2004 ABQB 962
Docket: 0103 12052

Alberta Court of Queen's Bench
Judicial District of Edmonton
Clackson J.

Heard: November 3, 2004.
Judgment: December 21, 2004.
Filed: December 22, 2004.
(81 paras.)

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REASONS FOR JUDGMENT

CLACKSON J.:—

I. ABOUT THIS CASE

¶ 1 This is an application by Zygmunt Baczynski, Bacz Engineering Ltd., the City of Edmonton, David Hamilton, David Hamilton Architects, Twin City Excavating Ltd. and Peter Lafreniere Construction Ltd. to summarily dismiss the Plaintiff's claim on the ground that it is time barred as the claim was discoverable more than two years before the date on which the Plaintiff sued, which was May 25, 2001.

¶ 2 The Amended Statement of Claim is based on breach of statutory duty, negligence, breach of contract and nuisance. It is alleged that the two condominium buildings which are the subject of this dispute (Building 8 and Building 20) had certain specified deficiencies, including floor and wall deflection, which resulted in standing water in the crawl spaces, and a generalized rot and deterioration of the floor trusses, subfloors, walls and carpeting. It is also alleged that these deficiencies created an environment for fungal growth and that such growth did occur. The Plaintiff seeks 4.5 million dollars in damages to correct the specified deficiencies and resulting damage.

¶ 3 Building 8 was completed in 1994 and Building 20 in 1996.

¶ 4 There is no dispute that sometime after May 25, 1999, within two years of the date of this suit, the Plaintiff became fully aware of the nature and extent of the alleged deficiencies in both buildings. What is in dispute is whether the Plaintiff knew or ought to have known about the deficiencies prior to May 25, 1999.

II. ABOUT DETERMINING LIMITATION PERIODS

¶ 5 The Limitations Act, R.S.A. 2000, c. L-12 (the Act) came into force on March 1, 1999 and replaced the

Limitations of Actions Act, R.S.A. 1980, c. L-15 (LAA). The Applicants argue that the Plaintiff knew or ought to have known that it had a claim prior to March 1, 1999 and, therefore, s. 2 of the Act is applicable. They argue that the law as it existed prior to the Act coming into force determines the issue. Section 2 of the Act provides that:

> 2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999.
>
> (2) Subject to sections 11 and 13 [neither of which is relevant here], if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of
>
> (a) the time provided by the Limitation of Actions Act, RSA 1980 c. L-15, that would have been applicable but for this Act, or
>
> (b) two years after the Limitations Act, SA 1996 c. L-15.1, came into force,
>
> the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

¶ 6 The Plaintiff maintains that it did not know, nor ought it to have known, that it had a claim until after May 25, 1999. In any event, the Plaintiff argues s. 3 of the Act provides the appropriate analytical structure for determining whether its claim was known or knowable. The Plaintiff also contends that at least a portion of its claim is one for economic loss and that the limitation period applicable to such a claim under the LAA was six years and not two.

¶ 7 Section 3 of the Act states:

> 3(1) Subject to section 11 [not relevant here], if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to

immunity from liability in respect of the claim.

¶ 8 The first limitations issue which must be determined on this application is whether the analytical framework in s. 3(1)(a) of the Act is intended to apply to the determination of discoverability under s. 2 of the Act.

¶ 9 Prior to proclamation of the Act, the rule for discoverability was well established. A cause of action was deemed to have arisen when the material facts on which it was based had been discovered or ought to have been discovered on the exercise of reasonable diligence: Central & Eastern Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at 224. Discoverability did not require perfect knowledge of all material facts. There was no consideration given to whether the prospective claimant knew or ought reasonably to have known that the injury warranted bringing a proceeding. That is a feature of post-proclamation discoverability pursuant to s. 3(1)(a)(iii) of the Act.

¶ 10 In Mohr v. 477470 Alberta Ltd. (c.o.b. Northern Sky), 2003 ABQB 294 at para. 13, Marceau J. held that s. 2(2) of the Act simply codified the common law on discoverability. However, Phillips J. in Malsbury v. Lefthand Estate, 2003 ABQB 218, 337 A.R. 307 (Q.B.) concluded that the discoverability determination under s. 2(2) should be undertaken in accordance with the three criteria listed in s. 3(1)(a) of the Act. Malsbury was applied in Allison v. Francescutti, 2003 ABQB 983, 345 A.R. 345 and again in Neal v. Kozens, 2002 ABQB 995, 331 A.R. 380. Kozens was appealed. One of the issues on the appeal was whether discoverability under s. 2(2) of the Act incorporates the s. 3(1)(a) analysis. The court determined in a decision (2004 ABCA 394) issued after the parties had argued the present application that it does, reasoning at para. 31 that: "It cannot be said that the plaintiff `knew or ought to have known' of the claim absent an appreciation that the injury warranted bringing a proceeding."

III. ABOUT ONUS AND SUMMARY JUDGMENT/DISMISSAL

¶ 11 The Act specifies the onus for establishing compliance and non-compliance with limitation periods. Section 3(5) states:

> 3(5) Under this section,
>
> (a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a), and
>
> (b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).

¶ 12 The Applicants argue that the Plaintiffs must establish that they come within the applicable limitation period. There is no merit to this position on a summary judgment application. The Plaintiff's obligation to prove the action was commenced within the limitation period is an ultimate burden, a burden to be discharged at trial. It is not a burden born by the Plaintiff on an application for summary dismissal. The onus here is on the Applicants. To be successful, they must show that the Plaintiff's case is doomed to fail and that there are no issues of fact or law for trial.

¶ 13 The Applicants argue that there is an onus on the Plaintiff in this matter to establish that it could not have known it had a claim prior to March 1, 1999. They rely for that proposition on the judgment of Johnstone J. in 732311 Alberta Ltd. v. Paradise Bay Spa Tub Warehouse Inc., 2003 ABQB 228, 332 A.R. 315 at para. 55 (QB), in which she stated:

> ... As was found in 365733, supra and Jagar Industries Inc. v. Canadian Occidental Petroleum Ltd. (2000), 84 Alta. L.R. (3d) 353 (Q.B.) at pp. 363-365, the following factors are relevant in the

determination of ... [a Rule 159(1) application]:

(a) where a Respondent to a summary judgment application has made admissions which establish the Appellant's cause of action or defence, the burden of proof shifts to the Respondent, who must then adduce some evidence, as opposed to mere allegations, to establish a triable issue;

(b) it is not open to a Respondent on a summary judgment application to argue that a triable issue exists based upon facts or evidence not currently available but which "may" emerge at discovery or trial;

(c) where an Applicant has shown there are no facts in issue for trial, it is incumbent upon the Respondent to adduce evidence that it has a reasonable chance of success at trial;

(d) it is insufficient for a Respondent who resists summary judgment to present only bare allegations of fact; the Respondent must present evidence which lends some support to the claims it advances; and

(e) a summary judgment application may be made at any time.

¶ 14 The Applicants also rely on the Court of Appeal's decision in the same case (2003 ABCA 362, 339 A.R. 386). In upholding Johnstone J., the court at paras. 10-12 confirmed that the test for summary judgment involves a two step process: (1) the plaintiff has the evidentiary burden of proving its cause of action on a balance of probabilities; after which (2) the evidentiary burden shifts to the defendant to prove that there is a genuine issue for trial. The ultimate burden remains with the plaintiff, however.

¶ 15 In my view, neither decision stands for the proposition advanced by the Applicants. Rule 162 states:

162. At any stage of the proceedings the court may, upon application, give any judgment or order to which the applicant may be entitled when

(a) admissions of fact have been made on the pleadings or otherwise, or

(b) the only evidence consists of documents and such affidavits as are sufficient to prove their execution or identity.

¶ 16 In this Rule 162 application to summarily dismiss the Plaintiff's claim, the Applicants must establish clear and unequivocable admissions by the Plaintiff which, alone or in the context of other undisputed evidence, lead inexorably to the conclusion that the Plaintiff's claim was discoverable by the exercise of reasonable diligence prior to May 25, 1999.

¶ 17 If any of the evidence before me could reasonably support the conclusion that either the admissions are not as they seem or that the claim was not discoverable prior to that date, the application must fail. The Court is not to engage in fact finding or in fact weighing on applications of this nature. I may not draw inferences essential to the matters in issue unless those inferences are based on conclusively established facts and follow incontrovertibly from

those facts. Conversely, where an inference is possible on the facts which may be found on the evidence presented on the application, and that inference raises a reasonable doubt about whether the claim was discoverable prior to May 25, 1999, I must reject the application.

¶ 18 The Plaintiff is entitled to attempt to persuade the Court through argument that the Applicants' evidence is not sufficiently conclusive or compelling to meet the standard required of them. Depending on the nature of that evidence, however, there may be a practical burden on the Plaintiff to either lead evidence or to point to evidence led by others to support its position in order to avoid the danger of having its action dismissed.

¶ 19 There is much similarity between the plaintiff in a summary dismissal application and a defendant in a criminal prosecution. While the ultimate burden remains on the crown/applicants and never shifts, the accused/plaintiff is in danger of losing unless he/it can point to something in the evidence or lack thereof which raises or leaves a reasonable doubt as to guilt/success.

IV. WHAT ACTUALLY HAPPENED AND WHEN DID IT HAPPEN?

¶ 20 There is surprisingly little dispute as to the facts which are relevant to this application. The following chronological summary is borrowed with some modification from the brief of the Defendants David Hamilton and David Hamilton Architect Ltd.

¶ 21 On or about April 23, 1998, the occupant of Unit 101 in Building 8, Diane Olive, reported that her floors were heaving, there was a dark colour around her carpeting, and there was a space between her floor and the walls. The Plaintiff's Board of Directors instructed the property manager, Kim Tilburn of the Defendant Hearthstone Management, to retain an engineer to inspect Building 8's foundation in order to determine the cause of these deficiencies. The Plaintiff considered Ms. Olive's complaint to be severe.

¶ 22 At about the same time, there were complaints from the occupant of Unit 104 in Building 8 relating to the cupboards.

¶ 23 Bruce Davison, an engineer, inspected the property on April 29, 1998 and prepared a report dated April 30, 1998, in which he stated:

> There is a noticeable undulation in the main floor near the entry in the hallway. The entrance door is jammed at the top door sill due to either timber shrinkage or movements. Evidence of air infiltration along the base of bearing walls from the crawl space had stained the flooring (carpet) at or near the base of the bearing wall. Inspection of the floor to wall interface indicated a gap of up to 1/2" between the wall 9concrete [sic] foundation wall0 [sic] and the plywood floor system. . .
>
> . . .
>
> We conclude . . . that the air infiltration is caused by the detail of construction that allows the gap at the wall floor interface to occur. This deficiency in construction can lead to both structural and health problems as moisture and air flow can move from the crawl space to the interior of the unit causing deterioration to the subfloor material and possibly wall material. The gap between wall and floor should be sealed from the crawl space with the installation of a vapour barrier and wood trimmer along the interface and underside of the floor decking.

¶ 24 It is clear that Mr. Davison was proposing a means of keeping the crawl space air out of Ms. Olive's condominium.

¶ 25 The Board was aware of the contents of the April 30, 1998 Davison Report by May 21, 1998 and thought that the problems with Unit 101 in Building 8 were serious enough that they instructed Ms. Tilburn to advance a claim in relation to those problems against the Alberta New Home Warranty Program, which was done on May 5, 1998.

¶ 26 On July 1, 1998, Ms. Olive completed an Alberta New Home Warranty Program "Request for Conciliation." She noted a number of concerns in this Request, including: "cement seams unfinished and not capped off properly"; " improper venting causing dirt, dust, fumes to enter condo"; "improperly laid subfloor . . . causing floors to crack"; "shrinkage of beams causing floors to sink, door to stick and cracking of the electrical wiring"; "all structural components should be thoroughly checked (floors, doors shifting or sticking)"; "stucco falling off outside walls on pillar"; and "outside wall buried by dirt concerned if plywood behind dirt is pressure treated."

¶ 27 Ms. Tilburn was aware of Ms. Olive's concerns and requests, but the Board did not undertake any additional investigations at the time.

¶ 28 In August 1998, the Board learned that Unit 107 in Building 8 was having problems with cabinet doors sticking. At his examination for discovery, Mr. Moody, the authorized officer of the Plaintiff, was asked these questions and gave these answers:

> Q. . . . that would indicate the building was moving?
>
> A. Settling, yes.
>
> Q. Well, settling or whatever. It was moving?
>
> A. That's right. It turned out it was floating, but . . .

¶ 29 In my view, this exchange is ambiguous as to whether the Board had concluded at the time that the building was moving.

¶ 30 On September 9, 1998, Mr. Davison, Ms. Tilburn, and a representative of the Alberta New Home Warranty Program cut a hole in a stairway in Building 8 to inspect the crawl space. Either or both of Ms. Tilburn and Mr. Davison became aware that there was standing water in the crawl space, the crawl space was not vented, and the plywood subfloor a part of the floor wood structure was becoming deformed.

¶ 31 By September 15, 1998, the Board knew that there was a problem with the ventilation in Building 8's crawl space, and was told that redress for this problem had been sought and would be forthcoming from the Alberta New Home Warranty Program.

¶ 32 Sometime before October 20, 1998, the Board knew there was no vapour barrier in Building 8 and became concerned that there might not be a vapour barrier in Building 20. It retained Davison to perform an inspection.

¶ 33 Mr. Davison's inspection report of October 26, 1998 stated:

> The ground in the crawl space is very damp to saturated throughout . . . no evidence of a moisture barrier was encountered. Ventilation to the crawl space is provided by a number of vertical gravity vent pipes, which would in the writers opinion provide a method of equalising the air pressure in the crawl space but does not allow for substantial movement of air hence removal of moisture from the crawl space.

. . .

> We conclude . . . that the air movement in the crawl space is not sufficient to remove moisture from the crawl space thus entrapping the moisture around footings and other foundation elements. High moisture levels in the crawl space could permit the growth of bacteria and cause health risks and structural deterioration of the main floor framing. We recommend that a positive airflow be introduced to the crawl space and a vapour barrier be installed or confirmed.

¶ 34 The Davison report in respect of Building 20 was provided by the Board through Ms. Tilburn to the Alberta New Home Warranty Program on November 5, 1998. It was subsequently determined that the program did not cover that building. As a result, a claim was made against the National New Home Warranty Program on November 17, 1998.

¶ 35 At the examination for discovery of Mr. Moody, the following exchange took place:

> Q. And this particular minute reflects a venting problem in 2508, and you later were told by Mr. Davison in his report of October - - whatever it was - - 26th, that there was a similar venting problem - - not an identical, but similar venting problem that required redress with respect to 2520. Isn't that correct?
>
> A. It would be a similar problem but not the same problem.
>
> Q. But again, both buildings had ventilation problems, and I take it that you were aware of those problems and the need to remedy them in September and October of 1998.
>
> A. Yes.
>
> . . .
>
> Q. So the Board was then aware there was no vapour barrier in Building Number 2 (herein identified as Building 20). There is moisture in the crawl space in Building Number 2 or 2520.
>
> A. Yes.
>
> Q. There is a ventilation problem in 2520, and that those conditions can lead to structural deterioration and fungal growth.
>
> A. Yes.
>
> Q. So by November 17th, the Board knows that there is moisture in the crawl space in Phase 1, moisture in the crawl space in Phase 2. There is no vapour barriers in either. There is poor ventilation or improper ventilation in both, and that presumably these conditions

can lead to structural deterioration and fungal growth. Is that correct?

A. That's correct.

Q. And what did the Board do about that?

A. I believe that they notified the insurance companies.

MR. BELZIL: The warranty companies.

A. Or the warranty companies.

Q. The Board didn't take any remedial action to remedy those conditions other than asking somebody else to do it. Is that correct?

A. If your car gets smashed up, you don't go fix it yourself.

Q. But the short answer to my question is that correct?

A. That's correct.

¶ 36 On December 4, 1998, Ms. Tilburn wrote to the builder, the Defendant Main Street Developments Ltd. (Main Street), demanding that action be taken within fourteen days to remedy the defects, one of which was described as: "the crawl space does not have sufficient air movement to remove moisture." This letter was sent on the Board's instructions. Clearly, the Board was aware of the problem with moisture at that time.

¶ 37 On December 17, 1998, the Defendant Hearthstone Management Inc. (Hearthstone), the property management company, received a letter from Main Street, which acknowledged receipt of Ms. Tilburn's December 4th letter and which stated:

> As to the ventilation of the crawl space this is the first time that our office has been made aware of this possible problem. Investigations have commenced into this possible problem and we will be contacting you in the New Year to make arrangements to gain access into the crawl spaces of the building.

¶ 38 The Defendant Zygmunt Baczynski, of the Defendant Bacz Engineering Ltd., inspected Buildings 8 and 20 on January 11, 1999 at the request of Main Street.

¶ 39 Mr. Baczynski swears in his affidavit that he met with Ms. Tilburn at the condominium complex on January 11, 1999. He deposes that Ms. Tilburn advised him that the Board was concerned about the water and moisture that was present in the crawl spaces of both buildings and was also concerned about structural decay and the health risks from bacterial and fungal growth in the crawl spaces. There is no admission by the Board that this exchange occurred.

¶ 40 Mr. Baczynski also swears in his affidavit that he again met with Ms. Tilburn at the premises on January 12, 1999 and that a gentleman who identified himself as a member of the Board of the Plaintiff was present at that

meeting. Mr. Baczynski says that he advised this individual that he was a mechanical engineer with Bacz Engineering Ltd., which had provided mechanical engineering services in connection with the design of the condominium project. The individual in question advised Mr. Baczynski that the Board of the condominium corporation was concerned about the water and moisture in the crawl spaces, structural decay and health risks from fungal, mould and bacterial growth. Again, there is no admission by the Board that this exchange occurred.

¶ 41 Mr. Baczynski authored a report, dated January 12, 1999, in which he noted that Building 1 (herein referred to as Building 8) had a "very shallow" crawl space, that he could not determine the type and location of the fire walls, that the crawl space was damp, and that he could not identify any means of ventilation of the crawl space. He recommended installing additional ventilation. He further noted that there was evidence of moisture build-up in the crawl space of Building 2 although it was dry at the time. The Board became aware of this report in January or February, 1999.

¶ 42 The Plaintiff admitted in discovery that by February 11, 1999, the Plaintiff's agent, Hearthstone, was aware of Mr. Baczynski's report and knew that Building 8 did not comply with the Alberta Building Code with respect to ventilation of the crawl space.

¶ 43 In discovery, the Plaintiff admitted that on February 17, 1999, Mr. Davison advised Hearthstone of the Alberta Building Code provisions relating to the provision of ventilation and a vapour barrier or ground cover in crawl spaces. The implication in his letter was that, in relation to Building 20, these provisions had been breached.

¶ 44 As a result, at least by the end of February 1999, the Board was aware that the crawl spaces in both buildings were not Building Code compliant.

¶ 45 The minutes of the Board's March 16, 1999 meeting state:

> Kim advised that Mainstreet (sic) will do the Phase I venting work in the Spring. Mainstreet also claims that the venting in Phase II is okay for now.
>
> Mainstreet has not responded to our February 19, 1999 letter about no vapor barrier in Phase II.
>
> > Peter moved that we send a copy of the February 19, 1999 letter to Victoria Archer with instructions to send a second request to Mainstreet for action on the Vapor Barrier problem in Phase II. Seconded by Ken and carried. (Julie abstained)
>
> With respect to the venting in Phase I, Kim will instruct Mainstreet to provide plans on how and when the work will be completed, and for confirmation that they will return everything back to the original state.

¶ 46 Victoria Archer was the lawyer retained by the Plaintiff to try to get some action out of Main Street to fix the problems. Ms. Archer did correspond with Mr. Sheckter, counsel for Main Street, asking for Main Street's response to the Plaintiff's requests for action.

¶ 47 While the Plaintiff's attention seems to have focussed upon ventilation it is apparent that ventilation was just a means to an end, the end being to rid the crawl spaces of moisture.

¶ 48 Again on March 29, 1999, Ms. Tilburn raised the ventilation work needed on Building 8 with Main Street. She sought a work plan and written confirmation that the property would be returned to its original condition. She also asked for a response to her previous letter respecting the ventilation and lack of vapour barrier

for Building 20.

¶ 49 At a Board meeting on April 20, 1999, Ms. Tilburn gave an update on the status of Building 8 and advised that there had not been a response to Ms. Archer's March 18, 1999 letter to Main Street. Ms. Tilburn was instructed to follow up with the Plaintiff's lawyer.

¶ 50 At a May 18, 1999 Board meeting, Ms. Tilburn advised that Main Street had not responded to the Building 8 venting work request, and that the Plaintiff's lawyer had not responded regarding Building 20. Ms. Tilburn was again asked to follow up with the Plaintiff's lawyer.

¶ 51 At a July 20, 1999 Board meeting, a motion was passed to have the Plaintiff's counsel commence an action, if necessary, to see that the problems in Building 8 and Building 20 were remedied. There was no evidence offered to suggest that any new developments occurred or that any new information was received by the Plaintiff between the Board meetings of May 18, 1999 and July 20, 1999.

¶ 52 In November 1999, Main Street workmen were discovered to be working on Units 113 and 101 in Building 8 and Unit 122 in Building 20. It was at that time that the Plaintiff saw the rotting and mouldy floor trusses, which ultimately resulted in significant remedial work being done to repair the trusses and to cover the mouldy ground. The Plaintiff submits this was the first that it knew that floor trusses were rotting and that it learned that the rotting may have resulted from improperly located weeping tile.

V. WHAT DID THE PLAINTIFF KNOW OR WHAT OUGHT IT TO HAVE KNOWN?

A. About occurrence of the injury (s. 3(1)(a)(i))

¶ 53 The Plaintiff argues that the Applicants must show that the Plaintiff knew or ought to have known that the floor trusses in both buildings were rotting and in danger of collapse and that the toxic mould had developed or was developing in the crawl space. The Applicants argue that, to the extent that is what is required, those injuries or damages were known or knowable. However, they contend that all they need to prove is that the Plaintiff knew that water was accumulating in the crawl space and that this was known to be a bad thing for wooden truss buildings.

¶ 54 In my view, the admissions at examination for discovery, the Davison reports, the Board's minutes and the actions taken at the Board's direction establish, beyond a reasonable doubt, that:

(a) the Plaintiff knew it had considerable moisture problems in the crawl spaces of both buildings;

(b) the Plaintiff knew something had to be done about those moisture problems or damage to the building units and occupants' health might result;

(c) the Plaintiff did seek to have the problems rectified both through warranty providers and through the Defendant Main Street;

(d) the Plaintiff's store of information on the problem did not change between the end of February 1999 and the time it instructed action on July 20, 1999.

¶ 55 I am satisfied that these facts establish, beyond a reasonable doubt, that the Plaintiff knew that the buildings suffered from moisture problems and knew of the potential sequella if the problems were not rectified. This knowledge existed well before May 25, 1999. While I accept that it is possible the Plaintiff did not have

perfect knowledge of the injury, that level of knowledge is not required: Peixeiro v. Haberman, [1997] 3 S.C.R. 549; Hill v. Alberta (South Alberta Land Registration District), (1993) 135 A.R. 266 (C.A.), leave to appeal to S.C.C. refused [1994] 1 S.C.R. viii; Ward v. Taubner, 2004 ABQB 565, 9 E.T.R. (3d) 275 (Q.B.).

¶ 56 What was obvious was that there was a problem and that there was damage or at least the real potential for damage if the problem was not addressed. In my view, that is enough. The injuries alleged by the Plaintiff are all the result of water in the crawl space. The Plaintiff's claim is based on that simple fact. The presence of water in the crawl space was known by the 17th of November, 1998.

B. What is the next step? (S. 3(1)(a)(ii))

¶ 57 The next step in the s. 3 analysis is Section 3(1)(a)(ii). Section 3(1)(a)(ii) is about identifying the person or persons responsible for the injury.

¶ 58 Ordinarily, where the injury is the result of contemporaneous action or inaction, the prospective defendant is readily identifiable. It is for that reason that much of what has been written on discoverability does not assist in determining how to assess the efforts of the plaintiff in discovering prospective defendants.

¶ 59 In this case, the Applicants argue that the Plaintiff could easily have discovered all parties now Defendants in its action. The Applicants maintain that an action against the builder would have lead immediately and inexorably to the disclosure and discovery of all other Defendants. They contend that multi-party construction deficiency litigation is common place and the Court can effectively take judicial notice that identifying defendants is, by and large, an exercise of little challenge, especially so where the plaintiff is represented by counsel, which this Plaintiff was.

¶ 60 The Plaintiff submits that the obligation to diligently seek to identify prospective defendants does not arise until a plaintiff knows that the injury warrants bringing a proceeding. The Plaintiff says that this means the injury has to be serious and the two year period does not commence until the plaintiff knows or ought to know that the injury was serious.

¶ 61 Additionally, the Plaintiff argues that every Defendant here is not in the same category relative to discoverability. For instance, the Plaintiff argues that the City would not necessarily have been a Defendant unless it was discovered that the injury was the result of a Building Code violation, which ought to have been picked up in the course of inspection preliminary to issuance of an occupancy permit.

¶ 62 I agree with the Plaintiff that the search for defendants is suspended until the plaintiff knows or ought to know that the injury "warrants bringing a proceeding" and that this assessment involves a consideration of the seriousness of the injury.

C. About whether proceedings are warranted (s. 3(1)(a)(iii))

¶ 63 It is not every nick, bump, bruise, failing or deficiency that warrants action. Thankfully, we Canadians are still reasonably tolerant and non litigious. The question of whether an injury warrants proceedings is not strictly an issue of fault, nor even potential economic gain. What warrants proceedings embraces a consideration of the extent of the injury in comparison to the economics of prospective action. This assessment involves a blended objective/subjective analysis.

¶ 64 The Act was the product of extensive study by the Law Reform Institute of Alberta. The Institute's Report No. 55 on the subject, which includes its commentary on the provisions it proposed, is helpful in understanding what the phrase "warrants bringing a proceeding" was intended to embrace.

¶ 65 Commenting on what is now s. 3(1)(a)(iii), the Institute stated at p. 33 of its Report:

> As to the third requirement, the discovery period will not begin until the claimant first knew that his injury was sufficiently serious to have warranted bringing a proceeding, that is, there must be relatively serious harm. This criterion will protect litigants from incurring unnecessary legal expenses, and bringing unnecessary legal action. The discovery rule will, in effect, invite the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time, and to make the cost-benefit analysis which would be reasonable for the actual claimant.

¶ 66 And at p. 64:

> 7. Comment on subcl. 3(1)(a)(iii). Potential claimants rarely seek the advice of lawyers until they perceive that they have suffered relatively serious harm. Even if a potential claimant does seek the advice of a lawyer, the lawyer will rarely recommend the expense of bringing a proceeding unless he is reasonably certain that the harm suffered by the claimant will justify it. A limitation provision that failed to recognize these realities and which encouraged proceedings to be brought prematurely would serve neither claimants nor the legal system.
>
> 8. When was harm sufficiently serious to have warranted bringing a proceeding? The circumstances may vary enormously from one specific situation to another. The Act does not attempt to list considerations common to many cases because a statutory list would be of dubious benefit to experienced judges, to whom the considerations will be patently obvious, and might unnecessarily constrain their judgment. Experienced trial judges are well equipped to answer such a judgmental question. Clause (iii) of s. 3(1)(a) invites the judge to put himself in the claimant's shoes, to consider what knowledge he had at the relevant time, and to make the analysis of the advantages and disadvantages of bringing a legal proceeding which would be reasonable for the actual claimant.

¶ 67 As noted by Major J. in Novak v. Bond, [1999] 1 S.C.R. 808 at para. 81, and applied by the Court of Appeal in Neal, the section:

> ... [denotes] a time at which a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could - not necessarily should - bring an action. This approach is neither purely subjective nor purely objective. The question becomes: "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?"

¶ 68 McLachlin J., for the majority in Novak, also endorsed a "restrictive subjective/objective approach" that takes into account the plaintiff's particular situation.

¶ 69 Therefore, in the context of this case, and this application, I must put myself in the Plaintiff's shoes and consider its knowledge or the knowledge it ought to have had at the time. I am then to assess at what point the Plaintiff, in light of its personal circumstances, could reasonably have brought an action.

¶ 70 Here, the Plaintiff knew by November 17, 1998 that it had been injured. Although it did not fully appreciate the extent of that injury, it certainly appeared that the injury was reasonably serious. Indeed Mr. Moody, the Plaintiff's officer, did admit as much on examination for discovery. The Plaintiff's actions also reflect the seriousness with which it viewed the problems. It made claims against a national and a provincial home warranty program and demanded action from the builder. In my view, the words and actions of the Board clearly indicate that

the Plaintiff considered itself to have been seriously injured.

¶ 71 Having suffered an actionable wrong, what cost benefit analysis would have been reasonable for this prospective plaintiff to make? What were the advantages and disadvantages to bringing suit which it would have been reasonable for this prospective plaintiff to consider?

¶ 72 In my view, it would have been reasonable to consider the following matters: the extent of the damage, the cost of remedying the damage, the likelihood of success, the cost of proceedings, the likely time necessary to achieve success, the time to be personally expended by the Board's members in pursing action, the willingness of the individual owners to finance the litigation, the complexity of the potential litigation, whether the entire costs of the proceedings would have to be paid up front, and whether all or a portion of the litigation could be undertaken by contingency arrangement. No doubt, there are other matters which it might have been reasonable to consider in this case. However, the foregoing is representative of the kind of issues that a cost benefit analysis might reasonably encompass in this Plaintiff's circumstances.

¶ 73 In the end, the answer to whether the injury warranted proceedings in this case is provided by the Plaintiff's own actions. It is clear that the Plaintiff instructed its agent to obtain satisfaction, through counsel, from the builder Main Street. From February until July 1999, the Plaintiff's determination to obtain satisfaction from Main Street persisted. When Main Street did not respond satisfactorily, the Board instructed its lawyer to commence proceedings. In my view, that uncontroverted evidence demonstrates conclusively that this Plaintiff was of the view that the injuries it had suffered "warranted proceedings." Here, the Board did what any reasonable prospective litigant would do. It demanded a remedy from the prospective Defendant, failing which, it would sue. It is clear that, as of the end of February 1999, this Plaintiff could reasonably have brought action.

D. About discoverability of the responsible parties (s. 3(1)(a)(ii))

¶ 74 I am of the view that the Applicants are correct in their suggestion that, with the exercise of reasonable diligence, the present parties to this action were readily discoverable well before May 25, 1999. Multi-party litigation is complicated, but becoming more and more common. The Plaintiff here was represented and certainly counsel could have assisted in the timely discovery of prospective defendants. Knowing that there was water in the crawl space of the two buildings, it would have been reasonable to name any party that might be responsible, including the architect, the engineer, the contractor, the party that excavated the crawl space and the party that was responsible for the construction. The names of these parties would have been readily available to the Plaintiff.

¶ 75 However, as previously noted, the Plaintiff argues that not all of the Defendants should be treated in the same way. It suggests that Defendants such as the City were not obvious. The Plaintiff maintains that the City did not become a discoverable Defendant until the Plaintiff knew that the City had failed in its inspection duties and activities, and that it was that failure which led to the injuries which warranted proceedings.

¶ 76 The Plaintiff relies on Kamloops v. Nielsen, [1984] 2 S.C.R. 2 in support of its contention that the City is not protected by the limitation period. Of course, the difference between this case and Kamloops is that the Plaintiffs in Kamloops did not know nor should they have known, more than two years before their action was commenced, that an injury had occurred as a result of the City's action or inaction. In this case, the Plaintiff knew by February 1999 that there were Building Code infractions. It would have been reasonable to assume there had been inspections and, therefore, it would have been reasonable to name the City as a Defendant.

¶ 77 I reject the notion that time does not run against the Plaintiff until it knew that the City failed in its duty of inspection. Actual knowledge is not required. Rather, it is enough that the alleged negligence was discoverable by exercise of reasonable diligence.

VI. AND IN THE END

¶ 78 I am satisfied that, prior to May 25, 1999:

1. the Plaintiff knew it had been seriously injured;

2. it ought to have known who the parties were that may have been responsible for that injury;

3. the Plaintiff knew the injury was serious enough to warrant proceedings.

¶ 79 I am satisfied that the admissions, the Davison reports, the minutes of the Board's meetings and the actions taken at the Board's direction, together, establish the foregoing beyond a reasonable doubt.

¶ 80 Therefore, the application of Zygmunt Baczynski, Bacz Engineering Ltd., the City of Edmonton, David Hamilton, David Hamilton Architects, Twin City Excavating Ltd. and Peter Lafreniere Construction Ltd. is granted. The Plaintiff's action against those Defendants is dismissed.

¶ 81 Costs may be spoken to.

CLACKSON J.

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