Court of King's Bench of Alberta

Citation: Condominium Corporation No 062 1161 v Park Place Communities Ltd, 2023 ABKB 373

Date: 20230620
Docket: 1303 12077
Registry: Edmonton

Between:

The Owners: Condominium Corporation No. 062 1161

Plaintiff

- and -

Park Place Communities Ltd., Park Homes Ltd., Park Place Construction Ltd., and Park Place Construction Services Ltd.

Defendants

Reasons for Decision of the Honourable Justice Douglas R. Mah

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A. Background

[1] This case is about leaky condos.

[2] The issue before me, on appeal, is whether the plaintiff condominium corporation has commenced its action for damages in time against the defendant developer. If not, the developer has immunity from suit and is entitled to summary dismissal.

[3] This is an appeal from the February 7, 2022 oral decision of then Master (now Applications Judge) Schlosser denying the developer's application for summary dismissal based on limitation period expiry. I will refer to the previous decision-maker as the Master or Master Schlosser as he was then called.

[4] The plaintiff condominium corporation and the defendant developer both go by the name Park Place. In order to avoid confusion, I will refer to the plaintiff (respondent) as the condo board and the defendant (appellant) as the developer. As a matter of law and practicality, the condominium corporation acts through its board of directors.

[5] Counsel for the parties agreed with me that:

- The standard of review is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30;
- I may draw factual inferences to resolve differences in the interpretation of the evidence; and
- The applicable test comes from the case of ***Weir Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 and I must determine whether there is 'no merit' to the plaintiff's action because of the expiry of the limitation period.

[6] Counsel relied on the same briefs and evidence filed for the initial application before the Master.

B. Summary Judgment & Expiry of Limitation Period

[7] In considering summary judgment under Rule 7.3 in Alberta, the Court is required to apply the test for summary judgment from ***Hryniak v Maudlin***, 2014 SCC 7 and the standard of proof for summary judgment per ***Weir Jones***.

[8] Under ***Hryniak***, summary judgment is indicated where the record allows the Court to make the necessary findings of fact, apply the law to the facts and where summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result. Applying ***Weir Jones***, the question is whether the matter can be fairly resolved on a summary basis or whether the facts, the record or the law reveal a genuine issue requiring a trial. The moving party must meet the burden of showing there is either 'no merit' or 'no defence' based on facts proven on a balance of probabilities and therefore no genuine issue requiring a trial. If the moving party meets this burden, then the resisting party must put its best foot forward to demonstrate from the record that there is a genuine issue requiring a trial. Overall, the Court must have confidence that the state of the record is such that judicial discretion should be exercised to resolve the dispute summarily.

[9] Summary dismissal is an available remedy based on a defence arising under the ***Limitations Act***.

[10] Section 3(1) of the ***Limitations Act*** requires that a claimant seek a remedial order within two years of the date on which the claimant first knew, or ought to have known, that the claimant suffered an injury, that it was attributable to the conduct of the defendant, and that the injury warranted bringing a proceeding. The two-year limitation period is based upon discovery of all three elements. Since section 3(1) employs the language of "knew or ought have known", whether there has been discovery of any element is determined from both objective and subjective standpoints.

[11] The argument before me focused only on the third element: that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding. As to the other two

elements, it is not disputed that as of 2007, the condo board was aware of a leaky roof and considered the developer responsible. The statement of claim was issued on August 22, 2013.

[12] This is a summary judgment application brought by a defendant. The onus is cast upon the developer to demonstrate, on this record and to the standard of a balance of probabilities, the facts necessary to establish that the date on which the condo board acquired the knowledge that a legal action was warranted occurred at least two years prior to the issuance of the statement of claim.

[13] The developer suggests there are three separate dates on which it could be said that the requisite knowledge of injury, attribution and warranting of legal action coalesced and crystallized on the condo board's part, triggering the start of the limitation clock. All of those dates are more than two years before the date the statement of claim was filed.

[14] The condo board says that the limitation period did not begin until it learned in May 2013 that the developer was reneging on its long-standing commitment to repair the roof. It says that given the circumstances and the developer's conduct, an action was not warranted until then. Alternatively, the condo board says that the developer's conduct and representations about fixing the roof, over a course of years, amounts to promissory estoppel that extends the limitation period.

C. Brief Facts

[15] In order to provide context for the decision that follows, I briefly outline the pertinent facts:

- The condominium development known as Park Place Ellerslie came into existence in 2006. It consists of two buildings, 151 and 155 Edwards Drive, forming a single condominium corporation. The developer (a group of entities named Park Place or Park Homes) built the development in 2005 and 2006.
- The roof began leaking water in 2006/2007. The leakage persisted into 2008 when the developer hired Wade Engineering to figure out what was wrong and provide recommendations. Roof repair was carried out in 2008 at a cost of $35,496.
- Nonetheless, the leaking issues continued for a period of years. For the period of 2008 to 2012, the leaking roof was a recurring topic of discussion at condo board meetings. The meeting minutes throughout that period reflect what the condo board knew and understood about the state of the roof and the efforts of the condo board and the developer to fix the problem.
- Throughout this period, it is fair to say that the condo board and the developer were engaged in good faith discussions about remediation of the roof and the developer took numerous steps to identify the cause and make repairs. Ultimately, nothing worked and the leakage persisted.
- Also, throughout this period, the condo board says that the developer repeatedly committed to fixing the roof. Ron Gauvreau was and is the

property manager for this condominium development. As reflected in his evidence, both in affidavit and questioning on affidavit, Mr. Gauvreau insisted that the developer's commitment to repairing the roof was not restricted to a particular point in time or particular repair, and that the effect was that it was made repeatedly over the course of years.

- On December 21, 2010 the warranty under the National Home Warranty certificate expired.
- The 2008 Wade Engineering report commissioned by the developer concerning the leakage was not made available to the condo board until 2011. In September 2011, a second report was commissioned from Wade Engineering. The developer says this second report belongs to the condo board and the condo board says it belongs to the developer. The condo board minutes from November 2011 show that following the second Wade inspection report, the developer agreed to do repairs according to Wade's recommendations.
- Due to a difference of opinion between the roofing contractor hired to do the repairs and Wade Engineering, a different contractor was required. The developer indicated that Jayson Global Roofing was engaged to do the repairs.
- In November 2012, the developer proposed to the condo board that the cost of the repairs be shared 50-50. The condo board says that this is the first it ever heard of cost-sharing. There was an unsuccessful meeting on April 30, 2013 between both sides to discuss the roof repairs and how they would be paid. After that meeting and thereafter, the developer's representative indicated to the condo board's representative that all further communication should be directed through legal counsel and any proposals concerning roof repair were withdrawn.
- As early as July 2011, the condo board treasurer and its primary representative in discussions with the developer, Stephen Dykau, was aware from discussions with his own lawyer that the limitation period might be an issue in terms of enforcement against the developer. Mr. Dykau had consulted his own lawyer in respect of remedies he might have against certain parties in relation to his own unit.
- Mr. Dykau further opined in an email on November 28, 2011 that with receipt of Wade Engineering second report, the condo board was now in a position to move forward with legal action against the developer.
- The developer at no time discussed the limitation period with the condo board nor made any overt statement that the developer was paying the whole cost of the roof repair.
- The condo board says that it was taken by surprise by the developer's position on May 8, 2013 that all previous proposals were withdrawn and

further communications should be directed to legal counsel. The statement of claim was then issued on August 22, 2013.

[16] As I progress for these reasons, I may refer to additional facts found in the record.

D. Developer's Position

[17] In saying the limitation period expired before issuance of the statement of claim, the developer argues as follows:

- The standard that should be applied in evaluating whether an action is warranted is whether a reasonable person acting reasonably in light of his or her own circumstances and interests, could - not necessarily should - bring an action, that is, at what point could the plaintiff reasonably have brought an action in the context of whether there existed subjectively and objectively 'relatively serious harm' that would warrant such a proceeding. This test was expressed by the Court of Appeal of Appeal in ***Community Futures Lesser Slave Lake Region v Alberta Indian Investment Corporation***, 2014 ABCA 232 at paras 23-25, which in turn adopts the Supreme Court of Canada's dictum in ***Novak v Bond***, [1999] 1 SCR 808 at para 81.
- Applying that standard, there are three points in time when it could be said that an action was warranted, all of which occurred more than two years before the date of statement of claim issuance.
- The first date is in December 2009 after the initial repairs were carried out by West Point Roofers, the leaking problem was declared fixed but then further leaking issues continued. By this point, the condo board had gone through two years of leaking and repair work that never resolved the problem and knew, or ought to have known, that the claim warranted commencing a proceeding.
- The second date is in December 2010 when the New Home Warranty expired. The developer argues that the warranty belongs to the condo board and that it knew that the warranty was intended to respond to any remediation work and the cost of it during the warranty period. Once the warranty expired, the condo board knew, or ought to have known, that the developer's own liability for the defective roof had begun.
- The third date is July 28, 2011 when Stephen Dykau, after consultations with his personal lawyer, alerted the condo board about a pending limitations issue. This information, argues the developer, fixed the condo board with the precise knowledge that an action was warranted since the condo board's rights were about to expire.
- In all three instances, the dates precede the date of issuance of the statement of claim by more than two years. Hence, there is ample proof on the record by picking any one of the three dates, that the developer is entitled to immunity because of the expiry of the limitation period.

- The developer also says that it makes no difference that the second Wade Engineering report was not received until November 2011. That report did nothing more than inform the condo board about the extent of the damages. Based on ***Community Futures*** at paras 23 – 25, the context is whether there existed subjectively and objectively 'relatively serious harm' that would warrant a proceeding. In the concurring but separate decision of Justice Slatter in ***Gayton v Lacasse***, 2010 ABCA 123 at para 59, Justice Slatter noted that significant damages need not be incurred, only a monetary amount within the jurisdiction of the then provincial court. [1]
- Further, the knowledge required for limitation period to apply is the knowledge of the injury, not the legal cause of action or the consequences of the injury: ***HOOPP Realty Inc v Emery Jamison LLP***, 2020 ABCA 159 at paras 55 – 58. Thus, the second Wade Engineering report did not restart the limitation period nor have any relevance in terms of discovery of the three components of knowledge required for the limitation period to start.

E. Condo Board's Position

[18] The condo board, of course, takes a very different view of when the limitation period started to run. It says the limitation period commenced in May 2013 when the condo board was referred to the developer's legal counsel, or at earliest, in November 2012 when the cost-sharing was first raised. The condo board argues the following in saying that an action was not warranted until either of those two dates:

- As detailed in its brief at paragraph 57, the condo board points to 19 specific instances between February 2007 and November 2012 in which it says the developer, by words or conduct, represented that it was fixing the roof.
- While the developer never explicitly stated it would pay the entire cost of a roof replacement, its conduct conveyed that intention and created that expectation on the condo board's part. The facts show that the condo board reposed reliance and trust in these words and conduct.
- Based on the developer's representations and conduct, an action was not warranted until the developer changed its position. Here, the condo board

[1] ***Gayton*** is personal injury case arising from a domestic assault. The plaintiff had sustained a brain permanent injury. The majority felt the chambers judge had failed to "make any finding as to whether the brain injury was qualitatively different from the concussion, nor did he discuss when the appellant ought, in her circumstances, to have known that she had a permanent brain injury. Nor did he address at what point the appellant knew, or in the circumstances ought to have known, that her injury (whatever it was determined to be) was connected to the respondent's actions or warranted bringing an action. Finally, he never addressed any of these questions, taking into consideration the appellant's personal circumstances, including the effect of the injury on her ability to gain the knowledge required to meet the three criteria set out in section 3(1)(a)." In the result, the majority said "this case raises serious legal issues relating to the interpretation of section 3(1)(a) of the *Act* which ought to be dealt with in the context of a full factual matrix: ***Tottrup***. The chambers judge erred, therefore, in granting summary judgment on the basis it was plain and obvious the action could not succeed due to the application of section 3(1)(a)."

> relies on ***Yunecraft Corp v Rexx Management Corp***, 2010 SCC 19 at para 58; ***Condominium Corporation 0812755 v IBI Group Inc***, 2019 ABQB 75 at para 58 (Master Robertson); ***Points West Living Red Deer Inc v Rockliff Pierchaljlo Kroman Architects Ltd***, 2021 ABQB 589 at paras 42 – 43 (Master Summers) as well as ***Axcess Mortgage Fund Ltd v 117620 Alberta Ltd***, 2018 ABQB 626 at paras 103-104 (Renke J).

[19] Alternatively, the same representations and conduct can be characterized as promissory estoppel within the meaning of ***Maracle v Travelers Indemnity Co of Canada***, [1991] 2 SCR 50 at para 13 as the facts show that the developer resiling from its former position is unjust. Promissory estoppel can in its legal effect extend the limitation period: ***Brar v Roy,*** 2005 ABCA 269 at para 33 and ***Axcess Mortgage*** at para 132.

[20] Finally, the condo board argues in its brief that the 2011 second report of Wade Engineering was not obtained for the purpose of determining the extent of damages, but rather to determine the problem itself. The condo board says that until that point, the leaking roof was considered a limited albeit frustrating issue. The 2011 report for the first time shed light on the seriousness of the injury and thus for the firs time an action was warranted.

F. When was a proceeding warranted?

[21] There is no doubt that the Supreme Court of Canada has directed courts to be the change agent in the culture shift called for in ***Hryniak v Maudlin***. Summary judgment should be granted where it is proportionate, expeditious and less expensive to do so. But ***Hryniak*** itself imposes limits on summary disposition: where the record is unsuitable, would not lead to a just result, where the issues are not amenable to summary disposition or there is a genuine issue requiring a trial. ***Weir-Jones*** requires the court engaged in the inquiry to ask whether the facts, the record or the law reveal a genuine issue to be tried.

[22] Here, the moving party, the developer, says that the record establishes on a balance of probabilities all of the necessary facts to demonstrate that the resisting party, the condo board, on a date more than two years preceding issuance of the statement of claim either grasped or ought to have grasped that there was an injury, that the injury was attributable to the developer and, assuming liability, a proceeding was warranted. The developer says that given the expiry of the two-year limitation period prior to statement of claim issuance, the developer has complete immunity and thus there is no merit to the claim.

[23] The condo board relies on the decisions of Masters Robertson and Summers in ***IBI Group*** and ***Points West*** respectively. ***IBI Group*** involves a condominium corporation suing an architect for water leakage into the parkade. The condo corporation had been working on remediation with two other parties deemed responsible for the injury, the developer and the home warranty provider, not the architect. In dismissing the defendant summary dismissal application by the architect, Master Robertson said in conclusion at para 58:

> In my view, when there is no reason for a party to sue anyone, because the party reasonably believes that someone who has apparent liability has actually assumed responsibility for addressing it, and is doing so, the injury does not warrant bringing a proceeding. Requiring a party to sue in this circumstance would encourage needless litigation.

[24] The developer argues that ***IBI Group*** should not be relied upon because it fails to follow the dictates stated by the Court of Appeal in the ***Community Futures*** case providing that an action is warranted when the plaintiff subjectively and objectively appreciates that 'relatively serious harm' has occurred. ***Community Futures*** is quite a different case involving two creditors competing for excess funds following a foreclosure. One sought to preclude the other's claim by saying that the opposing creditor had not advanced its claim within two years of the debtor's default. The court made its pronouncements concerning 'relatively serious harm' warranting an action but in the end allowed the second creditor to realize its claim nonetheless because that is how foreclosure works. It is noteworthy, as the condo board's counsel points out here, the ***Community Futures*** case does not involve a claimant who relies on a course of conduct by a potential defendant or someone else aimed at redressing the injury. ***IBI Group*** raises a different question altogether from ***Community Futures***.

[25] Master Summers (then called) in ***Points West*** picked up on Master Robertson's theme. The case involved the owner of a seniors living facility suing the project architects over a faulty heating system. The action was commenced more than two years after substantial completion and the defendant said it was out of time. In dismissing the summary dismissal application, Master Summers at paras 42 – 43:

> [42] As suggested by these precedent cases, I put myself into the shoes of the Plaintiff in this case, as at May 3, 2017 (i.e. two years before the action was commenced) to consider whether I had sufficient information that commencing action against RPK was then warranted. In doing so, I would have concluded, based upon my understanding of the significant efforts that were being made to correct the Heating Problem by those responsible for the System (and on a warranty, no charge basis at that) and based upon what those parties were telling me, I would conclude that it was premature to commence an action against RPK at that time. I believe that the Plaintiff's reliance was reasonable in all of the circumstances.
>
> [43] In my view, the application of this test achieves the proper balance between not allowing a cause of action to linger and not requiring lawsuits to be commenced prematurely.

[26] From the record before me, I could reasonably infer that:

- Throughout the period 2007 to 2012, the developer assumed responsibility for remediating the leaking roof, to the extent of effecting repairs in 2008, continuing to do inspections, continuing to field concerns from the condo board, and working on a repair schedule following receipt of the second Wade Engineering report;
- The developer changed its position in November 2012 by requesting cost-sharing; and
- It was only on April 30, 2013 that the condo board learned that the developer would actually be doing nothing to fix the roof, contrary to all the discussion and what appeared to be collaborative effort in the preceding 6 or 7 years, and referred condo board to its legal counsel.

[27] I say those inferences are reasonably available from the record, although I am not now specifically making those findings. What I do conclude is that based on the record in this case and the law as stated in ***IBI Group*** and ***Points West***, there is merit to the condo board's position that an action was not warranted until either November 2012 or the end of April 2013, or that the elements of promissory estoppel are present, so as to forestall the limitation period, might be present.

[28] The elements of promissory estoppel are well-known: representation or assurance giving rise to expectation of benefit, reasonable reliance and detrimental reliance: ***Maracle*** at page 57; ***Axcess Mortgage*** at para 51. Promissory estoppel may operate to prevent the application of a limitation period and effectively extend it: ***Brar*** at para 33. While it is true there was no discussion of the limitation period between the condo board and the developer and no express promise, there were words and conduct which, in my view, could be reasonably construed as an implied promise or intention to take responsibility for the roof issue. From 2007 through November 2012, the developer acted as though it had committed to rectifying the roof issue, including stating that it would implement the recommendations from the second Wade Engineering report. To that end, the developer engaged two successive roofing contractors. It was after the second roofing contractor (Jayson Global Roofing) was on-board that the subject of cost-sharing was first raised. For the previous five-year period, through all the discussions and attempts at repair, there had been no suggestion that any costs would fall on the condo board.

[29] The reliance that condo board placed on the developer's conduct is reflected in Stephen Dykau's November 28, 2011 email, which says that:

- The second Wade Engineering had been received;
- The developer had always been in agreement to complete the repairs once there had been a full assessment of the problem;
- The condo board would refrain from legal action until the developer had been given a chance to review the report and commit to a timeline.

[30] It took almost another year to get Jayson Global Roofers in place to do the work and work out a timeline. I think it fair to say there were no negotiations between the condo board and the developer until the topic of cost-sharing was raised in November 2012. They were not in conflict nor had anything to negotiate about. Both parties were focused on fixing the roof problem.

[31] The developer also argues that there is no standstill agreement here that arises from negotiations or settlement discussions suspends the limitation period.

[32] I appreciate from paras 59 – 61 of ***Weir-Jones*** that settlement discussions do not create a standstill agreement. Dealing only with factual comparison, ***Weir-Jones*** is different. The parties knew that breach of contract had been alleged and the willingness to undertake settlement discussions was in full contemplation of the parties' readiness to engage in litigation.

[33] The condo board here, as far as I can tell, is not alleging that a standstill agreement was created. Rather, it says the parties were collaboratively engaged in solving the problem of a leaky roof. No one yet had threatened litigation. It is true that Mr. Dykau on his own was contemplating litigation against someone in the summer of 2011 in respect of his own unit, but was doing so in his personal capacity. The first time that litigation was even hinted at, as

between these parties, was in May 2013 when the developer told the condo board to talk to the lawyer and even then it was in an oblique manner.

[34] Master Schlosser noted in his reasons in this case that the condo board's arguments with respect to when an action was warranted and promissory estoppel may well be different sides of the same coin. In a similar vein, Justice Renke at para 124 of ***Axcess Mortgage*** observed that the plaintiffs' invocation of promissory estoppel could be understood as an 'elaboration' of the issue of when commencing proceedings were 'warranted' as a matter of law.

[35] I agree that the issue of when an action is 'warranted' under section 3(1)(a)(iii) and promissory estoppel, on the present facts, may well be variations on a theme. As such, I conclude that there is sufficient evidentiary basis in the record to elevate both to the position of having merit in this summary dismissal application.

[36] Now I do have to deal with two points raised by the developer that are adverse to the condo board's position. They are:

- the significance, if any, of the expiry of the new home warranty; and
- Mr. Dykau's consultation with his own lawyer in July 2011 and its effect in terms of when an action was warranted by the condo board against the developer.

G. The Warranty

[37] As I understand it, the date of warranty expiry is important to the developer because it would have signaled to the condo board that its remedy in respect to the roof was now against the developer itself and would not be covered by the warranty. The developer points out that the warranty belonged to the condominium corporation.

[38] There is not much evidence in the record about the warranty. The document itself is not part of the record. The developer says this is not important because the language is statutory. However, I think the condo board's counsel is quite correct when she says that it is unknown whether the roof deficiencies were warrantable.

[39] In Mr. Gauvreau's questioning, he did not say much about the warranty other than to confirm that it expired on December 21, 2010. Whether an action is warranted has both subjective and objective qualities. There is no evidence in the record that the condo board was looking to the warranty to cover the roof repair, or what effect of its existence and expiry had on the condo board's thinking or actions.

[40] While the warranty and its expiry may have occupied a position in the developer's mind, it does not seem to have played any sort of role in the condo board's thought process. It seems that the condo board was always looking to the developer for remediation of the roof, regardless of the warranty.

[41] At this point, I am not prepared to say that the fact the warranty expired on December 21, 2010 means the limitation period has also expired two years thereafter and the condo board's claim has died with it.

H. Mr. Dykau's emails regarding the limitation date

[42] I acknowledge that these emails of July 3, 4, and 28, 2011 are problematic for the condo board. In the first of these emails, Mr. Dykau asked that discussion of limitation periods be kept confidential from the developer, presumably so not to raise a flag. It is clear that Mr. Dykau was warning the condo board about possible effluxion of time and urging the board to make an early decision regarding legal action. It could be inferred that the condo board was put on notice, by one of their own, that time was running out and thus an action was warranted.

[43] On the other hand, Mr. Dykau's interests and the condo board's interests are not one and the same. Indeed, in reading the first of the emails, Mr. Dykau refers to "personal options" but it is not known what those options are or who they might be against. He then expresses dissatisfaction in his dealings to date with both the condo board itself and the property manager York West. It is not known what Mr. Dykau told his lawyer, whether the lawyer had the same information as the condo board or exactly what the advice was based upon.

[44] Mr. Dykau was an unhappy unit owner among several who had divined his own course to deal with the problem relating to his own unit. It is true that he is a member of the collective and represented the condo board in many if not most of the discussions with the developer. But he is not the condo board.

[45] At present, Mr. Dykau's sounding of the alarm bell regarding limitation periods is not a smoking gun. It is but one factual circumstance that must be taken into account in determining when an action was warranted. I am not prepared to say that it is the one circumstance that defines when an action was warranted, particularly in light of subsequent events. For example, the developer in a December 1, 2011 email from Patrick Adams told the condo board that the developer was putting together a work plan for the new year. Then on April 18, 2012 an email from Paul Mayer to Mr. Dykau indicated that a new managing director was taking responsibility for the roof project and would keep them apprised of the progress and the ultimate construction schedule. Such communications could have conveyed the impression that the developer had the roofing issue in hand.

[46] After reviewing the record and receiving the submissions of counsel, I conclude there is a genuine issue to be tried. I also conclude that the condo board has demonstrated that the record, the facts and the law preclude a fair disposition on the summary basis.

[47] That issue is whether the conduct and representations made by the developer up to either November 12, 2012 or May 8, 2013 meant that an action was not warranted within the meaning of s 3(1)(a)(iii) of the ***Limitations Act,*** or alternatively, whether that same conduct or representations constituted promissory estoppel so as to delay the start of the limitation period to one of those dates. In this regard, I see these questions for determination by the trial court:

- Do the words and actions of the developer, between February 2007 and either November 2012 or May 2013, mean that the developer had actually assumed responsibility for remediating the leaking roof, and thus the injury did not warrant bring a proceeding?
- Alternatively, did those words and actions on the part of the developer lull the condo board into a false sense of security, such that the limitation period is extended on the basis of promissory estoppel?

- In either case, was the reliance by the condo board reasonable?
- Fundamentally, the determination of those questions relies on the credibility of the witnesses, the weighing of evidence and the interpretation of evidence.

[48] Given that these are, in my view, live issues to be litigated, I cannot say that there is 'no merit' to the condo board's position, nor that the record in this case makes it suitable for summary disposition.

I. Tipping Point

[49] Counsel for the developer makes a fair point when she says that the potential defendant should not be held hostage as a result of its own efforts to make good. Why would such a defendant ever make good faith attempts to solve a claimant's problem if doing so would only be used against the defendant by extending the limitation period? On the other hand, as both Master Robertson and Master Summers noted in their respective decisions, if a responsible party is making significant efforts to correct the injury, then it is premature to commence an action.

[50] I appreciate that both ***IBI Group*** and ***Points West*** are decisions at the former Master and now Applications Judge level. I have looked at other Alberta cases at the Justice level that might assist in the analysis. These cases were referred to in ***IBI Group***. In ***Condominium Plan 9421549 v Main Street Developments Ltd,*** 2004 ABQB 962, Justice Clackson examined a course of dealings between a condominium corporation and a developer concerning water egression in the building's crawlspace. Notably, the condominium corporation had made demand upon the developer for rectification by December 1998 and referred the matter to its lawyer by February 1999, yet did not commence action until May 2021. Justice Clackson granted summary dismissal because of limitation expiry; however, this result was overturned on appeal at 2006 ABCA 194 (at para 8) on the basis that "[t]he record before the court is not adequate to answer all of the issues relative to the limitation defence." It should be noted that the Court of Appeal was working from the old "plain and obvious" test for summary judgment that pre-dated ***Weir-Jones***.

[51] ***Condominium Corporation No 0610078 v Pointe of View Condominiums (Prestwick) Inc***, 2016 ABQB 609, another instance of a condominium corporation suing a developer for post-construction deficiencies, is a case about adding parties where the proposed new parties asserted a limitations defence. The condominium corporation, through legal counsel, had signaled its intention in March 2010 to bring action against the developer and others involved in the construction. In June 2015, the plaintiff tried to add three new defendants who had not been third-partied into the action. Strekaf J (now JA) found that the plaintiff knew an action was warranted by October 2009 when it received an expert's report identifying the problem. The court concluded that the plaintiff had not exercised the requisite diligence in determining the additional parties and refused to add them to the litigation because the limitation period had expired.

[52] On a collateral point, I will note here that the developer argued that the condo board's receipt of the second Wade Engineering report merely informed the extent of damages and did not restart the limitation period. In its brief, the condo board argued that the second report actually identified the injury itself, which up to that point was thought to be minor. The condo

board's counsel did not press this point in argument and I come to no conclusion on it in light of my other findings. I just point out that this may be an issue for trial in light Justice Strekaf's comments about the role of the expert's report in the ***Pointe of View*** case.

[53] Justice Renke in ***Axcess Mortgage*** comments on how the subjective and objective assessment required for section 3(1)(a) must be undertaken in the particular factual context of the case. ***Axcess Mortgage*** is, of course, a case about when a foreclosure action is warranted with reference to section 3(1)(a) and illustrates how factual complexity might operate to make the limitation date somewhat of a moving target.

[54] In the present case, there is an important tipping point that must be found and there are competing objectives at play:

- There is an objective of certainty in business relations, which includes being able to figure out when the limitation period begins and ends.
- A rational justice system should encourage parties to work out their issues without litigation, and to say that a limitation period does not run while the parties are so engaged is a disincentive to a potential defendant to engage in that effort.
- That policy equally applies to an injured party working with the other side toward redressing an injury, a process that might take a matter of years, only to be told when the process fails that the other side is immune from suit because the limitation period expired while the two sides were trying to work out a solution.

[55] In this case, the identification of that tipping point and how these competing objectives can be accommodated can only be determined after a full trial on the facts. It will be found only after the trial court assesses credibility, weighs the evidence and interprets the evidence. After that, it will be necessary to determine from the evidence whether the condo board slept on its rights or reasonably relied on the developer to correct the leakage problem.

[56] Since this is a summary judgment application, I am not deciding whether the limitation period has been met or exceeded; rather, I am only deciding whether the condo board's response to the developer's limitations defence has merit. As Justice Renke pointed out in ***Axcess Mortgage*** at para 57: "An issue has merit, and should be decided at trial, if the issue cannot fairly and justly be decided on summary judgment."

[57] I conclude that I cannot fairly and justly decide the issue, given the state of the record.

[58] This dynamic of a condominium corporation seeking post-construction remediation from a developer is a common scenario. As the cases illustrate, sometimes the interactions can occur over a course of years. A somewhat more definitive statement of law, emerging from a trial on the facts, is desirable.

J. Outcome

[59] Consequently, I dismiss the appeal and affirm the decision of Applications Judge Schlosser. I direct that the issue of whether the limitation period has expired prior to

commencement of the action is an issue to be determined at trial, at which time the onus of proof will fall on the condo board.

[60] Counsel may, if they wish, address costs of this appeal by way of written submissions in letter form, not to exceed two single-spaced pages (excluding exhibits, authorities) and supported by a draft bill of costs.

Heard on the 20th day of June, 2023.
Dated at the City of Edmonton, Alberta this 20th day of June, 2023.

Douglas R. Mah
J.C.K.B.A.

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