Citation: Wilde et al v The Rural Municipality of Taché et al, 2022 MBCA 31
Date: 20220407
Docket: AI21-30-09675

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Richard J. Chartier
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

B E T W E E N :

	)	***L. M. French***
	)	*for the Appellants*
	)	
	)	***K. A. Vilks***
GLEN WILDE and SHEILA LAJOIE-WILDE	)	*for Respondent*
	)	*The Rural Municipality of*
	)	*Taché*
(Applicants) Appellants	)	
	)	***A. Mireault*** *and*
	)	***S. J. R. Tallon***
	)	*for the Respondent*
- and -	)	*E. G. Penner Building*
	)	*Centres Ltd.*
	)	
	)	***J. W. van der Krabben***
THE RURAL MUNICIPALITY OF TACHÉ,	)	*on a watching brief*
DENIS LAJOIE and E.G. PENNER	)	*for the Respondent*
BUILDING CENTRES LTD.	)	*Denis Lajoie*
	)	
	)	*Appeal heard and*
(Respondents) Respondents	)	*Decision pronounced:*
	)	***March 28, 2022***
	)	
	)	*Written reasons:*
	)	***April 7, 2022***

On appeal from 2021 MBQB 166

SPIVAK JA (for the Court):

[1] The applicants appeal the dismissal of their application to extend time, pursuant to section 14(1) of *The Limitation of Actions Act*, CCSM c

L150 (the *Act*), to commence an action against the respondents for defects in the design and construction of their residence. At the hearing, we dismissed the appeal with costs, with reasons to follow. These are those reasons.

[2] The applicants appeal on the grounds that the application judge misapprehended the evidence and misapplied the tests under Part II of the *Act*.

[3] In 2007, the applicants approached the respondent E.G. Penner Building Centres Ltd. (Penner) for assistance in the design of a home and garage. Foundation plans, prepared and stamped by an engineer arranged by Penner, provided for a concrete basement slab and were submitted by the applicants and approved by the respondent, the Rural Municipality of Taché (the RM). A Penner representative told the applicants that, because silty soil under a concrete basement slab is prone to expand in wet conditions causing heaving and cracking, a switch to a suspended wood basement floor should be considered if silty soil was discovered. In July 2007, the applicants observed silty soil during excavation and instructed a change from a concrete basement slab to a suspended wood basement floor, after consulting with the general contractor, the respondent Denis Lajoie (Lajoie). The RM's inspector failed to note that the foundation was not in accordance with the plans that had been provided, and approved the construction and issued an occupancy permit.

[4] Following 2008, at various times, the applicants observed cracking at different places in the home and garage. In July 2018, after noticing a section of the drywall had split behind a basement baseboard, the applicants arranged inspection of the defect and were told there was no problem. Unsatisfied, they obtained a further inspection and were advised, in

January 2019, that the I-joists for the suspended wood basement floor were not properly supporting the walls and the resulting soil pressure was causing the walls to move inward.

[5] The applicants submit that they met the timing requirements of section 14(1) of the *Act* as it was not until January 2019 that they became aware of any problem with the construction (the first part of the test for an extension of time). The application judge disagreed and held that she was satisfied "that the applicants knew, or ought to have known, of all of the material facts of a decisive character upon which their cause of action is based well before, but in any event, more than twelve months before seeking leave to begin their action on December 20, 2019" (at para 18). She also found that the applicants failed to meet the second part of the test for an extension of time, namely, to establish a prima facie case against Penner, as required by section 15 of the *Act*, since there is no evidence to support a breach of contract or any breach of duty of care on its part.

[6] A decision under section 14(1) of the *Act* is discretionary and afforded a high degree of deference unless there is an error of law, a palpable and overriding error of fact or mixed fact and law or the decision is so clearly wrong as to amount to an injustice (see *Olford et al v Springwood Homes Inc*, 2019 MBCA 2 at para 9; and *St Boniface General Hospital v PCL Constructors of Canada Inc et al*, 2019 MBCA 57 at para 17 (*St Boniface*)). Further, both aspects of the test for leave to commence an action under the *Act* are applications of a legal standard to a set of facts and, absent a purely legal error, raise questions of mixed fact and law reviewable on a standard of palpable and overriding error (see *Fawley et al v Moslenko*, 2017 MBCA 47 at para 27).

[7] We are not persuaded that the application judge committed any errors warranting appellate intervention.

[8] We reject the applicants' argument that the application judge mischaracterized the nature of the cause of action as against the respondents, by focussing solely on the failure to build the residence in accordance with the submitted plans. The application judge specifically noted that the applicants were alleging that there were defects in the design and construction of their residence which they say were caused by the action or inaction of the respondents.

[9] The application judge described the key issue before her as "when the applicants knew, or ought to have known, that there were problems with the foundation such that they should take steps to ascertain the cause of the problem or defects" (at para 17). She considered the extent of the cracking noticed by the applicants throughout the years, their knowledge of the silty soil and that soil expansion could cause foundation issues. She correctly identified what constitutes a material fact, as described in sections 20(2)-20(3) of the *Act*, and the positive obligation that section 20(4) imposes on a person to take reasonable steps to ascertain a fact or obtain advice in that regard. She also referred to this Court's decision in *Johnson v Johnson*, 2001 MBCA 203, which noted that the applicable standard is whether the applicant knew or ought to have known that there could be a link sufficient to establish a cause of action and not that there actually is such a link (see para 15; see also *St Boniface* at para 24; and *Viscount Gort Motor Hotel Ltd v Pre-Con Builders Ltd et al*, 2021 MBCA 5 at para 18).

[10] Contrary to the applicants' submission, the application judge did not misapprehend the evidence by incorrectly determining that the cause of the cracking observed was related to foundation movement. Rather, she found that, cumulatively, in the context of the applicants having known or ought to have known that the foundation was not built in compliance with the submitted plans, the ongoing problem of cracking should have led them to investigate a possible foundation problem earlier than they did. It was open to her to find that the applicants knew or ought to have known of a possible foundation problem at least by 2014 or 2015 and failed to act; and, at the very latest, knew or ought to have known in July 2018 that they had a serious problem. Her conclusion that "material facts could have been obtained by seeking appropriate advice in a more timely way given the applicants' intelligence, education and experience" (at para 25) is without palpable and overriding error and entitled to deference. Though not necessary to decide, we also see no error in her determination that the applicants failed to establish a prima facie case against Penner.

[11] The application judge correctly stated the law and made no palpable and overriding error in her factual findings or her application of the law to the facts. Moreover, we have not been persuaded that the decision is wrong, let alone so clearly wrong as to amount to an injustice.

[12] For these reasons, we dismissed the appeal with costs in favour of the respondents Penner and the RM.

Spivak JA

Chartier CJM

Simonsen JA