of the *Act*) to deal with issues of discoverability, so the "[p]olicy" concern alluded to by McLachlin JA for latent defects is of less relevance (*WCB (BC)* at para 19).

[12] I am not persuaded that the motion judge identified the wrong legal test. In deciding the applicable limitation period, she properly understood that she had to look beyond how the claim was framed and determine the essence of the claim on the record before her (see *Speciallaser Tech Inc* at para 12; and *TLB et al v REC*, 2000 MBCA 83 at para 18).

[13] While this Court has not previously considered what is meant by an "injury to chattels" under section 2(1)(g) of the *Act*, it has commented on the meaning of "trespass . . . to chattels" under that section (see *Michaud v Manitoba*, 2012 MBCA 21). In *Michaud*, the Court stated that a "trespass to chattels occurs where there is a direct, intentional interference with a person's possession of a chattel without consent" (at para 18).

[14] The "identifiable external event" standard discussed in *WCB (BC)* (at para 19) is consistent with *Michaud* and properly reflects the text, context and purpose of section 2(1)(g) of the *Act* (see *Canada Trustco Mortgage Co v Canada*, 2005 SCC 54 at para 10). In my view, *Speciallaser Tech Inc* does not create a different legal standard than *WCB (BC)*; in actuality, both decisions rely on the same precedent, *Alberni District Credit Union v Cambridge Properties Ltd*, 1985 CarswellBC 246 (CA), to conclude that an

"injury" requires some discrete "physical" act to the property (at para 15; see also *WCB (BC)* at para 16; and *Speciallaser Tech Inc* at paras 6-7).

[15] I do agree with the defendant that, because of the wording of the *Act*, the injury to chattels can be "direct or indirect," but it still must be reasonably traceable to an identifiable external event, such as what occurred in *Speciallaser Tech Inc* or *Michaud* and not be too remote.

[16] In *Speciallaser Tech Inc*, the damage to an industrial laser was clearly attributable to an identifiable external event: the delivery person dropping the laser. The same situation occurred in *Michaud*: grain was removed from a farm and disposed of by government agents.

[17] I also note that the law of limitations is rife with policy considerations as to the balance between fairness and finality. The issue here is what limitation period applied, not the extension of the correct limitation period. While it is accurate to say that a Manitoba plaintiff can extend an expired limitation period under the procedure set out in Part II of the *Act,* unlike the situation in *WCB (BC)*, I am not satisfied that is reason to depart from the normal meaning of the term "injury". Given what this Court said in *Michaud*, a consistent interpretation of section 2(1)(g) is appropriate whether the interference with a chattel causes an injury or merely is a trespass. Both situations require an identifiable external event, whether direct or indirect, for section 2(1)(g) to apply.

[18] On September 30, 2022, the law of limitations in Manitoba will be modernized and aligned with other provinces (see *The Limitations Act*, SM 2021, c 44 (the new *Act*)). One of the reforms is that, instead of the *Act*'s current system of multiple limitation periods ranging from two to 10 years

from when a cause of action arises—which has often engendered litigation, such as here, as to the applicable limitation period—under the new *Act*, there will be a basic two-year limitation period to commence a claim from the date it is discovered, absent some narrow exceptions. I do not think there is good jurisprudential reason in the short time section 2(1)(g) of the *Act* has left (even bearing in mind there will be some transitional cases) to set out on a new path from *WCB (BC)* and *Michaud.*

[19] The other submission of the defendant is that the motion judge erred in deciding that it had not been established that the damage to the boat was caused by an identifiable external event. For the purposes of appellate review, whether a limitation period expired before an action was commenced is, absent an extricable legal issue, a question of mixed fact and law and, thus, is reviewable on a standard of palpable and overriding error (see *Housen* at para 36; and *Fercan Developments Inc v Canada (Attorney General)*, 2021 ONCA 251 at para 11).

[20] I fail to see a palpable and overriding error in the motion judge's decision. On the facts before her, it was open to her to conclude that there was an internal failure with the boat's plumbing. Unlike the situation in *Speciallaser Tech Inc* or *Michaud*, the cause of the plumbing problem was debatable. It is not for this Court to reweigh the evidence. Also, pleadings do matter to a court for the proper adjudication of a dispute (see *Sentinel Self-Storage Corp v Dyregrov*, 2003 MBCA 136 at para 17). As mentioned previously, in its pleadings, the defendant formally denied having done any identifiable external event, directly or indirectly, that injured the boat. It would have been odd, to put it mildly, for the motion judge to have granted the defendant's summary judgment motion based on the logic of its faulty

repair of the boat's transmission when that is contrary to its averments in the pleadings.

[21] The motion judge did not address the plaintiff's submission that, while the sinking of the boat was a dramatic event, it was irrelevant to characterizing the claim for the purposes of the *Act* because there was something clearly wrong with the boat as of the date of sale; it never was fully sea-worthy.

[22] As noted in *Sentinel Self-Storage Corp*, under the wording in the *Act*, an action for breach of contract accrues from "when the breach of contractual duty occurs regardless of when damage results from the breach" (at para 35; see also *Incorporated Broadcasters Limited et al v CanWest Global Communications Corp et al*, 2008 MBQB 296 at para 80; *Cahill v Pasieczka*, 2014 MBQB 217 at para 33; and *City of Portage la Prairie et al v Tower Engineering Group Limited Partnership et al*, 2019 MBQB 4 at para 59).

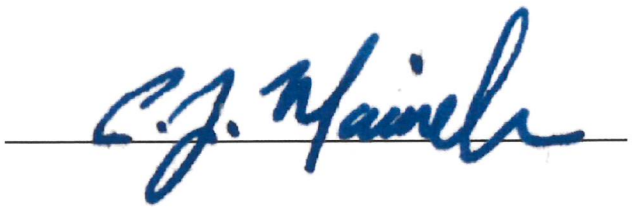
[23] While there is merit to the plaintiff's submission that he had a cause of action well before the boat sank and, thus, section 2(1)(i) of the *Act*—not section 2(1)(g)—was applicable, the argument does not add or subtract from the motion judge's analysis of whether this was a claim of "injury to chattels" within the meaning of section 2(1)(g) of the *Act*. This alternative also does not assist the defendant because, if the plaintiff is correct, the motion for summary judgment should have been dismissed as the claim would not be statute barred.

[24] As Simonsen JA noted in *Bibeau et al v Chartier et al*, 2022 MBCA 2, "The decision to grant or deny a motion for summary judgment is

a discretionary decision, reviewed on a deferential standard, and will only be set aside if there is a material error as to the law or the facts, or if the decision is so clearly wrong as to be unjust" (at para 50). I have not been persuaded that the motion judge misdirected herself in fact or law or that her decision is so clearly wrong as to amount to an injustice.

Disposition

[25] In the result, I would dismiss the appeal with costs.



JA

I agree:

JA

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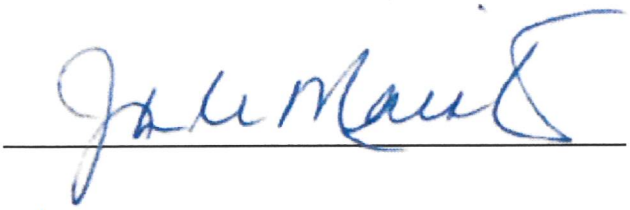

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